Court of Justice EU, 5 July 2012, Geistbeck v Saatgut

Marabel potato

PLANT VARIETY RIGHTS

"Reasonable compensation" in case of infringement variety right equivalent to C-licence: fee payable in the same area for production under licence of propagating material of same variety

- **that, in order to determine the 'reasonable compensation' payable, under Article 94(1) of Regulation No 2100/94, by a farmer who has used the propagating material of a protected variety obtained through planting and has not fulfilled his obligations under Article 14(3) of that regulation, read in conjunction with Article 8 of Regulation No 1768/95, it is appropriate to base the calculation on the amount equivalent to the fee payable for production under the C-Licence.**

"Reasonable compensation" does not include costs incurred for monitoring compliance

- **that the payment of compensation for costs incurred for monitoring compliance with the rights of the plant variety holder cannot enter into the calculation of the 'reasonable compensation' provided for under Article 94(1) of Regulation No 2100/94.**

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Court of Justice EU, 5 July 2012
(A. Tizzano, A. Borg Barthet, E. Levits, J.-J. Kasel and M. Berger)
Judgment of the Court (First Chamber)
5 July 2012 (*)
(Intellectual and industrial property – Community plant variety rights – Regulation (EC) No 2100/94 – 'Farmer's privilege' – Concept of 'reasonable compensation' – Compensation for damage suffered – Infringement)
In Case C-509/10,
REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 30 September 2010, received at the Court on 26 October 2010, in the proceedings
Josef Geistbeck, Thomas Geistbeck
v
Saatgut-Treuhandverwaltungs GmbH,
THE COURT (First Chamber),
composed of A. Tizzano, President of the Chamber, A. Borg Barthet, E. Levits (Rapporteur), J.-J. Kasel and M. Berger, Judges, Advocate General: N. Jääskinen, Registrar: K. Malacek, Administrator, having regard to the written procedure and further to the hearing on 18 January 2012, after considering the observations submitted on behalf of:
– Messrs Geistbeck, by J. Beismann and M. Miersch, Rechtsanwälte,
– Saatgut-Treuhandverwaltungs GmbH, by K. von Gierke and C. von Gierke, Rechtsanwälte,
– the Greek Government, by X. Basakou and A.-E. Vasilopoulou, acting as Agents, – the Spanish Government, by F. Díez Moreno, acting as Agent,
– the European Commission, by B. Schima, F. Wilman and M. Vollkommer, acting as Agents,
after hearing **the Opinion of the Advocate General at the sitting on 29 March 2012**, gives the following
Judgment
1 This reference for a preliminary ruling concerns the interpretation of certain provisions of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1) and of Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation No 2100/94 (OJ 1994 L 173, p. 14), as amended by Commission Regulation (EC) No 2605/98 of 3 December 1998 (OJ 1998 L 328, p. 6) ('Regulation No 1768/95').
2 The reference was made in the course of proceedings between two farmers, Josef and Thomas Geistbeck ('the Geistbecks'), and Saatgut-Treuhandverwaltungs GmbH ('STV') – a company which represents the interests of the holders of the rights relating to the protected plant varieties, Kuras, Quarta, Solara and Marabel – with regard to the planting of those varieties by the Geistbecks in a way which did not fully accord with the declaration made.
Legal context
Regulation No 2100/94
3 Under Article 11 of Regulation No 2100/94, entitlement to Community plant variety rights is vested in the 'breeder', that is to say, the 'person who bred, or discovered and developed the variety, or his successor in title'.
4 Article 13 of that regulation, entitled 'Rights of the holder of a Community plant variety right and prohibited acts', provides:
'1. A Community plant variety right shall have the effect that the holder or holders of the Community plant variety right, hereinafter referred to as "the holder", shall be entitled to effect the acts set out in paragraph 2.
2. Without prejudice to the provisions of Articles 15 and 16, the following acts in respect of variety constituents, or harvested material of the protected variety, both referred to hereinafter as 'material', shall require the authorisation of the holder:
(a) production or reproduction (multiplication);

…
The holder may make his authorisation subject to conditions and limitations.
…'
5 Article 14(1) of Regulation No 2100/94, entitled 'Derogation from Community plant variety right' provides:
'Notwithstanding Article 13(2), and for the purposes of safeguarding agricultural production, farmers are authorised to use for propagating purposes in the field, on their own holding the product of the harvest which they have obtained by planting, on their own holding, propagating material of a variety other than a hybrid or synthetic variety, which is covered by a Community plant variety right.'
6 Article 14(3) of Regulation No 2100/94 provides:
'Conditions to give effect to the derogation provided or in paragraph 1 and to safeguard the legitimate interests of the breeder and of the farmer, shall be established, before the entry into force of this Regulation, in implementing rules pursuant to Article 114, on the basis of the following criteria:
…
– small farmers shall not be required to pay any remuneration to the holder; …
…
– other farmers shall be required to pay an equitable remuneration to the holder, which shall be sensibly lower than the amount charged for the licensed production of propagating material of the same variety in the same area; the actual level of this equitable remuneration may be subject to variation over time, taking into account the extent to which use will be made of the derogation provided for in paragraph 1 in respect of the variety concerned, …
– relevant information shall be provided to the holders on their request, by farmers and by suppliers of processing services; …'
7 Article 94 of Regulation No 2100/94, which deals with the civil law actions which may be brought in the event of the use of a plant variety in a manner which amounts to an infringement, provides:
'1. Whosoever:
(a) effects one of the acts set out in Article 13 (2) without being entitled to do so, in respect of a variety for which a Community plant variety right has been granted; … … may be sued by the holder to enjoin [sic] such infringement or to pay reasonable compensation or both.
2. Whosoever acts intentionally or negligently shall moreover be liable to compensate the holder for any further damage resulting from the act in question. In cases of slight negligence, such claims may be reduced according to the degree of such slight negligence, but not however to the extent that they are less than the advantage derived therefrom by the person who committed the infringement.'
8 The supplementary application of national law in the case of infringements is governed by Article 97 of Regulation No 2100/94, paragraph 1 of which provides:
'Where the party liable pursuant to Article 94 has, by virtue of the infringement, made any gain at the expense of the holder or of a person entitled to exploitation rights, the courts competent pursuant to Articles 101 or 102 shall apply their national law, including their private international law, as regards restitution.'

Regulation No 1768/95

9 Article 2(1) of Regulation No 1768/95 reads as follows:
'The conditions referred to in Article 1 shall be implemented both by the holder, representing the breeder, and by the farmer in such a way as to safeguard the legitimate interests of each other.'
10 Article 5 of Regulation No 1768/95, which sets out the rules regarding the remuneration due to the holder, states:
'1. The level of the equitable remuneration to be paid to the holder pursuant to Article 14 (3), fourth indent of [Regulation No 2100/94] may form the object of a contract between the holder and the farmer concerned.
2. Where such contract has not been concluded or does not apply, the level of remuneration shall be sensibly lower than the amount charged for the licensed production of propagating material of the lowest category qualified for official certification, of the same variety in the same area.
…
5. Where in the case of paragraph 2 an agreement as referred to in paragraph 4 does not apply, the remuneration to be paid shall be 50% of the amounts charged for the licensed production of propagating material as specified in paragraph 2. …'
11 Paragraph 1 of Article 14 of that regulation, which concerns checks to be carried out by the holder to make sure that the farmer has fulfilled his obligations, provides:
'For the purpose of monitoring, by the holder, compliance with the provisions of Article 14 of [Regulation No 2100/94] as specified in this Regulation, as far as the fulfilment of obligations of the farmer is concerned, the farmer shall, on request of the holder:
(a) provide evidence supporting his statements of information under Article 8, through disclosure of available relevant documents such as invoices, used labels, or any other appropriate device such as that required pursuant to Article 13(1)(a), relating to:
– the supply of services of processing the product of the harvest of a variety of the holder for planting, by any third person, or
– in the case of Articles 8(2)(e), the supply of propagating material of a variety of the holder,
or through the demonstration of land or storage facilities;
(b) make available or accessible the proof required under Article 4(3) or 7(5).'
12 Under Article 18 of Regulation No 1768/95:
'1. A person referred to in Article 17 may be sued by the holder to fulfil his obligations pursuant to Article

14(3) of [Regulation No 2100/94] as specified in this Regulation.
2. If such person has repeatedly and intentionally not complied with his obligation pursuant to Article 14(3) 4th indent of [Regulation No 2100/94], in respect of one or more varieties of the same holder, the liability to compensate the holder for any further damage pursuant to Article 94(2) of [Regulation No 2100/94] shall cover at least a lump sum calculated on the basis of the quadruple average amount charged for the licensed production of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area, without prejudice to the compensation of any higher damage.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 The Geistbecks planted the protected varieties Kuras, Quarta, Solara and Marabel in the years 2001 to 2004, after notifying STV accordingly. However, following an inspection, STV noted that the quantities actually planted were higher than the quantities declared, sometimes more than three times as high. STV therefore claimed payment of the sum of EUR 4 576.15, corresponding to the remuneration which would have been payable. As the Geistbecks paid only half of that sum, STV brought an action for payment of the balance and compensation for costs incurred prior to the court proceedings in the amount of EUR 141.05.

14 That action was successful at first instance. The appeal brought by the Geistbecks was dismissed. They then brought an appeal on a point of law before the referring court.

15 On the basis of the judgment in Case C-305/00 Schulin [2003] ECR I-3525, the referring court finds that a farmer who has not duly fulfilled his obligations to provide information to the holder of the protected variety cannot rely on Article 14(1) of Regulation No 2100/94 and risks having to defend an action for infringement brought under Article 94 of that regulation and having to pay reasonable compensation.

16 The referring court has doubts concerning the method of calculating the 'reasonable compensation' payable under Article 94(1) of Regulation No 2100/94 to the holder of the protected right and the damages due under Article 94(2) of that regulation.

17 That compensation could be calculated either on the basis of (i) the average amount of the fee charged for the licensed production of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area or on the basis of (ii) the remuneration due in the event of authorised planting under the fourth indent of Article 14(3) of Regulation No 2100/94, read in conjunction with Article 5(5) of Regulation No 1768/95 ('the remuneration for authorised planting').

18 If the first option were chosen, the offender would be liable for that average amount under the same conditions and at the same rates as a third party whereas, if the second option were chosen, he could invoke the preferential rate reserved for farmers, that is to say, 50% of the amounts due for licensed production of propagating material.

19 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must the "reasonable compensation" which a farmer must pay to the holder of a Community plant variety right in accordance with Article 94(1) of Regulation No
2100/94, because he has used propagating material of a protected variety obtained through planting and has not fulfilled the obligations laid down in Article 14(3) of
Regulation No 2100/94 and Article 8 of Regulation No 1768/95, be calculated on the basis of the average amount of the fee charged for the licensed production of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area, or must the (lower) remuneration which would be payable in the event of authorised planting under the fourth indent of Article 14(3) of Regulation No 2100/94 and Article 5 of Regulation No 1768/95 be taken as a basis for the calculation instead?
2. In the event that only the remuneration for authorised planting must be taken as a basis for the calculation:
In the circumstances described above, may the holder, in the event of a single intentional or negligent infringement, calculate the damage for which he must be compensated in accordance with Article 94(2) of Regulation No 2100/94 as a lump sum based on the fee for the grant of a licence for the production of propagating material?
3. Is it permitted or even required, when assessing the "reasonable compensation" due under Article 94(1) of Regulation No 2100/94 or the further compensation due under Article 94(2) of that regulation, for the special monitoring costs of an organisation which protects the rights of numerous holders to be taken into account in such a way that double the compensation usually agreed, or double the remuneration due under the fourth indent of Article 14(3) of Regulation No 2100/94, is awarded?'

The questions referred to the Court

The first question

20 By its first question, the referring court essentially wishes to ascertain the information needed to determine the amount of the 'reasonable compensation' payable under Article 94 (1) of Regulation No 2100/94 by a farmer who has not fulfilled the requirements incumbent on him under the fourth and sixth indents of Article 14(3) of that regulation. In particular, the referring court asks if it must take, as the basis for calculating that compensation, the fee payable for the licensed production of propagating material of the same variety in the same area – the 'C-Licence fee' – or the fee for authorised planting under the fourth indent of Article 14(3) of Regulation No 2100/94, which amounts, under Article 5(5) of Regulation No 1768/95,

to 50% of the amounts payable for the licensed production of propagating material.
21 As a preliminary point, it should be recalled that, under Article 13(2) of Regulation No 2100/94, authorisation from the holder of the Community plant variety right is required, in respect of variety constituents or harvested material of the protected variety, inter alia, for production or reproduction (multiplication); for conditioning for the purposes of propagation; for offering for sale, selling or other marketing; and for stocking for those purposes (see Schulin, paragraph 46).
22 In that context, Article 14 of Regulation No 2100/94 constitutes a derogation from the rule that authorization must be granted by the holder of the Community plant variety right (see, to that effect, Schulin, paragraph 47), in so far as use of the product of the harvest obtained by the farmers, on their own holding, for propagating purposes in the field, is not conditional upon authorization by the holder of the Community right, where they fulfill certain conditions expressly set out in Article 14(3) of that regulation.
23 In that regard, the Court has found that a farmer who does not pay equitable remuneration to the holder when he uses the product of the harvest obtained by planting propagating material from a protected variety cannot rely on Article 4(1) of Regulation No 2100/94 and must therefore be considered to have carried out, without being authorised, one of the acts referred to in Article 13(2) of that regulation (Schulin, paragraph 71).
24 As it is, the situation of the Geistbecks is similar to that of farmers who have not paid the 'equitable remuneration' provided for under the fourth indent of Article 14(3) of Regulation No 2100/94, in so far as, by not declaring a part of the product of the harvest that they had planted, they did not pay such remuneration.
25 It follows that the cultivation by the Geistbecks of seeds which they had not declared constitutes, as the referring court rightly pointed out, an 'infringement' for the purposes of Article 94 of Regulation No 2100/94. The rules for determining reasonable compensation, such as that payable by the Geistbecks to STV, should therefore be defined in accordance with that provision.
26 In that regard, the Geistbecks argue that, in so far as the terms used in the fourth indent of Article 14(3) and in Article 94(1) of Regulation No 2100/94 are almost identical, the 'reasonable compensation' due under Article 94(1) of Regulation No 2100/94 should be based on the remuneration for authorised planting.
27 That interpretation cannot, however, be accepted.
28 First, it should be noted that, although the terms 'rémunération équitable' are used in both those provisions in the French-language version of Regulation No 2100/94, the same is not true of other language versions, particularly the German and English versions, as the Advocate General mentioned in point 43 of his Opinion. Accordingly, it cannot be inferred from the similarity of the expressions used in those provisions of Regulation No 2100/94 that they refer to the same concept.
29 Secondly, it should be noted that, as Article 14 of Regulation No 2100/94 derogates from the principle of Community plant variety rights, it must be interpreted restrictively and is not intended, therefore, to be applied in circumstances other than those expressly specified in that provision.
30 Accordingly, as the Advocate General stressed in points 45 to 47 of his Opinion, the objective underlying the concept of 'equitable remuneration' referred to in the fourth indent of Article 14(3) of Regulation No 2100/94, read in conjunction with Article 5(5) of Regulation No 1768/95, is to establish a balance between the reciprocal legitimate interests of farmers and holders of plant variety rights.
31 On the other hand, Article 94(1) of Regulation No 2100/94, the wording of which draws no distinction depending on the status of the person committing the infringement, refers specifically to the payment of reasonable compensation in the context of an action for infringement.
32 It follows that, in the circumstances of the case before the referring court, the remuneration for authorised planting, for the purposes of Article 14 of Regulation No 2100/94, cannot be taken as a basis for calculating the 'reasonable compensation' referred to in Article 94(1) of that regulation.
33 As an alternative basis for calculating that remuneration, the referring court mentions the remuneration payable for production under licence: the C-licence fee.
34 As was pointed out in paragraph 23 above, a farmer who has not fulfilled his obligations, in particular those under Article 14(3) of Regulation No 2100/94, read in conjunction with Article 8 of Regulation No 1768/95, cannot rely on the privilege accruing to farmers under that provision.
35 In consequence, he must be regarded as a third party who, without authorisation, has carried out one of the acts referred to in Article 13(2) of Regulation No 2100/94.
36 In so far as Article 94 of Regulation No 2100/94 is intended to make good the loss suffered by the holder of a plant variety who is the victim of an infringement, it must be held that, in the case before the referring court, since the Geistbecks cannot rely on the 'farmer's privilege' – namely, the derogation from Community plant variety rights allowed under Article 14(1) of Regulation No 2100/94 and as provided for in Article 14(3) of that regulation – that loss amounts to at least the fee that a third party would have had to pay for a C-Licence.
37 Consequently, in order to determine, in the circumstances of the case before the referring court, 'reasonable compensation' as provided for under Article 94(1) of Regulation No 2100/94, it is appropriate to take as the basis for that calculation an amount equivalent to the remuneration payable for licensed production.
38 By way of challenge to that interpretation, the Geistbecks claim, first, that the quality of propagating material from an initial harvest would be inferior to that

referred to in Article 13 (2) of Regulation No 2100/94. However, an argument along those lines is not relevant as the propagation of protected material cannot affect the existence of the intellectual property right attaching to that material.

39 Nor can the Geistbecks legitimately argue, secondly, that to consider an amount equivalent to the fee payable for production under the C-Licence as the basis for calculating the 'reasonable compensation' payable, under Article 94(1) of Regulation No 2100/94, by a farmer who has not fulfilled the requirements set out in Article 14(3) of that regulation, read in conjunction with Article 8 of Regulation No 1768/95, would amount to acknowledging that the provisions of Article 94 give rise to punitive compensation, an outcome which is not in keeping with the objective of that provision.

40 As was pointed out in paragraph 35 above, a farmer who does not rely on Article 14(3) of Regulation No 2100/94 must be regarded as a third party who, without authorisation, has carried out one of the acts referred to in Article 13(2) of that regulation. Accordingly, the benefit which has been gained by the person who committed the infringement and which Article 94(1) of Regulation No 2100/94 seeks to offset corresponds to the amount equivalent to the fee payable for production under the C-Licence, which he has not paid.

41 Moreover, to take, as the basis for calculating the reasonable compensation due in the event of infringement, not the amount equivalent to the fee payable for production under the C-Licence, but a lower amount corresponding to the remuneration for authorised planting, could have the effect of favouring farmers who do not fulfil their information obligations to the holder under the sixth indent of Article 14(3) of Regulation No 2100/94 and Article 8 of Regulation No 1768/95, as compared with those who correctly declare the seeds cultivated.

42 The incentive effect attaching to the concept of 'reasonable compensation' as provided for in Article 94 of Regulation No 2100/94 is all the more compelling in that, under the fifth indent of Article 14(3) of that regulation, the holders alone are responsible for the control and supervision of the use of the protected varieties in the context of the authorised planting and they depend, therefore, on the good faith and cooperation of the farmers concerned.

43 It follows from all those considerations that the answer to the first question is that, in order to determine the 'reasonable compensation' payable, under Article 94(1) of Regulation No 2100/94, by a farmer who has used the propagating material of a protected variety obtained through planting and has not fulfilled his obligations under Article 14(3) of that regulation, read in conjunction with Article 8 of Regulation No 1768/95, it is appropriate to base the calculation on the amount equivalent to the fee payable for production under the C-Licence.

44 In the light of the answer given to the first question, it is not necessary to answer the second question.

The third question

45 By its third question, the referring court seeks to know, first, if Article 94 of Regulation No 2100/94 is to be interpreted as meaning that the payment of compensation for costs incurred to monitor compliance with the rights of the plant variety holder enters into the calculation of the reasonable compensation provided for under Article 94(1) of Regulation No 2100/94, or whether such a payment enters into the calculation of the compensation for damage provided for under Article 94(2). Secondly, the referring court asks whether, in cases where the holder claims such damage, that compensation may be calculated on a lump sum basis, corresponding to double the compensation usually agreed or double the equitable remuneration provided for in the fourth indent of Article 14(3) of Regulation No 2100/94.

46 The Commission suggested in its observations that that question is purely hypothetical, in so far as STV has not claimed payment of such costs.

47 In that regard, it has consistently been held that the procedure provided for under Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them (see, inter alia, Case C-445/06 Danske Slagterier [2009] ECR I-2119, paragraph 65, and Case C-197/10 Unió de Pagesos de Catalunya [2011] ECR I-0000, paragraph 16 and the caselaw cited).

48 In the context of that cooperation, questions relating to EU law enjoy a presumption of relevance. The Court may thus refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, **Joined Cases C-94/04 and C-202/04 Cipolla and Others [2006] ECR I-11421, paragraph 25**, and Unió de Pagesos de Catalunya, paragraph 17).

49 In this case, in so far as it is apparent from the order for reference that, by its action in the main proceedings, STV did claim payment of 'reasonable compensation' for the purposes of Article 94(1) of Regulation No 2100/94, it is appropriate to answer the third question referred, which concerns the concept of 'reasonable compensation'.

50 In that respect, it is sufficient to note that Article 94(1) of Regulation No 2100/94 does no more than provide for reasonable compensation in the event of unlawful use of a plant variety, but does not provide for compensation for damage other than that connected to the failure to pay that compensation.

51 In those circumstances, the answer to the third question is that the payment of compensation for costs incurred for monitoring compliance with the rights of the plant variety holder cannot enter into the calculation

of the 'reasonable compensation' provided for under Article 94(1) of Regulation No 2100/94.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable. On those grounds, the Court (First Chamber) hereby rules:

1. In order to determine the 'reasonable compensation' payable, under Article 94(1) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, by a farmer who has used the propagating material of a protected variety obtained through planting and has not fulfilled his obligations under Article 14(3) of that regulation, read in conjunction with Article 8 of Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation (EC) No 2100/94, as amended by Commission Regulation (EC) No 2605/98 of 3 December 1998, it is appropriate to base the calculation on the amount of the fee payable for the licensed production of propagating material of protected varieties of the plant species concerned in the same area.

2. The payment of compensation for costs incurred for monitoring compliance with the rights of the plant variety holder cannot enter into the calculation of the 'reasonable compensation' provided for under Article 94(1) of Regulation No 2100/94.

[Signatures]

* Language of the case: German.

Opinion of Advocate General Jääskinen

delivered on 29 March 2012 (2)

Case C-509/10

Josef Geistbeck, Thomas Geistbeck

v

Saatgut-Treuhandverwaltungs GmbH

(Reference for a preliminary ruling from the Bundesgerichtshof (Germany)) (Intellectual and industrial property – Regulation (EC) No 2100/94 – Community plant variety rights – Obligation to pay reasonable compensation to the holder of such a right and to compensate the holder for any further damage resulting from the act in question – Criteria for determining reasonable compensation – Infringement – Regulation (EC) No 1768/95 – Farmers' privilege – Costs of monitoring and supervision)

I – Introduction

1. The reference for a preliminary ruling lodged by the Bundesgerichtshof (Federal Court of Justice) (Germany) concerns in particular the interpretation of Articles 14 and 94 of Regulation (EC) No 2100/94 (3) ('the basic regulation') on Community plant variety rights and of Regulation (EC) No 1768/95 (4) ('the implementing regulation') implementing rules on the agricultural exemption provided for in Article 14(3) of the basic regulation.

2. The dispute before the referring court is between the farmers Josef and Thomas Geistbeck ('the Geistbecks') and Saatgut-Treuhandverwaltungs GmbH ('STV'), which represents the interests of the holders of the protected plant varieties Kuras, Quarta, Solara, Marabel and Secura. In essence, the dispute concerns the relationship between the derogation provided for in Article 14 of the basic regulation (also known as the 'farmers' privilege') and the calculation of the reasonable compensation within the meaning of Article 94(1) of the basic regulation payable to the holder of a plant variety right in the event of an infringement.

3. More specifically, the Court is invited by the present reference for a preliminary ruling to determine the method to be adopted for the purpose of calculating the reasonable compensation payable by the farmer to the holder of a plant variety in a situation where the farmer, who is authorised, under the farmers' privilege, to plant harvested material, has failed to declare a part of the new crop, contrary to the farmers' obligations under Article 14(3) of the basic regulation, which give effect to that privilege.

4. The questions referred therefore require the balancing of conflicting interests. As Advocate General Ruiz-Jarabo Colomer has stated, a balance must be struck between, firstly, the need to increase the fruits of agricultural activity and safeguard agricultural production, a paramount aim of the common agricultural policy, and secondly, the need to safeguard the rights of breeders, who are active in the field of industrial, research and development policy and determined to achieve a suitable legislative framework for promoting their activities in the European Union, while respecting the objectives pursued by the legislation in question. (5)

5. This case will therefore enable the Court to enlarge upon the case-law laid down in Schulin (6) and, in particular, to clarify its position on reasonable compensation where plant variety rights are infringed as well as to rule on the balance to be struck between the interests underlying the rules on Community plant variety rights.

II – Legal framework

A – The basic regulation

6. The fifth recital in the preamble to the basic regulation (7) states that, in order to stimulate the breeding and development of new varieties, there should be improved protection compared with the present situation for all plant breeders.

7. According to the 17th recital in the preamble to the regulation, the exercise of Community plant variety rights must be subjected to restrictions laid down in provisions adopted in the public interest.

8. In this regard, the 18th recital in the preamble to the regulation states that the public interest referred to in the previous recital includes safeguarding agricultural production and that that purpose requires an authorisation for farmers to use the product of the harvest for propagation under certain conditions.

9. According to Article 11(1) of the basic regulation, the Community plant variety right belongs to the breeder, namely 'the person who bred, or discovered and developed the variety, or his successor in title'.

10. Under the heading 'Rights of the holder of a Community plant variety right and prohibited acts', Article 13 of the basic regulation provides:

'1. A Community plant variety right shall have the effect that the holder or holders of the Community plant variety right, hereinafter referred to as "the holder", shall be entitled to effect the acts set out in paragraph 2.

2. Without prejudice to the provisions of Articles 15 and 16, the following acts in respect of variety constituents, or harvested material of the protected variety, both referred to hereinafter as "material", shall require the authorisation of the holder:

(a)

production or reproduction (multiplication);

...

The holder may make his authorisation subject to conditions and limitations.'

11. The famers' privilege is referred to in Article 14 of the basic regulation in the following terms:

'1. Notwithstanding Article 13(2), and for the purposes of safeguarding agricultural production, farmers are authorised to use for propagating purposes in the field, on their own holding, the product of the harvest which they have obtained by planting, on their own holding, propagating material of a variety other than a hybrid or synthetic variety, which is covered by a Community plant variety right.

...

3. Conditions to give effect to the derogation provided for in paragraph 1 and to safeguard the legitimate interests of the breeder and of the farmer, shall be established ... on the basis of the following criteria:

...

–

small farmers shall not be required to pay any remuneration to the holder ...

...

–

other farmers shall be required to pay an equitable remuneration to the holder, which shall be sensibly lower than the amount charged for the licensed production of propagating material of the same variety in the same area ...

–

monitoring compliance with the provisions of this Article or the provisions adopted pursuant to this Article shall be a matter of exclusive responsibility of holders ...

–

relevant information shall be provided to the holders on their request, by farmers and by suppliers of processing services ...'

12. Article 94 of the basic regulation, headed 'Infringement', provides:

'1. Whosoever:

(a) effects one of the acts set out in Article 13(2) without being entitled to do so, in respect of a variety for which a Community plant variety right has been granted ……may be sued by the holder to enjoin such infringement or to pay reasonable compensation or both.

2. Whosoever acts intentionally or negligently shall moreover be liable to compensate the holder for any further damage resulting from the act in question. In cases of slight negligence, such claims may be reduced according to the degree of such slight negligence, but not however to the extent that they are less than the advantage derived therefrom by the person who committed the infringement.'

B – The implementing regulation

13. According to Article 3(2) of the implementing regulation, the rights and obligations of the holder which derive from the provisions of Article 14 of the basic regulation 'may be invoked by individual holders, collectively by several holders or by an organisation of holders which is established in the Community at Community, national, regional or local level'.

14. Under the heading 'Level of remuneration', Article 5 of the implementing regulation provides:

'1. The level of the equitable remuneration to be paid to the holder pursuant to Article 14(3), fourth indent of the basic Regulation may form the object of a contract between the holder and the farmer concerned.

2. Where such contract has not been concluded or does not apply, the level of remuneration shall be sensibly lower than the amount charged for the licensed production of propagating material of the lowest category qualified for official certification, of the same variety in the same area.

...

5. Where in the case of paragraph 2 an agreement as referred to in paragraph 4 does not apply, the remuneration to be paid shall be 50% of the amounts charged for the licensed production of propagating material as specified in paragraph 2.

...'

15. Article 8 of that regulation, headed 'Information by the farmer', provides:

'1. The details of the relevant information to be provided by the farmer to the holder pursuant to Article 14(3), sixth indent of the basic Regulation may form the object of a contract between the holder and the farmer concerned.

2. Where such contract has not been concluded or does not apply, the farmer shall, without prejudice to information requirements under other Community legislation or under legislation of Member States, on request of the holder, be required to provide a statement of relevant information to the holder. The following items shall be considered to be relevant:

...

(b)

the fact whether the farmer has made use of the product of the harvest belonging to one or more varieties of the holder for planting in the field or fields of his holding;

(c)

if the farmer has made such use, the amount of the product of the harvest belonging to the variety or varieties concerned, which has been used by the farmer in accordance with Article 14(1) of the basic Regulation;
…'
16. Article 14 of the implementing regulation, which governs the monitoring, by the holder, of compliance with Article 14 of the basic regulation, provides in paragraph 1 as follows:
'… the farmer shall, on request of the holder:
(a)
provide evidence supporting his statements of information under Article 8, through disclosure of available relevant documents such as invoices, used labels, or any other appropriate device …
…'
17. Under Article 16(1) of the implementing regulation:
'The monitoring shall be carried out by the holder. He may make appropriate arrangements to ensure assistance from organisations of farmers, processors, cooperatives or other circles of the agricultural community.'
18. Article 17 of the implementing regulation, headed 'Infringement', provides: *'The holder may invoke the rights conferred by the Community plant variety right against a person who contravenes any of the conditions or limitations attached to the derogation pursuant to Article 14 of the basic Regulation as specified in this Regulation.'*

III – The main proceedings, the questions referred and the procedure before the Court

19. Between 2001 and 2004 the Geistbecks, under the derogation provided for in Article 14 of the basic regulation and after informing STV, planted the varieties Kuras, Quarta, Solara, and Marabel, which are protected under EU law, and the variety Secura, which is protected under German law.
20. However, when carrying out an inspection, STV found that the quantities actually planted were higher than the quantities declared, sometimes more than three times as high. On the basis of the amount which would generally have been demanded for the grant of a licence for the production of propagating material, STV calculated that the amount of compensation due to it for the difference in quantities was EUR 4 576.15. However, the Geistbecks paid only half of this amount. That amount corresponded to the remuneration which would have been payable under the fourth indent of Article 14(3) of the basic regulation in the event of authorised planting under the farmers' privilege.
21. Consequently, STV brought an action against the Geistbecks for incompletely declared planting of protected plant varieties and demanded payment of the remaining amount of EUR 2 288, as well as reimbursement of pre-litigation costs in the amount of EUR 141.05. STV's claim was upheld at first instance and on appeal. The Geistbecks lodged an appeal on a point of law with the Bundesgerichtshof against the decision on appeal.
22. In this context, the referring court harbours doubts, in particular, about the calculation of the reasonable compensation payable under Article 94(1) of the basic regulation owed to the holder of the rights protected under that regulation. In this regard, it considers, on the basis of the judgment in Schulin, that a farmer who has not duly fulfilled the obligation, owed to the holder of the protected plant variety, to provide information under the sixth indent of Article 14(3) of the basic regulation cannot rely on Article 14(1) of that regulation and may be the subject of an action for infringement under Article 94 thereof and be liable for payment of reasonable compensation.
23. However, the referring court has doubts about the method of calculating such compensation. Firstly, it could, in its view, be calculated on the basis of the average amount of the fee charged for the licensed production of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area ('the fee for licensed production'). Secondly, it could be calculated on the basis of the remuneration due in the event of authorised planting under the fourth indent of Article 14(3) of the basic regulation, read in conjunction with Article 5(5) of the implementing regulation ('the fee for authorised planting').
24. In the first case, the farmer would be liable to pay the fee for licensed production under the same conditions and at the same rates as a third party. In the second case, he could invoke the preferential rate reserved for farmers, that is to say the fee for authorised planting, which corresponds to 50% of the amounts due for licensed production of propagating material unless the remuneration is the subject of a contract between the holder of the plant variety right and the farmer concerned.
25. In these circumstances, the Bundesgerichtshof decided, by order of 30 September 2010 lodged with the Court Registry on 26 October 2010, to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
'(1) Must the reasonable compensation which a farmer must pay to the holder of a Community plant variety right in accordance with Article 94(1) of the [basic regulation] because he has used propagating material of a protected variety obtained through planting and has not fulfilled the obligations laid down in Article 14(3) of the [basic regulation] and Article 8 of the [implementing] Regulation, be calculated on the basis of the average amount of the fee charged for the licensed production of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area, or must the (lower) remuneration which would be payable in the event of authorised planting under the fourth indent of Article 14(3) of the [basic regulation] and Article 5 of the [implementing regulation] be taken as a basis for the calculation instead?
(2) In the event that only the remuneration for authorised planting must be taken as a basis for the calculation: in the circumstances described above, may

the holder, in the event of a single intentional or negligent infringement, calculate the damage for which he must be compensated in accordance with Article 94(2) of the [basic regulation] as a lump sum based on the fee for the grant of a licence for the production of propagating material?
(3) Is it permitted or even required, when assessing the reasonable compensation due under Article 94(1) of the [basic regulation] or the further compensation due under Article 94(2) of the [basic regulation], for the special monitoring costs of an organisation which protects the rights of numerous holders to be taken into account in such a way that double the compensation usually agreed, or double the remuneration due under the fourth indent of Article 14(3) of the [basic regulation], is awarded?'
26. Written observations were lodged by the parties to the main proceedings and by the Greek Government, the Spanish Government and the European Commission. The parties to the main proceedings, the Greek Government and the Commission attended the hearing on 18 January 2012.

IV – Analysis

A – Introductory remarks

27. In response to the questions referred by the national court, I shall make some preliminary observations, firstly, on the matter raised by the Geistbecks of the quality of the propagating material used in this case, and, secondly, on the extent of the farmers' privilege.
28. I shall then deal with the matter of the appropriate method for calculating the reasonable compensation due to the holder of the Community plant variety rights under Article 94(1) of the basic regulation. Finally, I shall examine whether it is possible, when calculating that remuneration or the further compensation due under Article 94(2) of that regulation, for the monitoring costs of an organisation such as that in question in the main proceedings to be taken into account. (8)

1. The quality of the protected propagating material

29. According to the Geistbecks, the propagating material in question is no longer of the same quality as the material referred to in Article 13(2) of the basic regulation and was therefore no longer suitable for commercial transactions requiring the grant of a licence. Thus they consider that the poorer quality of the harvested material does not justify full payment of a royalty to the holder of the plant variety right.
30. I note that, from the point of view of intellectual property law, the use of the protected material does not affect the protection of the identity of the material protected, such as the plant varieties in question in the main case. An intellectual property right does not disappear as a result of its being used.
31. Moreover, for the farmer's activity to be classified as falling within the scope of the farmers' privilege provided for in Article 14 of the basic regulation, the product of the harvest must conform to the characteristics of the protected variety. (9) The farmer therefore plants and propagates plants which fulfil the necessary characteristics of the variety in question.

2. The extent of the farmers' privilege

32. It should first be pointed out that, under Article 13(2)(a) of the basic regulation, the holder's authorisation is, in principle, required for the propagation of the harvested material of a protected variety.
33. However, Article 14(1) of the basic regulation provides for a derogation from that principle. That derogation aims to safeguard agricultural production. Under that article, farmers are authorised to use the product of the harvest obtained by planting propagating material of protected varieties for propagation in the field on their own holding, provided that the criteria referred to in Article 14(3) are complied with.
34. The farmers' privilege does not therefore apply if the farmer does not fulfil the obligations laid down in Article 14(3) of the basic regulation, which are specified in detail in the implementing regulation.
35. In the judgment in Schulin, the Court has already briefly considered the extent to which a farmer is entitled to rely on that derogation. According to the Court, a farmer who does not pay equitable remuneration to the holder when he uses the product of the harvest obtained by planting propagating material from a protected variety cannot rely on Article 14(1) of the basic regulation and, therefore, must be considered to have undertaken, without being authorised, one of the acts referred to in Article 13(2) of that regulation. Accordingly, it is clear from Article 94 of that regulation that such a farmer can have an action brought against him by the holder for an injunction in respect of the infringement or for payment of reasonable compensation or both. If the infringement is intentional or negligent, the farmer is also obliged to pay damages to make good the loss suffered by the holder. (10)
36. In my view, the same must necessarily apply where a farmer has not duly fulfilled his obligation to provide the information laid down in the sixth indent of Article 14(3) of the basic regulation, since the payment of equitable remuneration referred to in Schulin and the provision of information are both specified in that article, which lists the criteria for giving effect to the derogation provided for in Article 14(1) of the regulation.
37. As the Commission stated in its observations, if a farmer does not fulfil his obligation towards the holder to provide information, under the sixth indent of Article 14(3) of the basic regulation read in conjunction with Article 8 of the implementing regulation, and if he also does not pay him equitable remuneration for that part of the production, the derogation provided for in Article 14(1) of the basic regulation can no longer be applied.
38. Indeed, if the conditions for authorised planting laid down in Article 14(3) of the basic regulation are not fulfilled, the derogation provided for in Article 14(1) thereof cannot be applied either. Consequently, if, at the time of planting, the criteria laid down in Article 14 (3) are not fulfilled, the planting of the protected variety constitutes an infringement of the rights

conferred on the holder by Article 13(2) of the basic regulation.

B – The calculation of the reasonable compensation provided for in Article 94(1) of the basic regulation

39. It is clear from the order for reference that, as a result of the infringement of the plant variety rights, STV is entitled to require
payment of reasonable compensation under Article 94(1) of the basic regulation. Moreover, the referring court points out that the Geistbecks' failure to fulfil their obligation to provide information is intentional or negligent, so that STV can also claim compensation for any further damage resulting from the infringement under Article 94(2) of that regulation.

40. I must point out straight away that, for the purposes of examining Article 94 of the basic regulation, one should start from the assumption that the underlying objective of that article is full compensation based on the principle of restitutio in integrum. (11) In other words, the compensation which is payable when plant variety rights have been infringed is intended to return the holder of those rights to
the situation that existed prior to the infringement. However, it is not so easy to apply that principle in this case because that situation can be
restored either by reference to authorised planting or by taking into account the amount charged for the licensed production of the
propagating material.

1. The regimes established by Articles 14 and 94 of the basic regulation

41. The referring court outlines two methods that could be used to calculate reasonable compensation within the meaning of Article 94(1)
of the basic regulation, namely one based on the fee for licensed production and one based on the fee for authorised planting.

42. I would point out that the wording of Article 94 of the basic regulation does not provide any indication as to the possibility of taking the amount of the fee for authorised planting, as provided for in the fourth indent of Article 14(3) of that regulation, into account in the
calculation of reasonable compensation within the meaning of the former provision.

43. I also note that certain language versions (in particular, the Spanish, Danish, German, English, Italian and Finnish versions) use different wording in Article 94(1) (12) and in the fourth indent of Article 14(3) (13) of the basic regulation, whereas the French version adopts the same expression in both provisions, namely 'rémunération équitable'. However, as no conclusions can be drawn from that linguistic difference, the provisions should be examined in their respective contexts, taking into account, in particular, their objectives.

44. Firstly, it should be recalled that the equitable remuneration provided for in the fourth indent of Article 14(3) of the basic regulation forms part of a derogation. In this context, the Court has already stated in the judgment in Schulin that, in accordance with the 17th and 18th recitals in the preamble to the basic regulation, the provisions of Article 14 thereof, which were adopted on the basis of the public interest in safeguarding agricultural production, constitute an exception to the rule that the holder's authorisation is required to propagate the harvested material of the protected variety. (14)

45. In the judgment in Brangewitz, the Court also held that the right of farmers, without the prior authorisation of the holder, to plant the product of the harvest obtained by planting propagating material of a variety subject to the farmers' privilege has as a corollary their obligation to provide, on request of that holder, the relevant information and, with the exception of small farmers, to pay him an equitable remuneration. (15)

46. The Court has further held that Article 14 of the basic regulation therefore establishes a balance between the interests of the holders of plant variety rights on the one hand and those of the farmers on the other. The farmers' privilege, namely planting without prior authorisation, combined with the obligation to provide information and pay equitable remuneration, thus enables the reciprocal legitimate interests of farmers and holders in their direct relations to be preserved. (16)

47. It is therefore essential to interpret the concept of 'equitable remuneration' referred to in the fourth indent of Article 14(3) of the basic regulation restrictively, and in its particular context, as forming an integral part of the derogation provided for in that article.

48. Next, the reasonable compensation referred to in Article 94(1) of the basic regulation must, like the remuneration referred to in the fourth indent of Article 14(3) thereof, be interpreted in the light of the context of the regulation and of the objective pursued by it.

49. Generally, as is indicated by the fifth recital in the preamble to the basic regulation, the overall objective of that regulation is to improve protection for all plant breeders. (17) Having regard to the aim of the protection under the basic regulation of the holders of plant variety rights, I consider that Article 94(1) of that regulation enables the holder to ensure that his interests are protected against any person who, without prior authorisation, effects one of the acts listed in Article 13(2) of the basic regulation. (18)

2. The method of calculation based on the fee for licensed production

50. In order to guarantee the protection of holders of plant variety rights and return them to the situation that existed prior to the infringement of their rights, the reasonable compensation under Article 94(1) of the basic regulation must be calculated on the basis of the
fee for licensed production.

51. That provision is also applicable where the person who committed an infringement did not do so deliberately or negligently.

(19) It aims to ensure that the holder receives reasonable compensation, which, in my view, cannot be lower than the compensation that the holder could have claimed on the basis of the licensed production of the propagating material under Article 13 of the basic regulation.

52. On the basis that the regime provided for in Article 14 of that regulation constitutes a derogation, I consider that a farmer who does not fulfil the conditions laid down in Article 14(3), which serves as a basis for applying the derogation provided for in Article 14(1), must be regarded like any third person obliged to acquire the protected variety on the market in return for payment of the fee for licensed production. Consequently, a farmer who does not fulfil his obligations under Article 14(3) of the basic regulation cannot rely on the derogation provided for in that article.
53. This conclusion can also be confirmed by reading Article 17 of the implementing regulation, which states that the holder may invoke the rights conferred by the Community plant variety right against a person who contravenes any of the conditions or limitations attached to the derogation pursuant to Article 14 of the basic regulation.
54. Moreover, I think that it is worth noting that, if one adopted a different approach, farmers might have no incentive to fulfil their obligation towards the holder to provide information, since non-fulfilment of the obligations which give effect to the derogation would not, in practice, give rise to any economic deterrent.
55. Seen from this perspective, as the order for reference also indicates, a cap on the holder's right to remuneration at the amount corresponding to the fee for authorised planting would have the effect of unjustifiably favouring farmers who do not fulfil the obligations laid down in Article 14(3) of the basic regulation.
56. In such a system where the general objective is to ensure a high level of protection of plant variety rights, it would be contrary to that objective for a farmer, irrespective of whether he fulfils his obligation to provide information, to be systematically required to pay only the fee for authorised planting, the level of which is maintained, under the applicable rules, at a threshold which is considerably lower than that of the fee for licensed production.
57. I shall add in this regard that, even though the obligation to pay reasonable compensation within the meaning of Article 94(1) of the basic regulation, when calculated on the basis of the fee for licensed production, results in a higher level of compensation than that provided for in the case of authorised planting under Article 14 of the basic regulation, the compensation cannot, for all that, be described as punitive damages, which also include an element of sanction. (20) However, this method of calculation enables the cost of licensed production of the propagating material to be imposed where planting has constituted an infringement and, by virtue of that fact, it has a preventive function.
58. In conclusion, I consider that, in a situation such as that in question in the main proceedings, the fee for licensed production must be taken as the basis for determining the amount of the reasonable compensation provided for in Article 94(1) of the basic regulation. Any other interpretation could not guarantee either the objective or the effectiveness of that regulation.
59. However, in the event that the Court does not share my view on the need to adopt the fee for licensed production as the basis for calculating the reasonable compensation provided for in Article 94(1) of the basic regulation, I shall also make some observations on the other method of calculation envisaged by the referring court, which is based on the fee for authorised planting.

3. The alternative method of calculation envisaged by the referring court

60. I would point out first of all that, if the reasonable compensation which a farmer must pay to the holder in the event of an infringement under Article 94(1) of the basic regulation were calculated on the basis of the fee for authorised planting, that compensation would be clearly lower than the amount due from third parties for licensed production of the propagating material.
61. I note that, according to the order for reference, the Geistbecks acted intentionally or negligently, so that STV can also claim compensation for any further damage resulting from the act in question under Article 94(2) of the basic regulation. (21)
62. In such a context, and in order to ensure that the general objective of the basic regulation is achieved and to prevent unauthorised propagation from resulting in the offenders gaining an unfair advantage over third parties who produce licensed propagating material, I consider it necessary to determine the amount of compensation for further damage under Article 94(2) of the basic regulation by reference to the fee for licensed production. In that case, the damage suffered by the holder referred to in Article 94(2) of the basic regulation would amount to the difference between that fee and the equitable remuneration provided for in the fourth indent of Article 14(3) of the basic regulation. (22)
63. I would point out that the fee for authorised planting covers only 50% of the amount of the fee for licensed production. (23) The further damage suffered by the holder, for the purposes of Article 94(2) of the basic regulation, therefore amounts in such a case, and without the holder having to furnish proof, to the difference between the amount of the fee for authorised planting and that of the fee for licensed production.
64. Moreover, as regards the ordinary monitoring and supervision costs mentioned by the referring court, I would add that taking the fee for authorised planting as the basis for the calculation of the reasonable compensation referred to in Article 94(1) of the basic regulation would also result in those costs, which are normally included in the amount of the fee for licensed production, not being entirely covered by the remuneration referred to in the fourth indent of Article 14(3) of the basic regulation.
65. It follows that, if that method of calculation were adopted as the appropriate method, the holder of a plant variety right would have to be able to calculate the amount of compensation for further damage under Article 94(2) of the basic regulation on the basis of the fee for licensed production in which the ordinary

monitoring and supervision costs incurred by that holder are also included. Such an interpretation has, from the economic viewpoint of that holder, the same result as that of my main proposal. 4. Taking account of special monitoring costs

66. The referring court also wonders whether the special monitoring undertaken by an organisation which protects the rights of numerous right holders in order to establish possible infringements of plant variety rights within the meaning of Article 94(1) or (2) of the basic regulation may be the subject of compensation and whether its cost may be calculated on a lump sum basis amounting to double the remuneration agreed.

67. As regards, firstly, the nature of that question, the Commission states that it has no effect on the resolution of the dispute in the main proceedings. Admittedly, it is clear from the order for reference that STV has not requested payment of such a lump sum amount and that the main proceedings relate only to a very small amount of pre-litigation costs, namely EUR 141.05, which were evidently not incurred as a result of the monitoring carried out by STV. However, I do not regard that question as hypothetical as it is closely linked to the application of Article 94(1) and (2) of the basic regulation. (24)

68. As to the substance, it should be noted that the provisions of Article 3(2) of the implementing regulation seek to allow holders to organise themselves appropriately in order to enforce the rights which they derive from Article 14 of the basic regulation. Indeed, they may act individually or collectively or may even establish an organisation for that purpose. (25)

69. According to the judgment in Jäger, STV is a company whose object is the protection of the economic interests of its members who directly or indirectly produce or market seeds or are involved in the production or marketing of seeds. In particular, that company monitors plant variety rights nationally and internationally and conducts checks in respect of the plant variety rights of its members or third parties at propagating and distribution enterprises. These activities also include the collection of licence fees in respect of plant variety rights and, lastly, the adoption of general measures intended to promote the production and the supply to consumers of high-quality seeds and the distribution of the latter. (26)

70. As the Greek Government stated in its observations, the ability to enforce collectively the rights derived from Article 14 of the basic regulation in no way implies that the cost of such a collective action must be charged to the farmer, even if he infringes the provisions of that regulation. On the contrary, under the fifth indent of Article 14(3) of the basic regulation, read in conjunction with Article 16 of the implementing regulation, according to which the monitoring will be carried out by the holder, such costs must be included by the holder in the amount of the fee for licensed production.

71. Having regard to the role performed by an organisation such as that in question in the main proceedings, which is closely connected with the monitoring and checks aimed at safeguarding the rights of the breeders concerned, the special monitoring costs incurred by such an organisation cannot be taken into account separately in the calculation of the reasonable compensation due under Article 94(1) of the basic regulation or the compensation for further damage due under Article 94(2) thereof.

72. In my view, such costs can be taken into account only in so far as they are supplementary pre-litigation or litigation costs associated with the examination of a particular infringement which may be required to be reimbursed under and subject to the conditions laid down in Article 94(2) of the basic regulation. (27) There must, in any event, be a causal link between such expenses and the infringement in question.

73. Finally, I would point out that, if the reasonable compensation provided for in Article 94(1) of the basic regulation is calculated, as I propose, by reference to the fee for licensed production, the holder cannot require payment of compensation by way of repayment of ordinary monitoring and supervision costs which are associated with the monitoring referred to in the fifth indent of Article 14(3) of the basic regulation and Article 16 of the implementing regulation. (28)

74. That finding is required as the ordinary monitoring and supervision costs, even where the amount involved is considerable, must be regarded, as is clear from this Opinion, as being included in the amounts charged in respect of licensed production, and hence included in the amount of the fee for licensed production, since the monitoring will be carried out by the holder, by virtue of the fifth indent of Article 14(3) of the basic regulation and Article 16 of the implementing regulation. Calculating the amount of reasonable compensation by reference to the fee for licensed production enables the consequences of the infringement to be made good and thus returns the holder to the situation which existed prior to the infringement.

V – Conclusion

75. In the light of all the foregoing, I propose that the Court should, firstly, declare that there is no need to answer the second question and, secondly, answer the first and third questions referred by the Bundesgerichtshof as follows:

The reasonable compensation which a farmer must pay to the holder of a Community plant variety right in accordance with Article 94(1) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights because he has used propagating material of a protected variety obtained through planting and has not fulfilled the obligations laid down in Article 14(3) of Regulation No 2100/94 and in Article 8 of Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation No 2100/94, as amended by Commission Regulation (EC) No 2605/98 of 3 December 1998, must be calculated on the basis of the average amount of the fee charged for the licensed production of a corresponding quantity of

propagating material of protected varieties of the plant species concerned in the same area. Since, firstly, calculation of the amount of reasonable compensation on the aforementioned basis enables the holder to be returned to the situation which existed prior to the infringement and the consequences of the infringement of his rights to be made good and, secondly, monitoring and supervision costs must be regarded as having been included by the holder in the amount of the licence, the payment of those costs can be required by the holder only in so far as they are supplementary pre-litigation or litigation costs associated with the examination of a particular infringement which may be required to be reimbursed under and subject to the conditions laid down in Article 94(2) of Regulation No 2100/94.

2 – Original language: French.

3 – Council Regulation of 27 July 1994 (OJ 1994 L 227, p. 1).

4 – Commission Regulation of 24 July 1995 (OJ 1995 L 173, p. 14), as amended by Commission Regulation (EC) No 2605/98 of 3 December 1998 (OJ 1998 L 328, p. 6).

5 – See to this effect points 22 and 23 of the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-7/05 to C-9/05 Deppe and Others [2006] ECR I-5045.

6 – See Case C-305/00 Schulin [2003] ECR I-3525. See also Case C-182/01 Jäger [2004] ECR I-2263; Case C-336/02 Brangewitz
[2004] ECR I-9801; Deppe and Others; and Case C-140/10 Greenstar-Kanzi [2011] ECR I-0000.

7 – At international level, plant variety rights are protected by a convention of the World Intellectual Property Organisation, namely the International Convention for the Protection of New Varieties of Plants. The European Community acceded to that convention in 2005 (Council Decision 2005/523/EC of 30 May 2005 approving the accession of the European Community to the International Convention for the Protection of New Varieties of Plants, as revised at Geneva on 19 March 1991 (OJ 2005 L 192, p. 63)). The EU rules are largely based on the provisions of that convention.

8 – I should add that one should start from the assumption that the holders generally include the ordinary monitoring and supervision costs involved in safeguarding their rights in the amount of the fee for licensed production.

9 – See, on the characteristics of planted varieties in the context of European agriculture, points 1 to 4 of the Opinion of Advocate General Kokott in Case C-59/11 Association Kokopelli, pending before the Court.

10 – .Schulin, paragraph 71.

11 – See, to this effect, Bonadio, E., 'Remedies and sanctions for the infringement of intellectual property rights under EC law', European Intellectual Property Review, 2008, No 8, Vol. 30, p. 324.

12 – The wording of these versions is as follows: 'indemnización razonable', 'rimelig vederlag', 'angemessene Vergütung', 'reasonable compensation', 'equa compensazione' and 'kohtuullinen korvaus'.

13 – These versions employ, respectively, the following wording: 'remuneración justa', 'rimelig godtgoerelse', 'angemessene Entschädigung', 'equitable remuneration', 'equa remunerazione' and 'kohtuullinen palkkio'.

14 – .Schulin, paragraph 47.

15 – .Brangewitz, paragraph 43.

16 – See, to this effect, Brangewitz, paragraph 43, and, by analogy, Case C-245/00 SENA [2003] ECR I-1251, paragraph 36.

17 – See also, in this regard, point 40 of the Opinion of Advocate General Ruiz-Jarabo Colomer in Jäger. In this context, he observed that the aim of the basic regulation was not to regulate any agricultural production sector in the Community but to establish Community plant variety rights.

18 – I would also note that that regime constitutes a separate and distinct compensation system which is intended to ensure the effectiveness of the basic regulation.

19 – See, on the non-fault-based nature of the reasonable compensation provided for in Article 94(1) of the basic regulation, Greenstar- Kanzi Europe, paragraph 48.

20 – See also recital 26 in the preamble to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45), which is not applicable in the present case.

21 – On the possible methods of calculating the damage suffered by the holder and the issues that they raise, see Würtenberger G. et al., European Plant Variety Protection, Oxford University Press, Oxford, 2009, pp. 177 and 178.

22 – I would add that Article 18(2) of the implementing regulation provides that, where the farmer repeatedly and intentionally disregards his obligations pursuant to Article 14(3) of the basic regulation, the liability to compensate the holder for any further damage will cover at least a lump sum calculated on the basis of the quadruple average amount of the fee charged for licensed production, without, prejudice to the compensation of any higher damage. Nevertheless, the provisions of the implementing regulation cannot impose more extensive obligations on farmers than those under the basic regulation. See, on the interpretation of Article 8(2) of the implementing regulation, Schulin, paragraph 60.

23 – Under Article 5(1) of the implementing regulation, that remuneration may also form the object of a contract between the holder and the farmer.

24 – I note in passing that this question is based, as is clear from the order for reference, on the case-law of the Bundesgerichtshof on infringements of performing rights. In this field, the Bundesgerichtshof has for some time approved a so-called 'infringer' supplement of double the usual licence fee for the collecting society which pursues such infringements of rights.

25 – See in this regard Jäger, paragraph 51.

26 – See Jäger, paragraph 17.

27 – This conclusion also seems to me to be in accordance with the principles stated in recital 26 in the preamble to Directive 2004/48 and in Article 13 thereof.
28 – Apart from these costs, the holder can, however, require payment of compensation for further damage suffered by him resulting from the act in question, under Article 94(2) of the basic regulation.