

Court of Justice EU, 14 October 2021, Pardo v CVVP



## PLANT VARIETY RIGHTS

**Three year prescription period starts to run from the date that the holder of the right had knowledge of the act and of the identity of the party liable**

- irrespective of the ongoing nature of an act of infringement of a protected variety or of the date on which that act ended, the three-year period of prescription set out in that provision in respect of claims pursuant to Articles 94 and 95 of that regulation starts to run, once the Community plant variety right was finally granted, from the date on which, first, the Community plant variety right was finally granted.

39 However, if Article 96 of Regulation No 2100/94 were interpreted to the effect that the period of prescription provided for therein starts to run only when the act of infringement in question has come to an end, that would mean that, for as long as the infringement continued, the holder of the Community plant variety right could bring claims pursuant to Articles 94 and 95 of that regulation up to three years after the end of that act, irrespective of the dates on which the infringement began or the holder had knowledge of it and of the identity of the party liable.

40 Such an interpretation would give rise to constant uncertainty for the party liable for acts of infringement, since the holder of the Community plant variety right, despite having tolerated acts to the extent of giving the party liable the impression of acting in good faith, could legitimately bring one of the actions referred to in Articles 94 and 95 of Regulation No 2100/94 in respect of all acts of infringement, irrespective of when each took place.

**Time bar limited to those individual acts and parties liable that the right holder has knowledge for more than three years**

- that claims pursuant to Articles 94 and 95 of that regulation in respect of a set of acts of infringement of a protected variety brought after more than three years have elapsed are time barred only from when, first, the Community plant variety right was finally granted and, second, the right holder had knowledge of each individual act forming part of that set of acts and of the identity of the party liable for them.

51 However, as the Advocate General stated in point 56 of his Opinion, rules of prescription can refer only to claims in respect of acts which took place in the past and not those which could be undertaken in the future.

52 Furthermore, if claims pursuant to Articles 94 and 95 of Regulation No 2100/94 were required to be declared time barred on the ground that those relating to the 'initial act' at the source of the infringing course of action, the holder's Community plant variety right would be meaningless in respect of acts of infringement taking place after the period of prescription applicable to that initial act had elapsed.

53 Such an interpretation of the period of prescription laid down in Article 96 of that regulation would be incompatible with the very purpose of that regulation which is, according to Article 1 thereof, to establish a system of Community plant variety rights.

Source: [ECLI:EU:C:2021:849](#)

## Court of Justice EU, 14 October 2021

(I. Ziemele (Rapporteur), T. von Danwitz and A. Kumin).

*(Reference for a preliminary ruling – Community plant variety rights – Regulation (EC) No 2100/94 – Article 96 – Calculation of the period of prescription for claims pursuant to Articles 94 and 95 – Point from which time starts to run – Date of grant of Community rights and of knowledge of the act and of the identity of the party liable – Date on which the course of action in question ceased – Repeated acts – Continuous acts – Restricted to acts carried out more than three years ago)*

In Case C-186/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 7 March 2018, received at the Court on 9 March 2018, in the proceedings  
José Cánovas Pardo SL

v

Club de Variedades Vegetales Protegidas,  
THE COURT (Seventh Chamber),  
composed of I. Ziemele (Rapporteur), President of the Sixth Chamber, acting as President of the Seventh Chamber, T. von Danwitz and A. Kumin, Judges,  
Advocate General: H. Saugmandsgaard Øe,  
Registrar: A. Calot Escobar,  
having regard to the written procedure,  
after considering the observations submitted on behalf of:

- José Cánovas Pardo SL, by V. Venturini Medina, procurador, and by A. Scasso Veganzones, abogada,
  - Club de Variedades Vegetales Protegidas, by P. Tent Alonso, V. Gigante Pérez, I. Pérez-Cabrero Ferrández and G. Navarro Pérez, abogados,
  - the Greek Government, by G. Kanellopoulos, E. Leftheriotou and A. Vasilopoulou, acting as Agents,
  - the European Commission, by B. Eggers, I. Galindo Martín and G. Koleva, acting as Agents,
- after hearing [the Opinion of the Advocate General](#) at the sitting on 22 April 2021,  
gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 96 of Council Regulation (EC)

No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

2 The request has been made in proceedings between José Cánovas Pardo SL (*'Pardo'*) and Club de Variedades Vegetales Protegidas (CVVP) concerning Pardo's cultivation of mandarin trees of the Nadorcott variety without CVVP's consent.

#### Legal context

3 Under Article 1 of Regulation No 2100/94, 'a system of Community plant variety rights is hereby established as the sole and exclusive form of Community industrial property rights for plant varieties'.

4 Article 13 of Regulation No 2100/94, which is entitled 'Rights of the holder of a Community plant variety right and prohibited acts', provides:

'1. 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);
- (b) conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) selling or other marketing;
- (e) exporting from the Community;
- (f) importing to the Community;
- (g) stocking for any of the purposes mentioned in (a) to (f).

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

3. The provisions of paragraph 2 shall apply in respect of harvested material only if this was obtained through the unauthorised use of variety constituents of the protected variety, and unless the holder has had reasonable opportunity to exercise his right in relation to the said variety constituents.

...

5 Under Article 94 of Regulation No 2100/94, entitled 'Infringement':

'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;

or

(b) omits the correct usage of a variety denomination as referred to in Article 17(1) or omits the relevant information as referred to in Article 17(2);

or

(c) contrary to Article 18(3) uses the variety denomination of a variety for which a Community plant variety right has been granted or a designation that may be confused with it;

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.'

6 Article 95 of that regulation, entitled 'Acts prior to grant of Community plant variety rights', reads as follows:

'The holder may require reasonable compensation from any person who has, in the time between publication of the application for a Community plant variety right and grant thereof, effected an act that he would be prohibited from performing subsequent thereto.'

7 Under Article 96 of Regulation No 2100/94, entitled 'Prescription':

'Claims pursuant to Articles 94 and 95 shall be time barred after three years from the time at which the Community plant variety right has finally been granted and the holder has knowledge of the act and of the identity of the party liable or, in the absence of such knowledge, after 30 years from the termination of the act concerned.'

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

8 Following an application lodged by Nadorcott Protection SARL on 22 August 1995 with the Community Plant Variety Office (*'the CPVO'*), the CPVO granted it a Community plant variety right in respect of the Nadorcott variety of mandarin tree on 4 October 2004. An appeal with suspensive effect was brought against that decision before the Board of Appeal of the CPVO but was dismissed by a decision of 8 November 2005 published in the Official Gazette of the CPVO on 15 February 2006.

9 Since 2006, Pardo has cultivated a grove of 4 457 mandarin trees of the Nadorcott variety.

10 Geslive, on whom the management of the rights over the Nadorcott variety had been conferred, sent Pardo formal notice on 30 October 2007 demanding that, in the absence of the appropriate licence, it cease the cultivation of that plant variety.

11 On 30 March 2011, CVVP, to whom the management of those rights had been transferred with effect from 13 December 2008, sent Pardo a new letter demanding that, if it were cultivating some 5 000 mandarin trees of the Nadorcott variety, it cease that activity.

12 Having applied in November 2011 to the Juzgado de lo Mercantil (Commercial Court, Spain) for preliminary measures for a declaration of infringement of the exclusive rights over the Nadorcott variety, CVVP brought two actions against Pardo, one for 'provisional protection' in respect of the acts of Pardo prior to the grant of those rights, that is, before 15 February 2006, the other for infringement in respect of acts after that date. In particular, CVVP sought a declaration of infringement of the exclusive rights over the Nadorcott variety from 15 February 2006 until the cessation of cultivation. CVVP also applied for an injunction that Pardo be ordered to bring its unlawful cultivation to an end, to remove and, if necessary, destroy any plant

material of that variety in Pardo's possession, and to pay it compensation in respect of such cultivation.

13 Having found that a period of time of more than three years had elapsed between the date on which the holder of the rights over the Nadorcott variety had identified Pardo as an unlawful cultivator of that variety, that is, at the latest by 30 October 2007, when Geslive gave formal notice to Pardo, and the date on which CVVP brought its action in November 2011, that court of first instance dismissed the action on the ground that the action for infringement was time barred under Article 96 of Regulation No 2100/94.

14 Following CVVP's appeal against that decision, the Audiencia Provincial de Murcia (Provincial Court of Murcia, Spain) found that Pardo did not dispute either the cultivation of the trees of the Nadorcott variety or the lack of consent of the holder of the rights in that variety. That court decided that Pardo's operations resulted in certain acts of infringement which were of an ongoing nature since the trees at issue were continuing to be cultivated. In addition, it held that Article 96 of Regulation No 2100/94 should be interpreted as meaning that the claims relating to those acts of infringement which took place less than three years before CVVP's action was brought were not time barred but that those relating to acts of infringement which took place more than three years before the claims had been brought were time barred.

15 Accordingly, Pardo was ordered to pay EUR 31 199 for its acts of infringement and as appropriate compensation for acts performed without the consent of the holder of the Community plant variety right during the period of its provisional protection. In addition, Pardo was ordered to cease all acts of infringement.

16 Pardo brought an appeal on a point of law before the referring court, the Tribunal Supremo (Supreme Court, Spain) against that decision of the Audiencia Provincial de Murcia (Provincial Court of Murcia), challenging the latter's interpretation of Article 96 of Regulation No 2100/94.

17 The referring court states that, according to the national case-law on matters of intellectual property, occasional acts of infringement must be distinguished from ongoing acts. In the case of the latter, the period of prescription is extended for as long as the act of infringement continues. That court asks whether such case-law can be applied to the rules on prescription set out in Article 96 of Regulation No 2100/94 and, in particular, whether all claims relating to acts of infringement are time barred on the ground that the holder of the Community plant variety right brought his or her action more than three years after becoming aware of those acts of infringement and of the identity of the party liable for them or if only those claims relating to acts of infringement which took place more than three years before the action was brought are time barred.

18 In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

*'(1) Is an interpretation according to which, provided that the period of three years has elapsed since the holder, once Community protection of the plant variety right was granted, became aware of the infringing act and the identity of the party liable, the actions provided for under Articles 94 and 95 [Regulation No 2100/94] would be time barred, although the infringing acts were continuing until the time the action was brought, contrary to Article 96 of [that regulation]?'*

*(2) If the first question is answered in the negative, is it to be considered that, in accordance with Article 96 of [the regulation], the limitation period operates only in respect of infringing acts committed outside the three-year period, but not in respect of those taking place within the last three years?'*

*(3) If the answer to the second question is in the affirmative, in such a situation could the action for an injunction and also for damages succeed only in relation to those latter acts taking place within the last three years?'*

#### **Procedure before the Court**

19 By decision of the President of the Court of 13 February 2019, the proceedings in the present case were stayed pending delivery of [the judgment in Case C-176/18](#) concerning a request for a preliminary ruling from the Tribunal Supremo (Supreme Court) on the interpretation of Article 13 of Regulation No 2100/94 in proceedings between CVVP and Mr Adolfo Juan Martínez Sanchís in respect of Mr Martínez Sanchís's cultivation of mandarin trees of the Nadorcott variety.

20 Following the delivery of the judgment of 19 December 2019, Club de Variedades Vegetales Protegidas ([C-176/18, EU:C:2019:1131](#)), the Court Registry sent a copy of that judgment to the referring court by letter of 7 January 2020 and asked it to state whether, in the light of that judgment, it wished to maintain its request for a preliminary ruling in the present case.

21 By letter of 16 October 2020, that court informed the Court that it wished to maintain its request for a preliminary ruling.

#### **Consideration of the questions referred**

##### **The first question**

22 By its first question, the referring court asks, in essence, whether Article 96 of Regulation No 2100/94 must be interpreted as meaning that the three-year period of prescription set out in that provision in respect of claims pursuant to Articles 94 and 95 of that regulation starts to run, after the Community plant variety right has finally been granted, from the time at which the holder has knowledge of the act and of the identity of the party liable, irrespective of whether or not the act of infringement continues until such time as a claim is brought.

23 In that regard, it should be recalled that, according to the Court's settled case-law, for the purposes of interpreting a provision of EU law, it is necessary to consider not only its wording, but also its context and the objectives of the rules of which it is part (judgment of 20 January 2021, Heavyinstall, C-420/19, EU:C:2021:33, paragraph 27 and the case-law cited).

24 First, as regards the wording of Article 96 of Regulation No 2100/94, it is clear from the express wording of that provision that claims pursuant to Articles 94 and 95 thereof are to be time barred after three years from the time at which the Community plant variety right has finally been granted and at which the holder of that right has knowledge of the act and of the identity of the party liable or, in the absence of such knowledge, after 30 years from the termination of the act concerned.

25 Thus, in the first place, it follows from that wording that Article 96 of Regulation No 2100/94 lays down two conditions for determining the time from which the three-year period of prescription of claims pursuant to Articles 94 and 95 of that regulation starts to run, one preceding the other.

26 The time for such a period to start to run is determined, first, by an objective event, namely when the Community plant variety right has finally been granted, and, second, by a subjective event, namely when the holder of that right has knowledge of the act of infringement and of the identity of the party liable for it.

27 As to whether there is any priority between those events in triggering the prescription period, it must be held that the starting point for that period is the date of the event that last occurs, namely the grant of the Community plant variety right or knowledge of the act and of the identity of the party liable (see, by analogy, judgment of 2 March 2017, *Glencore Céréales France*, C-584/15, EU:C:2017:160, paragraph 47).

28 It follows that Article 96 of Regulation No 2100/94 cannot be interpreted as meaning that the end of the act of infringement be regarded as the event from which the period of prescription for claims pursuant to Articles 94 and 95 of that regulation starts to run.

29 Such an interpretation, advocated by CVVP in its written observations, would not only run counter to the wording of Article 96, but would, **as the Advocate General stated in point 46 of his Opinion**, amount to the addition of a condition to those set out in paragraph 26 above, not provided for by the EU legislature.

30 In the second place, the wording of Article 96 of Regulation No 2100/94 merely states that the three-year period of prescription starts to run once the holder of the right has knowledge of the ‘act’ of infringement as such and of the party liable for it. That provision does not, however, specify further whether the extent of the duration of the acts of infringement of the holder’s rights or the ongoing nature of such acts should be taken into account. That wording makes clear only that the ‘act’ is one for which a claim may be brought pursuant to Articles 94 and 95 of Regulation No 2100/94.

31 In that regard, it should be noted, first, that, as of the grant of Community plant variety rights, effecting one of the unauthorised acts referred to in Article 13(2) of Regulation No 2100/94 in respect of a protected plant variety constitutes an ‘unauthorised use’ within the meaning of Article 13(3) of that regulation. Thus, in accordance with Article 94(1)(a) of that regulation, any person who, in those circumstances, effects one of those acts may be sued by the holder to enjoin such

infringement or to pay reasonable compensation or both (**judgment of 19 December 2019, Club de Variedades Vegetales Protegidas, C-176/18, EU:C:2019:1131, paragraph 41**).

32 Second, as regards the period prior to the grant of such rights, a right holder may, pursuant to Article 95 of Regulation No 2100/94, require reasonable compensation from any person who has, in the time between publication of the application for a Community plant variety right and grant thereof, effected an act that he or she would be prohibited from performing subsequent to that period on account of such rights (**judgment of 19 December 2019, Club de Variedades Vegetales Protegidas, C-176/18, EU:C:2019:1131, paragraph 42**).

33 Accordingly, it follows from paragraphs 24 to 32 above that, according to the wording of Article 96 of Regulation No 2100/94, the three-year period of prescription set out in that provision for claims pursuant to Articles 94 and 95 of that regulation starts to run, not from the time when the acts of infringement on account of which those claims are brought have come to an end, but from the date on which the holder of the Community plant variety right has knowledge of those acts and of the identity of the party liable, since that wording contains no reference or even allusion to the notions of duration of the infringement or of the ongoing nature of the act of infringement.

34 Such an interpretation is supported, second, by the legislative scheme of which Article 96 of Regulation No 2100/94 is part.

35 It should be made clear that claims pursuant to Articles 94 and 95 of that regulation are brought, *inter alia*, in respect of the acts referred to in Article 13(2) thereof. Article 13(2) of the regulation relates to individually identified acts, so that the fact that an act may be ongoing is not conclusive for the purposes of setting the point from which time starts to run in respect of the period laid down in Article 96 of the regulation.

36 Third, the interpretation of that provision, as referred to in paragraph 33 above, is borne out by the objective pursued by Regulation No 2100/94 by way of that provision in positing a rule of prescription.

37 It should be noted that, in general, periods of limitation and prescription fulfil the function of ensuring legal certainty (judgment of 30 April 2020, *Nelson Antunes da Cunha*, C-627/18, EU:C:2020:321, paragraph 44 and the case-law cited).

38 In order to fulfil their function effectively, such periods must be fixed in advance and any application ‘*by analogy*’ of a limitation period must be sufficiently foreseeable for a person (judgment of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 71 and the case-law cited).

39 However, if Article 96 of Regulation No 2100/94 were interpreted to the effect that the period of prescription provided for therein starts to run only when the act of infringement in question has come to an end, that would mean that, for as long as the infringement continued, the holder of the Community plant variety right could bring claims pursuant to Articles 94 and 95

of that regulation up to three years after the end of that act, irrespective of the dates on which the infringement began or the holder had knowledge of it and of the identity of the party liable.

40 Such an interpretation would give rise to constant uncertainty for the party liable for acts of infringement, since the holder of the Community plant variety right, despite having tolerated acts to the extent of giving the party liable the impression of acting in good faith, could legitimately bring one of the actions referred to in Articles 94 and 95 of Regulation No 2100/94 in respect of all acts of infringement, irrespective of when each took place.

41 Accordingly, the answer to the first question referred is that Article 96 of Regulation No 2100/94 must be interpreted as meaning that, irrespective of the ongoing nature of an act of infringement of a protected variety or of the date on which that act ended, the three-year period of prescription set out in that provision in respect of claims pursuant to Articles 94 and 95 of that regulation starts to run from the date on which, first, the Community plant variety right was finally granted and, second, the holder of the right had knowledge of the act and of the identity of the party liable.

#### The second and third questions

42 By its second and third questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 96 of Regulation No 2100/94 must be interpreted as meaning that all claims pursuant to Articles 94 and 95 of that regulation in respect of a set of acts of infringement of a protected variety brought after more than three years have elapsed from when, first, the Community plant variety right was finally granted and, second, the holder had knowledge of that set of acts and of the identity of the party liable for them, irrespective of the date of each individual act forming part of that set of acts, are time barred, or whether only claims in respect of acts which took place more than three years before those claims were brought are time barred.

43 As appears from paragraph 35 above, Article 96 of Regulation No 2100/94 concerns the prescription of claims pursuant to Articles 94 and 95 of that regulation in respect of individually identified acts of infringement.

44 As stated in paragraphs 31 and 32 above, the acts referred to in Article 13(2) of that regulation are those which would have required authorisation of the holder of the Community plant variety right, namely, production or reproduction (multiplication), conditioning for the purpose of propagation, offering for sale, selling or other marketing, exporting from the European Union, importing to the European Union and stocking for any of the acts in respect of variety constituents, or harvested material of the protected variety.

45 Therefore, for the purposes of applying Article 96 of Regulation No 2100/94, each act of infringement corresponding to the acts listed in Article 13(2) of that regulation must be taken into account individually, irrespective of whether it is repeated, ongoing or forms part of a set of acts.

46 Furthermore, as the Advocate General stated in point 61 of his Opinion, the fact that Article 96 of Regulation No 2100/94 provides for the time-bar of an 'act', not the time-bar of a course of action conceived as a 'set of acts', supports the view that each act of infringement forming part of a 'set of acts' should be examined individually in respect of the rules of prescription.

47 It follows that it is the date at which the holder of the Community plant variety right had knowledge of an individual act of infringement and of the identity of the party liable which is conclusive of whether claims pursuant to Articles 94 and 95 of Regulation No 2100/94 are time barred by virtue of the three-year period laid down in Article 96 of that regulation.

48 In the circumstances of the case in the main proceedings, it is therefore for the referring court to ascertain, for each of the acts of infringement claimed against Pardo, whether CVVP had knowledge of those acts and of the party liable more than three years before it brought its claims for compensation in the case in the main proceedings, which, as appears from the order for reference, were brought in November 2011.

49 Any interpretation to the contrary of Article 96 of Regulation No 2100/94, according to which the end of the three-year period laid down in that provision were to result in the prescription of all acts of infringement of the holder's rights, as maintained by Pardo in its written observations, would run counter to the objective of that provision.

50 It would follow from such an interpretation that the prescription of claims pursuant to Articles 94 and 95 of that regulation relating to an act of infringement which were regarded either as the beginning of a course of action or as being at the source of a set of acts of infringement in respect of a protected variety would also have the effect of time-barring claims relating to any other subsequent act capable of being attributed to that course of action or connected with such a set of acts, irrespective of the date at which the holder of the Community plant variety right had knowledge of that act or of the party liable for it.

51 However, as the Advocate General stated in point 56 of his Opinion, rules of prescription can refer only to claims in respect of acts which took place in the past and not those which could be undertaken in the future.

52 Furthermore, if claims pursuant to Articles 94 and 95 of Regulation No 2100/94 were required to be declared time barred on the ground that those relating to the 'initial act' at the source of the infringing course of action, the holder's Community plant variety right would be meaningless in respect of acts of infringement taking place after the period of prescription applicable to that initial act had elapsed.

53 Such an interpretation of the period of prescription laid down in Article 96 of that regulation would be incompatible with the very purpose of that regulation which is, according to Article 1 thereof, to establish a system of Community plant variety rights.

54 In the light of the foregoing considerations, the answer to the second and third questions is that Article

96 of Regulation No 2100/94 must be interpreted as meaning that claims pursuant to Articles 94 and 95 of that regulation in respect of a set of acts of infringement of a protected variety brought after more than three years have elapsed are time barred only from when, first, the Community plant variety right was finally granted and, second, the right holder had knowledge of each individual act forming part of that set of acts and of the identity of the party liable for them.

#### Costs

55 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 (Seventh Chamber) hereby rules:

1. Article 96 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights must be interpreted as meaning that, irrespective of the ongoing nature of an act of infringement of a protected variety or of the date on which that act ended, the three-year period of prescription set out in that provision in respect of claims pursuant to Articles 94 and 95 of that regulation starts to run from the date on which, first, the Community plant variety right was finally granted and, second, the holder of the right had knowledge of the act and of the identity of the party liable.

2. Article 96 of Regulation No 2100/94 must be interpreted as meaning that claims pursuant to Articles 94 and 95 of that regulation in respect of a set of acts of infringement of a protected variety brought after more than three years have elapsed are time barred only from when, first, the Community plant variety right was finally granted and, second, the right holder had knowledge of each individual act forming part of that set of acts and of the identity of the party liable for them.

### OPINION OF ADVOCATE GENERAL

SAUGMANDSGAARD ØE

delivered on 22 April 2021 (1)

Case C-186/18

José Cánovas Pardo SL

v

Club de Variedades Vegetales Protegidas

(Request for a preliminary ruling

from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling – Community plant variety rights – Regulation (EC) No 2100/94 – Article 96 – Limitation of the actions referred to in Articles 94 and 95 of that regulation – Three-year period – Continuous acts – Acts repeated over time – Starting point (*dies a quo*) – Date of grant of the Community right – Date of knowledge of the act and of the identity of the party liable – Date on which the conduct in question ceased – Effects of limitation – Restricted to acts carried out more than three years ago)

#### I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 96 of Regulation (EC) No 2100/94. (2)

2. The request has been made in proceedings between two companies – Club de Variedades Vegetales Protegidas and José Cánovas Pardo S.L. (*'Pardo'*) – concerning the latter's cultivation of mandarin trees of the Nadorcott variety without the holder's consent. (3)

3. Specifically, Pardo brought an appeal on a point of law before the referring court relating exclusively to the issue of limitation. The main proceedings are characterised, in that regard, by the fact that the holder allowed the three-year period laid down in Article 96 of Regulation No 2100/94 to expire. It is established that, when the action against Pardo was brought, the holder had been aware of the acts infringing its rights and of the identity of the party liable for them for more than three years.

4. The questions referred to the Court seek to ascertain what conclusions should be drawn from the expiry of that three-year period.

5. For the reasons set out below, I will propose that the Court's answer to the questions referred should be that, in the case of acts spread over time, the effects of that limitation attach only to acts committed more than three years ago. In other words, the holder retains the right to bring the actions provided for in Articles 94 and 95 of Regulation No 2100/94 in respect of acts committed during the last three years.

#### II. Legal context

6. Article 94 of Regulation No 2100/94, entitled *'Infringement'*, provides as follows:

*'1. Whatsoever:*

*(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; or*

*(b) omits the correct usage of a variety denomination as referred to in Article 17(1) or omits the relevant information as referred to in Article 17(2); or*

*(c) contrary to Article 18(3) uses the variety denomination of a variety for which a Community plant variety right has been granted or a designation that may be confused with it; 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.'*

7. Article 95 of that regulation states: *'The holder may require reasonable compensation from any person who has, in the time between publication of the application for a Community plant variety right and grant thereof, effected an act that he would be prohibited from performing subsequent thereto.'*

8. Under Article 96 of that regulation:

*'Claims pursuant to Articles 94 and 95 shall be time barred after three years from the time at which the Community plant variety right has finally been granted and the holder has knowledge of the act and of the identity of the party liable or, in the absence of such knowledge, after 30 years from the termination of the act concerned.'*

### **III. Community protection for the mandarin tree variety 'Nadorcott'**

9. The background to the dispute concerning Community protection for the mandarin tree variety 'Nadorcott', as set out in the order for reference, may be summarised as follows.

10. On 22 August 1995, the company Nador Cott Protection SARL applied to the Community Plant Variety Office (CPVO) for a Community right in respect of that plant variety. The application was published in the Official Gazette of the CPVO on 22 February 1996.

11. On 4 October 2004, the CPVO granted a Community right. That decision was published in the Official Gazette of the CPVO on 15 December 2004.

12. On 14 April 2005, the Federación de Cooperativas Agrícolas Valencianas (Federation of Agricultural Cooperatives of Valencia, Spain) brought an appeal before the Board of Appeal of the CPVO, with suspensory effect, against the decision granting the Community right. That appeal was dismissed by decision of 8 November 2005, published in the Official Gazette of the CPVO on 15 February 2006.

13. On 21 March 2006, the Federation of Agricultural Cooperatives of Valencia brought an action before the General Court of the European Union, this time without suspensory effect, against that decision. The General Court dismissed that action by judgment of 31 January 2008, Federación de Cooperativas Agrarias de la Comunidad Valenciana v CPVO – Nador Cott Protection (Nadorcott). (4)

### **IV. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court**

14. Although Nador Cott Protection is the holder of the rights over the mandarin tree variety 'Nadorcott', the company Carpa Dorada has an exclusive licence for the rights relating to that plant variety. Carpa Dorada entrusted the management of its rights to Gestión de Licencias Vegetales ('GESLIVE') until 12 December 2008 and to the company Club de Variedades Vegetales Protegidas thereafter.

15. Since 2006, Pardo has cultivated a grove of mandarin trees of the Nadorcott variety on a plot of land located in the area known as Alhama de Murcia (Spain) (4 457 trees).

16. On 30 October 2007, GESLIVE gave formal notice to Pardo requiring it to stop cultivating that plant variety without having applied for the corresponding licence.

17. On 30 March 2011, the company Club de Variedades Vegetales Protegidas sent Pardo a further communication requesting it, should it be established that it was cultivating some 5 000 mandarin trees of the Nadorcott variety, to cease that activity.

18. In November 2011, the company Club de Variedades Vegetales Protegidas applied to the Juzgado de lo Mercantil (Commercial Court, Spain) for preliminary measures for a declaration of infringement.

19. The company Club de Variedades Vegetales Protegidas brought an action against Pardo seeking a declaration that the legitimate rights over the Nadorcott variety had been infringed during the provisional protection period (from 26 February 1996 to 15 February 2006). (5) It also sought an order requiring Pardo to pay reasonable compensation of EUR 17 500 excluding VAT.

20. In addition, the company Club de Variedades Vegetales Protegidas brought infringement proceedings in respect of acts of cultivation occurring after 15 February 2006. In particular, it sought a declaration that the legitimate rights over the Nadorcott variety had been infringed from that date until the cessation of cultivation. It also sought an order requiring Pardo to cease such cultivation without the authorisation of the holder of the variety, to remove and, if necessary, destroy any plant material of that variety in Pardo's possession, to pay it compensation in the amount of EUR 35 000 excluding VAT and to publish, at Pardo's expense, the introductory and operative parts of the judgment.

21. The Juzgado de lo Mercantil (Commercial Court) dismissed those proceedings on the ground that the three-year limitation period laid down in Article 96 of Regulation No 2100/94 had expired. In support of its reasoning, the court found that the holder had been aware of the acts of cultivation carried out by Pardo at least since 30 October 2007, the date on which GESLIVE gave formal notice to Pardo.

22. The company Club de Variedades Vegetales Protegidas lodged an appeal against that judgment before the Audiencia Provincial de Murcia (Provincial Court of Murcia, Spain). That court found that the infringing acts had been repeated over time and that the limitation period had been interrupted in November 2009 by the adoption of a number of preliminary measures. Accordingly, it held that only the acts of cultivation committed more than three years before the adoption of those preliminary measures were time-barred.

23. As regards the substance, the Audiencia Provincial de Murcia (Provincial Court of Murcia) pointed out that Pardo did not dispute either the cultivation of the variety or the lack of consent of the plant variety holder, but only the amount of compensation. In order to cover the compensation payable in respect of both the infringement and the provisional protection, that court applied the sum of EUR 7 per tree, totalling EUR 31 199. In addition, the court ordered Pardo to cease the infringing acts, to remove and, if necessary, destroy any plant material of that variety in its possession, including harvested material, and to publish, at its expense, the introductory and operative parts of the judgment.

24. Pardo lodged an appeal on a point of law before the Tribunal Supremo (Supreme Court, Spain), challenging the appellate court's interpretation of Article 96 of Regulation No 2100/94 concerning the limitation period.

25. The Tribunal Supremo (Supreme Court) points out, in that connection, that it draws a distinction between specific infringing acts and infringing acts which continue over time, or are ‘*continuous*’. It refers to a recent judgment in the field of trade mark law in which it held that, where the infringement is the result of a continuous course of conduct, the point from which the limitation period starts to run is deferred for as long as the infringement continues or is repeated. It enquires whether that interpretation can be applied to Article 96 of Regulation No 2100/94.

26. As regards the main proceedings, the referring court notes that, first, more than three years have elapsed since the holder became aware of the acts carried out in breach of its rights and of the identity of the party liable for them and, secondly, the infringing acts were ongoing when the actions provided for in Articles 94 and 95 of Regulation No 2100/94 were brought. Against that background, the referring court is uncertain whether the limitation period laid down in Article 96 of that regulation catches:

- all acts infringing the holder’s rights, with the result that the actions brought are inadmissible in their entirety; or
- only acts committed outside the three-year period laid down in Article 96, with the result that those actions are admissible as regards acts committed during the last three years.

27. In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

*‘(1) Is an interpretation according to which, in so far as the period of three years has elapsed since the holder became aware of the infringing act and the identity of the infringer, once Community protection of the plant variety right was granted, the actions provided for under Articles 94 and 95 of [Regulation No 2100/94] are time-barred, contrary to Article 96 of that regulation, even if the infringing acts continued until the time the action was brought?’*

*‘(2) If the first question is answered in the negative, does, in accordance with Article 96 of [Regulation No 2100/94], the limitation period operate only in respect of infringing acts committed outside the three-year period, but not in respect of those taking place within the last three years?’*

*‘(3) If the answer to the second question is in the affirmative, in such a situation could the action for an injunction and also for damages succeed only in relation to those latter acts taking place within the last three years?’*

28. The request for a preliminary ruling was lodged at the Court Registry on 9 March 2018. The parties to the main proceedings, the Greek Government and the European Commission submitted written observations.

29. The proceedings in the present case were stayed by decision of the President of the Court of 13 February 2019 pending the decision in Case C-176/18, Club de Variedades Vegetales Protegidas. (6) Following notification of that judgment, on 10 January 2020, the referring court decided to maintain its request.

## V. Analysis

30. I note, as a preliminary point, that the scope of the main proceedings is limited to the issue of limitation. Indeed, before the appellate court, Pardo did not dispute either the cultivation of the variety or the holder’s lack of consent. Furthermore, the appeal on a point of law which it brought before the referring court is concerned only with limitation. (7)

31. Thus, unlike the case in Club de Variedades Vegetales Protegidas, (8) the Court is not asked about the interpretation of Article 13 of Regulation No 2100/94 for the purposes of classifying the acts at issue in the main proceedings.

32. I should point out that the questions referred to the Court in the present case relate to the first rule on limitation laid down in Article 96 of Regulation No 2100/94, namely that the holder’s actions are to be time-barred three years after the date on which the Community plant variety right was finally granted and the holder became aware of the infringing act and of the identity of the infringer. (9)

33. I recall that the rules on limitation laid down in Article 96 of Regulation No 2100/94 do not affect the existence of the plant variety right; they affect only the possibility for its holder to bring an action against the party liable for acts infringing the exclusive rights enjoyed by the holder pursuant to that plant variety right.

34. Three interpretations have been proposed to the Court to enable it to answer the questions put to it.

35. The first interpretation posits that, in such a situation, the limitation period laid down in Article 96 of Regulation No 2100/94 covers the holder’s actions, provided for in Articles 94 and 95 of that regulation, in their entirety, irrespective of the date of the infringing acts. Since the holder had knowledge of both the acts at issue and the identity of the party liable for them for more than three years, it forfeits all possibility of asserting its rights with regard to them. That, in essence, is the view taken by the court of first instance in the main proceedings (10) and by Pardo.

36. Under the second interpretation, actions brought by the holder are time-barred in part only. The effects of limitation apply only to acts committed more than three years before the actions provided for in Articles 94 and 95 of Regulation No 2100/94 were brought. That, in essence, is the view taken by the Greek Government. That interpretation is also consistent, at least in part, with the approach taken by the appellate court in the main proceedings. (11)

37. Lastly, under the third interpretation, the actions provided for in Articles 94 and 95 of Regulation No 2100/94 are not time-barred at all, in the light of the fact that the acts carried out in breach of the holder’s rights were ongoing when those actions were brought. The holder would be entitled to assert its rights with regard to all the acts at issue where the party liable for them (Pardo in the main proceedings) has not brought them to an end. (12) That, in essence, is the view taken by the company Club de Variedades Vegetales Protegidas.

38. I will begin by rejecting the third interpretation (no time bar) with an examination of the starting point (dies



a quo) provided for in the first rule on limitation laid down in Article 96 of Regulation No 2100/94.

39. I will then set out the reasons why the second interpretation (time bar in part) should be preferred over the first (time bar in full), when considering the question of the effects of that rule on limitation.

**A. The starting point (dies a quo) provided for in the first rule on limitation laid down in Article 96 of Regulation No 2100/94 (first question)**

40. By its first question, the referring court asks, in essence, whether the three-year period provided for in the first rule on limitation laid down in Article 96 of Regulation No 2100/94 can start to run even though the acts infringing the holder's rights have not ceased.

41. Under the first rule on limitation laid down in Article 96 of Regulation No 2100/94, the holder's actions are to be time-barred three years after the date on which the Community plant variety right was finally granted and the holder became aware of the infringing act and of the identity of the infringer.

42. Thus, the starting point or dies a quo is the date on which two conditions are met: (i) the Community plant variety right is granted; and (ii) the holder becomes aware of the act and of the identity of the party liable for it.

43. More specifically, and as the Greek Government pointed out, the three-year limitation period starts to run either when the Community right is granted or when the holder becomes aware of the act and of the identity of the party liable for it, whichever occurs last.

44. In the main proceedings, it is apparent from the order for reference that those two conditions were met, at the latest, on 30 October 2007. The Board of Appeal of the CPVO dismissed the appeal with suspensory effect against the grant of the Community right by decision of 8 November 2005, published on 15 February 2006. (13) Furthermore, 30 October 2007 marked the date of GESLIVE's first formal notice to Pardo requiring it to stop cultivating that variety. (14)

45. That said, it becomes clear, in my view, that the third interpretation proposed to the Court, according to which the limitation period cannot start to run until the acts at issue have ceased, effectively rewrites the first rule on limitation laid down in Article 96 of Regulation No 2100/94.

46. That first rule makes no reference at all to the date on which the acts at issue ceased. That observation is sufficient in itself to reject that interpretation, which would lead, in practice, to the addition of a third condition in order to determine the dies a quo: it would be necessary for the right to have been granted, for the holder to have been aware of the acts and of the identity of the party liable for them and for those acts to have ceased.

47. I should add that that interpretation would be at odds with the objective of legal certainty pursued by all rules on limitation, as the Greek Government rightly pointed out. The function of limitation periods is to ensure legal certainty, as confirmed by the settled case-law of the Court. (15) The Court has stated, in particular, that in order to fulfil that function, such a period must be fixed

in advance and any application by analogy of a limitation period must be sufficiently foreseeable for a person. (16)

48. The third interpretation proposed would be contrary to the requirement of legal certainty in so far as it would be open to the holder to bring, at any time, as long as the acts at issue have not ceased, the actions provided for in Articles 94 and 95 of Regulation No 2100/94 against all of those acts, irrespective of when they were committed.

49. In the context of the main proceedings, that interpretation would thus enable the holder to allow Pardo to cultivate mandarin trees of the Nadorcott variety for several decades before challenging it in legal proceedings directed at all acts committed in breach of the holder's rights.

50. Such an interpretation would clearly run counter to the objective of legal certainty pursued by the rules on limitation. I note, in that regard, that the infringer may have committed the acts complained of in good faith, that is to say, without knowing that they infringed the holder's rights.

51. I must also draw attention to a paradox arising from the third interpretation proposed to the Court, on a more systemic level. The second rule on limitation laid down in Article 96 of Regulation No 2100/94, which provides for a period of 30 years, does not seem to me to be applicable in a situation such as that in the main proceedings, since that rule presupposes that the holder was unaware of the acts at issue and of the party liable for them. Thus, if the third interpretation proposed to the Court were upheld, according to which the three-year limitation period starts to run only when the acts at issue have ceased, acts which continue over time and which the holder is aware of could never become time-barred under either the first rule (which presupposes that the acts have come to an end) or the second rule (which presupposes lack of knowledge on the part of the holder).

52. In the light of the foregoing, I have little doubt that the third interpretation must be rejected. The starting point for the three-year period provided for in Article 96 of Regulation No 2100/94 cannot be made conditional on the acts at issue having come to an end; the only relevant criteria are the date on which the Community right was granted and the date on which the holder became aware of the act and of the identity of the party liable for it.

53. For the sake of completeness, I should also point out that the criterion of '*knowledge*' on the part of the holder must, in my view, be construed as covering any situation in which the holder knew or ought to have known of the act and of the identity of the party liable for it. If only the criterion of actual knowledge were applied, the holder would be able to defer the starting point of the limitation period indefinitely by refusing to take cognisance of the act and/or of the identity of the party liable for it. Such an interpretation is not acceptable in the light of the objective of all rules on limitation, namely to ensure legal certainty for the debtor. (17) It would be preferable, to my mind, for the wording of Article 96 of Regulation No 2100/94 to be amended so

as to reflect more accurately the true meaning of that criterion.

54. In the light of the foregoing, I propose that the Court should answer the first question submitted by the referring court as follows: Article 96 of Regulation No 2100/94 must be interpreted as meaning that the three-year period starts to run either when the Community right is granted or when the holder becomes aware of the act and of the identity of the party liable for it, whichever occurs last, irrespective of the date on which the acts may have ceased.

**B. The scope of the effects of the first rule on limitation laid down in Article 96 of Regulation No 2100/94 (second and third questions)**

55. By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 96 of Regulation No 2100/94 must be interpreted as meaning that, where the three-year period has expired as regards acts repeated over time, the effects of limitation attach to all acts irrespective of when they were committed, or only to acts committed more than three years before the actions provided for in Articles 94 and 95 of that regulation were brought.

56. Let me begin by stating the obvious: the rules on limitation laid down in Article 96 of Regulation No 2100/94 operate only as regards acts committed in the past. Consequently, an action brought under Article 94(1) of that regulation, seeking an order requiring the cessation, in the future, of acts infringing the holder's rights, may not be time-barred.

57. Thus, the question raised by the referring court calls for a determination of the effects of that limitation in relation to the past, particularly in the context of actions for payment of reasonable compensation (Article 94(1) and Article 95 of Regulation No 2100/94) or for compensation for damage caused by intentional or negligent acts (Article 94(2) of that regulation).

58. In practice, the question which arises is as follows: where the holder has allowed the three-year limitation period to expire, does it forfeit in full the right to require payment of reasonable compensation and/or compensation for damage in respect of past acts (which corresponds to the first interpretation proposed to the Court (18)) or does it retain that right in respect of the most recent acts, namely those committed during the last three years (which corresponds to the second interpretation (19))?

59. I must point out that the wording of Article 96 of Regulation No 2100/94 does not expressly answer that question, unlike the question of the *dies a quo* examined above.

60. Nevertheless, several factors militate in favour of the second interpretation proposed to the Court, according to which the holder retains the right to claim compensation for acts committed during the last three years.

61. In the first place, Article 96 of Regulation No 2100/94 provides for the time bar of an '*act*', not the time bar of conduct conceived as a '*set of acts*'. That use of the singular is all the more significant since the

actions provided for in Articles 94 and 95 of that regulation will, in most cases, relate to a set of separate acts each of which infringes the holder's rights. (20)

62. The use of the singular suggests that, for the purposes of applying Article 96 of Regulation No 2100/94, acts infringing the holder's rights should be considered separately. Thus, in order to determine the effects of limitation, it is necessary to examine – separately for each act – whether the three-year limitation period has expired.

63. In practice, the national court will have to verify, for each act of infringement, whether more than three years have elapsed since either the date on which the Community right was granted or the date on which the holder became aware of the act and of the identity of the party liable for it, whichever occurred last, on the understanding that the holder cannot have such knowledge prior to the act being committed.

64. That means that the acts carried out during the provisional protection period, referred to in Article 95 of Regulation No 2100/94, will be time-barred before those carried out after the grant of the Community right, which are the subject of Article 94 of that regulation.

65. That seems to me to be the approach taken in the legal literature on plant variety rights. (21)

66. In the second place, I would like to draw attention to the practical implications of an interpretation to the contrary, according to which the expiry of the three-year period laid down in Article 96 of Regulation No 2100/94 would result in all acts infringing the holder's rights being time-barred, irrespective of when they were committed.

67. In practice, there is a risk that that interpretation would lead to the paradoxical outcome whereby any future act of infringement would be time-barred if it formed part of a course of conduct which the holder had been aware of for more than three years, as the company Club de Variedades Vegetales Protegidas rightly pointed out.

68. Thus, according to that interpretation, in the main proceedings, the fact that the holder allowed three years to elapse after the first formal notice dated 30 October 2007 would be sufficient to deprive it of all possibility of asserting its rights with regard to the conduct at issue, including in the future if that conduct were to continue.

69. My view is that such an interpretation is difficult to reconcile with both the purpose and the objective pursued by Regulation No 2100/94, namely Community protection for plant varieties.

70. I would point out, moreover, that that risk is in no way theoretical, since many acts infringing the holder's rights in the sphere of plant variety rights form part of continuing conduct. (22)

71. In the third place, I note that the interpretation which I propose is widely accepted in relation to the limitation of infringements under patent law, which is similar to the law on plant variety rights. (23)

72. Thus, German, (24) French (25) and Belgian (26) legal literature, among others, make clear that a patent infringement must be regarded as a '*series of infringements*' and not as a '*continuing infringement*'.

(27) That approach is essentially in line with the one I have proposed above, whereby acts infringing the holder's rights are treated separately for the purpose of applying Article 96 of Regulation No 2100/94.

73. In the fourth place, and for the sake of completeness, I would point out that both Regulation (EU) 2017/1001 on the European Union trade mark (28) and Directive (EU) 2015/2436 to approximate the laws of the Member States relating to trade marks (29) contain a rule of '*limitation in consequence of acquiescence*', which is essentially the same as the first interpretation proposed to the Court (30) – an interpretation which I have just rejected.

74. Article 61(1) of Regulation 2017/1001 and Article 9(1) of Directive 2015/2436 provide that a proprietor who has acquiesced for a period of five successive years in the use of a later trade mark, while being aware of such use, is no longer entitled to apply for a declaration of invalidity in respect of that later trade mark, unless registration was applied for in bad faith. (31) Furthermore, Article 16(1) of that regulation and Article 18(1) of that directive also state that the proprietor is no longer entitled, in such a situation, to have the use of that mark prohibited in infringement proceedings.

75. Thus, trade mark law includes a rule providing that the proprietor forfeits all possibility of bringing legal proceedings, including in the future, when he has allowed a period of five years to elapse since he became aware of the use of a later trade mark, whether in the context of an action for a declaration of invalidity or in infringement proceedings.

76. The existence of that rule does not, however, call into question the reasoning which I have set out above, for the following two reasons.

77. First, the existence of that rule is explained by two distinctive characteristics of trade mark law, which have no equivalent in patent law or in plant variety law. Unlike the latter two systems of intellectual property, the duration of which is limited in time, (32) trade mark protection is potentially unlimited in time, the onus being on the proprietor to renew his registration every 10 years. (33) From that perspective, the rule of limitation in consequence of acquiescence may be regarded as a restriction on the potentially unlimited duration of trade mark protection.

78. Furthermore, the existence of that rule is also justified in the light of the essential function of a trade mark as being to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. (34) Limitation in consequence of acquiescence presumes, in a sense, that the essential function of a trade mark can no longer be fulfilled where the proprietor has acquiesced, for a period of five years, in the use of a later trade mark presenting a likelihood of confusion.

79. Secondly, I note that the rule of limitation in consequence of acquiescence is the subject of express and detailed provisions in both Regulation 2017/1001 and Directive 2015/2436. In the light of its far-reaching

consequences for the holder's rights, I am of the view that the existence of such a rule cannot be presumed in the context of a system for the protection of intellectual property. Thus, in the absence of equivalent provisions in Regulation No 2100/94, it must be concluded that the protection of plant varieties does not recognise limitation in consequence of acquiescence.

80. In the light of the foregoing, I propose that the Court should answer the second and third questions submitted by the referring court as follows: Article 96 of Regulation No 2100/94 must be interpreted as meaning that, where the three-year period has expired as regards acts repeated over time, only acts committed more than three years before the actions provided for in Articles 94 and 95 of that regulation were brought are time-barred.

81. Therefore, the holder retains the right to bring those actions in respect of acts committed during the last three years.

## VI. Conclusion

82. In view of the considerations set out above, I propose that the Court should answer the questions referred for a preliminary ruling by the Tribunal Supremo (Supreme Court, Spain) as follows:

1. Article 96 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights must be interpreted as meaning that the three-year period starts to run either when the Community right is granted or when the holder becomes aware of the act and of the identity of the party liable for it, whichever occurs last, irrespective of the date on which the acts may have ceased.

2. Article 96 of Regulation No 2100/94 must be interpreted as meaning that, where the three-year period has expired as regards acts repeated over time, only acts committed more than three years before the actions provided for in Articles 94 and 95 of that regulation were brought are time-barred.

1 Original language: French.

2 Council Regulation of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

3 For the sake of simplicity, I will use the term '*holder*' in the introduction to this Opinion. The main proceedings are more complex: the holder granted an exclusive licence to the company Carpa Dorada S.A., which entrusted the company Club de Variedades Vegetales Protegidas with the management of its rights. See point 14 of this Opinion.

4 T-95/06, EU:T:2008:25.

5 In the absence of any further details in the order for reference, I assume that that action was brought after the application for preliminary measures made in November 2011.

6 Judgment of 19 December 2019, (C-176/18, EU:C:2019:1131).

7 See points 23 and 24 of this Opinion.

8 Judgment of 19 December 2019 (C-176/18, EU:C:2019:1131).

9 Under the second rule on limitation laid down in that provision, those actions are to be time-barred 30 years after termination of the act concerned where the holder

did not become aware of the infringing act and of the identity of the infringer.

10 See point 21 of this Opinion.

11 See point 22 of this Opinion. According to the information provided by the referring court, the appellate court held that only acts committed three years before the limitation period was interrupted by the adoption of preliminary measures were time-barred. Since the Court has not been asked to provide guidance in that regard and has received no further information on the matter, it is unable to rule on the existence of a possible interruption of the limitation period.

12 See point 25 of this Opinion.

13 See point 12 of this Opinion.

14 See point 16 of this Opinion.

15 See, inter alia, judgments of 13 June 2013, Unanimes and Others (C-671/11 to C-676/11, EU:C:2013:388, paragraph 31); of 7 July 2016, Lebek (C-70/15, EU:C:2016:524, paragraph 55); and of 30 April 2020, Nelson Antunes da Cunha (C-627/18, EU:C:2020:321, paragraph 44).

16 See judgments of 5 May 2011, Ze Fu Fleischhandel and Vion Trading (C-201/10 and C-202/10, EU:C:2011:282, paragraph 32); of 23 January 2019, Fallimento Traghetti del Mediterraneo (C-387/17, EU:C:2019:51, paragraph 71); and of 5 March 2019, Eesti Pagar (C-349/17, EU:C:2019:172, paragraph 112).

17 See, to that effect, my Opinion in Nelson Antunes da Cunha (C-627/18, EU:C:2019:1084, point 46): *‘It should be recalled that the rules on limitation play a fundamental role in the law of property. The limitation makes it impossible for the creditor to enforce the recovery of the debt. As the Court has already held, by imposing a time limit, the rules on limitation seek to ensure legal certainty for the debtor.’*

18 See point 35 of this Opinion.

19 See point 36 of this Opinion.

20 By way of illustration, an infringer wishing to sell mandarin trees of the Nadorcott variety without the holder’s authorisation could carry out the following acts one after the other: conditioning of mandarin trees for the purpose of propagation; propagation as such; offering for sale; exportation for the purposes of sale; sale as such; stocking of mandarin trees for any of the purposes mentioned above. Each of those acts infringes the holder’s rights under Article 13(2) of Regulation No 2100/94.

21 Leßmann, H and Würtenberger, G, Deutsches und Europäisches Sortenschutzrecht, Nomos, Baden-Baden, 2009, 2nd edition, § 7, Rn. 102, p. 309: *‘Bei wiederholten Verletzungshandlungen erfüllt jede einzelne Handlung den Tatbestand der Verletzung. Jede Einzelhandlung setzt damit gesondert die Verjährung des Unterlassungsanspruchs sowie des aus ihr fließenden Schadenersatzanspruchs in Lauf, sofern die weiteren Voraussetzungen – Kenntnis des Verletzten von der Verletzungshandlung und der Person des Verletzers – gegeben sind.’* (*‘In the case of repeated acts of infringement, each individual act constitutes an infringement. Thus, each individual act separately triggers the limitation period in respect of the action for*

*injunction and the ensuing action for damages, provided that the other prerequisites – knowledge on the part of the holder of the act of infringement and of the infringer – are satisfied.’*)

22 Leßmann, H and Würtenberger, G, Deutsches und Europäisches Sortenschutzrecht, Nomos, 2009, 2nd edition, § 7, Rn. 103, p. 309: *‘Gerade im pflanzlichen Bereich erstrecken sich Verletzungshandlungen über lange Zeiträume. Pflanzen werden in der Regel nicht in Einzelexemplaren vermehrt, sondern in größerem Umfang. Dies gilt auch für Obstbäume, andernfalls wäre eine gewerbliche Nutzung ohne Lizenz vermehrter Pflanzen nicht rentabel. Insbesondere das Anbieten und der Verkauf von sortenschutzverletzendem Material kann sich deshalb gerade im Gehölzbereich über große Zeiträume erstrecken. Auch wenn durch eine einzige Handlung große Mengen sortenschutzrechtsverletzender Pflanzen vermehrt worden waren und somit im strafrechtlichen Sinn eine einzige Handlung darstellen, ist die kontinuierliche Abgabe solchen Materials über längere Zeiträume jedes Mal eine Verletzungshandlung. Mit jeder Einzelhandlung wird damit der Lauf der Verjährung ausgelöst.’* (*‘In the plant industry in particular, acts of infringement continue over long periods of time. As a rule, plants are propagated not in single specimens, but on a larger scale. The same is true of fruit trees, as otherwise the commercial cultivation of propagated plants without a licence would not be profitable. In particular, the supply and sale of material which infringes plant variety rights may therefore continue for long periods of time, especially in forested areas. Even though large quantities of plants infringing plant variety rights may be propagated by a single act and therefore constitute a single act under criminal law, the continued supply of that material over long periods constitutes an act of infringement on the occasion of each supply. Each individual act therefore triggers the limitation period.’*)

23 See, in particular, Bouche, N, *‘La prescription en droit des obtentions végétales et autres satellites du brevet’*, Propriétés Intellectuelles, No 68, July 2018, pp. 34 to 39: *‘Les variétés végétales sont à la fois exclues de la brevetabilité et l’objet central du droit des obtentions végétales, si bien que ce qui est protégeable par un brevet ne peut être l’objet d’un droit d’obtention végétale et réciproquement. Malgré cette césure radicale, il existe tout de même des liens, un cousinage, entre droit des brevets et droit des obtentions végétales. Si l’on a préféré répondre aux spécificités des obtentions végétales par un régime spécifique, les deux matières ont en commun de porter sur des innovations techniques (le droit des brevets se posant finalement comme le droit généraliste et le droit des obtentions végétales comme le droit spécial des améliorations variétales).’* (*‘Plant varieties are, simultaneously, excluded from patentability and the central purpose of plant variety law, so that whatever qualifies for patent protection cannot be the subject of a plant variety right and vice versa. Despite that bold distinction, there are nevertheless links, or family ties, between patent law and plant variety law. Although it was considered preferable*

to address the specific characteristics of plant varieties by means of specific rules, both fields concern technical innovations (ultimately, patent law is the general law while plant variety law is the special law on plant improvements).’)

24 See, in particular, Benkard, G, Kommentar zum Patentgesetz (C. H. Beck, Munich, 2015 (9th ed.), § 141, Rn. 6, p. 1906: ‘Bei vergangenheitsbezogenen Ansprüchen setzen dagegen die einzelnen Schädigungen jeweils eigene Verjährungsfristen in Lauf, so dass jede schadenstiftende Handlung bzw. jeder schadenstiftende Teilakt verjährungsrechtlich separat zu betrachten ist.’ (‘On the other hand, in respect of claims relating to the past, the various types of damage trigger their own limitation period, so that each act or part of an act causing damage must be considered separately for the purposes of limitation.’)

25 Passa, J, Droit de la propriété industrielle, II, Brevets d’invention, protections voisines, LGDJ, Paris, 2013, Volume 2, No 631, p. 684: ‘La jurisprudence analysant le délit de contrefaçon comme successif, autrement dit comme se renouvelant à chaque instant tant que le comportement en cause se poursuit, le délai de prescription court distributivement pour chaque acte à compter de la date de sa commission et non pour le tout, à compter de la date à laquelle les actes en cause ont commencé ou cessé. En d’autres termes, chaque acte constitue, en ce qui le concerne, “le” point de départ d’un délai. ... Si un acte litigieux s’est prolongé dans le temps, par exemple par l’emploi d’une machine, le demandeur ne peut réclamer réparation que pour le préjudice consécutif aux actes d’usage accomplis dans le délai de trois ans.’ (‘Since the case-law treats infringement as a continuous act, in other words, as being in constant repetition for as long as the conduct in question carries on, the limitation period starts to run for each act in turn from the date on which it was committed, not for all the acts at issue as a whole from the date on which they began or ceased. Put another way, each act constitutes, for itself alone, “the” starting point of a period. ... If a disputed act has persisted over time, for example because a machine has been used, the claimant may claim compensation only for damage entailed by the acts of use committed within the three-year period.’)

26 Remiche, B and Cassiers, V, Droit des brevets d’invention et du savoir-faire : créer, protéger et partager les inventions au xxi e siècle, Larcier, Brussels, 2010, p. 574: ‘Toutefois, les différents actes de contrefaçon constituent des quasi-délits distincts qui se prescrivent séparément même lorsqu’ils sont imputables à une seule et même personne. Ainsi la contrefaçon consistant en une fabrication du produit breveté sera prescrite séparément de la contrefaçon consistant en l’offre en vente dudit produit.’ (‘However, the different acts of infringement constitute standalone breaches which become time-barred separately even when they are attributable to one and the same person. Thus, an infringement consisting of the manufacture of a patented product will be time-barred separately from the

*infringement consisting of the offering for sale of that product.’)*

27 Casalunga, A, Traité technique et pratique des brevets d’invention (LGDJ, 1949), V. 2, No 1080, p. 159: ‘[En cas de fabrication d’objets contrefaisants], il y a une succession de délits et non pas un délit successif; en conséquence, la prescription commence à courir à dater de chaque fait de contrefaçon et non pas à partir du dernier fait.’ (‘[In the case of the manufacture of infringing goods], there is a series of infringements and not a continuing infringement; consequently, the limitation period starts to run from the date of each act of infringement and not from the last act.’)

28 Regulation of the European Parliament and of the Council of 14 June 2017 (OJ 2017 L 154, p. 1).

29 Directive of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 336, p. 1).

30 See point 35 of this Opinion.

31 It is apparent from the case-law that four conditions must be satisfied before the period of limitation in consequence of acquiescence starts running if there is use of a later trade mark which is identical with the earlier trade mark or confusingly similar: first, the later trade mark must be registered; secondly, the application for its registration must have been made in good faith by its proprietor; thirdly, the later trade mark must be used in the territory where the earlier trade mark is protected; and fourthly, the proprietor of the earlier trade mark must be aware of the use of that trade mark after its registration. See, as regards Directive 2015/2436, judgment of 22 September 2011, Budějovický Budvar (C-482/09, EU:C:2011:605, paragraphs 54 to 58). As regards Regulation 2017/1001, see judgments of 28 June 2012, I Marchi Italiani and Basile v OHIM – Osra (B. Antonio Basile 1952) (T-133/09, EU:T:2012:327, paragraph 31) and of 27 January 2021, Turk Hava Yollari v EUIPO – Sky (skylife) (T-382/19, not published, EU:T:2021:45, paragraph 49).

32 See, as regards plant variety rights, Article 19(1) of Regulation No 2100/94, according to which the duration of those rights is, in principle, 30 years for trees and vines and 25 years for other varieties.

33 See Articles 52 and 53 of Regulation 2017/1001 and Articles 48 and 49 of Directive 2015/2436.

34 See, inter alia, judgments of 23 May 1978, Hoffmann-La Roche (102/77, EU:C:1978:108, paragraph 7) and of 31 January 2019, Pandalis v EUIPO (C-194/17 P, EU:C:2019:80, paragraph 84). See also the Opinion of Advocate General Trstenjak in Budějovický Budvar (C-482/09, EU:C:2011:46, point 63).