Court of Justice EU, 16 March 2023, MS v STV

KWS Meridian

PLANT VARIETY RIGHTS

Compensation for intentional or negligent infringement of plant variety rights (Article 94(2) Regulation 2100/94) should reflect actual damages and cannot be set at a lump sum of 4x the average amount of the licence fee

- **Article 18(2) of Commission Regulation (EC) No 1768/95 of 24 July 1995 is invalid**

45. In the first place, it must be noted that the provision at issue sets a minimum lump sum calculated by reference to the average amount of the licence fee, although the amount of that fee cannot per se form the basis for determining the damage under Article 94(2) of Regulation No 2100/94, as recalled in paragraph 42 of the present judgment.
46. In the second place, the establishment of a minimum lump sum as compensation for the damage suffered by the holder means, as stated by the Commission in answer to a question put by the Court, that that holder is not required to prove the extent of the damage suffered, merely the existence of repeated and intentional infringement of the holder's rights. As recalled in paragraphs 38 and 41 of the present judgment, compensation under Article 94 of Regulation No 2100/94 must reflect, as accurately as possible, the actual and certain damage suffered by that holder, who must produce evidence which establishes that the damage referred to in Article 94(2) goes beyond the matters covered by the reasonable compensation provided for in Article 94(1).
47. The establishment of a minimum lump sum for compensation also means that there is an irrebuttable presumption regarding the minimum extent of that damage and limits the court's discretion, as that court can only increase the minimum lump sum established by the provision at issue, but not decrease it, even if – as acknowledged by the Commission in answer to a question put by the Court during the hearing on that point – the real damage can easily be established and proves to be lower than that minimum lump sum.
48. Lastly, according to the case-law recalled in paragraph 43 of the present judgment, compensation under Article 94(2) of Regulation No 2100/94 may be set as a lump sum only on the basis of an assessment carried out by the court seised. As a result, by providing for a minimum lump sum to make good the damage suffered by the holder, the provision at issue also limits the court's discretion in that regard.
49. In the third place, while, as recalled in paragraphs 37 and 38 of the present judgment and as noted by the Advocate General in point 83 of his Opinion, the extent of the compensation due under Article 94 of Regulation No 2100/94 must reflect, as accurately as possible, the actual and certain damage suffered by that holder without amounting to punitive damages, the provision at issue can, by establishing the level of compensation for such damage at a minimum lump sum calculated on the basis of quadruple the average amount of the licence fee, lead to punitive damages being awarded.

Source: **ECLI:EU:C:2023:218 - C-522/21**

Court of Justice EU, 16 March 2023
(C. Lycourgos, L.S. Rossi, J.-C. Bonichot, S. Rodin and O. Spineanu-Matei (Rapporteur))
JUDGMENT OF THE COURT (Fourth Chamber)
16 March 2023 ([1])
(Reference for a preliminary ruling – Intellectual property – Protection of plant varieties – Regulation (EC) No 2100/94 – Derogation provided for in Article 14(3) – Article 94(2) – Infringement – Right to compensation – Regulation (EC) No 1768/95 – Article 18(2) – Compensation for damage – Minimum lump sum calculated on the basis of quadruple the licence fee – Competence of the European Commission – Invalidity)
In Case C-522/21,
REQUEST for a preliminary ruling under Article 267 TFEU from the Pfälzisches Oberlandesgericht Zweibrücken (Palatine Higher Regional Court, Zweibrücken, Germany), made by decision of 18 August 2021, received at the Court on 24 August 2021, in the proceedings
MS
v
Saatgut-Treuhandverwaltungs GmbH,
THE COURT (Fourth Chamber),
composed of C. Lycourgos, President of the Chamber, L.S. Rossi, J.-C. Bonichot, S. Rodin and O. Spineanu-Matei (Rapporteur), Judges,
Advocate General: M. Szpunar,
Registrar: S. Beer, Administrator,
having regard to the written procedure and further to the hearing on 14 July 2022,
after considering the observations submitted on behalf of:
- MS, by N. Küster, Rechtsanwalt,
- Saatgut-Treuhandverwaltungs GmbH, by E. Trauernicht and K. von Gierke, Rechtsanwälte,
- the European Commission, by A.C. Becker, B. Eggers and G. Koleva, acting as Agents,

[1] Language of the case: German.

after hearing **the Opinion of the Advocate General at the sitting on 27 October 2022**,
gives the following
Judgment
1. This request for a preliminary ruling concerns the validity of Article 18(2) of Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Council Regulation (EC) No 2100/94 on Community plant variety rights (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) ('*Regulation No 1768/95*'), in the light of the first sentence of Article 94(2) 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 MS and Saatgut Treuhandverwaltungs GmbH ('*STV*') concerning the calculation of the amount of compensation for damage suffered by STV as a result of the illegal planting by MS of the KWS Meridian winter barley variety.
Legal context
Regulation No 2100/94
3. Article 11 of Regulation No 2100/94, entitled '*Entitlement to Community plant variety rights*', provides, in paragraph 1:
'The person who bred, or discovered and developed the variety, or his successor in title, both – the person and his successor – referred to hereinafter as "the breeder", shall be entitled to the Community plant variety right.'
4. Article 13 of Regulation No 2100/94, entitled '*Rights of the holder of a Community plant variety right and prohibited acts*', provides, in paragraphs 1 to 3:
'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.
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. Article 14 of the regulation, entitled '*Derogation from Community plant variety right*', is worded as follows:
'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.
2. The provisions of paragraph 1 shall only apply to agricultural plant species of:
...
(b) Cereals:
...
Hordeum vulgare L. – Barley
...
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, before the entry into force of this Regulation, in implementing rules pursuant to Article 114, on the basis of the following criteria:
- there shall be no quantitative restriction of the level of the farmer's holding to the extent necessary for the requirements of the holding,
- the product of the harvest may be processed for planting, either by the farmer himself or through services supplied to him, without prejudice to certain restrictions which Member States may establish regarding the organisation of the processing of the said product of the harvest, in particular in order to ensure identity of the product entered for processing with that resulting from processing,
- 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,
- 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; in organising that monitoring, they may not provide for assistance from official bodies,
- relevant information shall be provided to the holders on their request, by farmers and by suppliers of processing services; relevant information may equally be provided by official bodies involved in the monitoring of agricultural production, if such information has been obtained through ordinary performance of their tasks, without additional burden or costs. ...'
6. Article 94 of the regulation, entitled '*Infringement*', is worded as follows:
'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.'

7. Article 114 of Directive No 2100/94, under the heading '*Other implementing rules'*, provides, in paragraph 1:

'Detailed implementing rules shall be adopted for the purpose of applying this Regulation. …'

Regulation No 1768/95

8. Regulation No 1768/95 was adopted on the basis of Article 114 of Regulation No 2100/94.

9. Article 5 of Regulation No 1768/95, entitled '*Level of remuneration*', provides:

'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.

…

4. Where in the case of paragraph 2 the level of remuneration is the subject of agreements between organisations of holders and of farmers, … the agreed levels shall be used as guidelines for the determination of the remuneration to be paid in the area and for the species concerned, if these levels and the conditions thereof have been notified to the Commission in writing by authorised representatives of the relevant organisations and if on that basis the agreed levels and conditions thereof have been published …

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.

However, if a Member State has notified the Commission before 1 January 1999 of the imminent conclusion of an agreement as referred to in paragraph 4 between the relevant organisations established at national or regional level, the remuneration to be paid in the area and for the species concerned shall be 40% instead of 50% as specified above, but only in respect of the use of the agricultural exemption made prior to the implementation of such agreement and not later than 1 April 1999.

…'

10. Article 17 of that 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 [Regulation No 2100/94] as specified in this Regulation.'

11. Article 18 of the regulation, entitled '*Special civil law claims*', provides:

'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 question referred for a preliminary ruling

12. STV is an association of holders of protected plant variety rights which has been tasked by its members to defend their rights and, in particular, to assert rights to information and entitlements to payment rights in its own name.

13. MS is a farmer who planted, during the four marketing years 2012/2013 to 2015/2016, the '*KWS Meridian*' winter barley variety, which is protected under Regulation No 2100/94.

14. STV brought an action seeking, inter alia, information on that planting. MS provided, for the first time before the court of first instance, information on the processing of the seeds of the '*KWS Meridian'* winter barley variety for those marketing years, that is, 24.5, 26, 34 and 45.4 quintals of seeds respectively.

15. MS then paid, for the 2013/2014, 2014/2015 and 2015/2016 marketing years, amounts corresponding to the fee charged for licensed production of the '*KWS Meridian*' winter barley variety, calculated in the same way as that for the marketing year 2015/2016; that amount corresponds to reasonable compensation within the meaning of Article 94(1) of Regulation No 2100/94.

16. STV sought payment of additional damages in respect of the three marketing years in question, in the amount of quadruple the fee, as compensation under Article 94(2) of Regulation No 2100/94, read in conjunction with Article 18(2) of Regulation No 1768/95 ('*the provision at issue'*), deducting from that amount the amount of the fee paid by MS in respect of those three marketing years.

17. MS challenged STV's entitlement to that payment. In that regard, he maintained, in essence, that the damage caused to STV had been made good by the payment of reasonable compensation, within the meaning of Article 94(1) of Regulation No 2100/94, rather than the payment of the planting fee, determined in accordance with Article 5(5) of Regulation No 1768/95. He also submitted that the imposition of general and additional punitive damages was not compatible with the Court's case-law.

18. By judgment of 4 December 2020, the Landgericht Kaiserslautern (Regional Court, Kaiserslautern, Germany) essentially upheld STV's claim, specifying that it was referring to the clear wording of the provision at issue.
19. MS appealed against that judgment before the Pfälzisches Oberlandesgericht Zweibrücken (Palatine Higher Regional Court, Zweibrücken, Germany), the referring court. According to MS, the provision at issue must be declared invalid on the ground that it does not comply with Article 94(2) of Regulation No 2100/94, which, he claims, does not allow for the holder to be awarded punitive damages on a lump-sum basis equivalent, in the present case, to quadruple the fee due for licensed production ('*the licence fee*').
20. STV submits that the provision at issue does not infringe Article 94(2) of Regulation No 2100/94 and that it is consistent with the Court's case-law.
21. The referring court considers that the decision which it is required to make depends exclusively on the validity of the provision at issue. After recalling that an implementing regulation adopted on the basis of an enabling provision in the basic regulation may not derogate from the provisions of that regulation, to which it is subordinate, and should be annulled in the event of contradiction, it observes that the provision at issue, by which the Commission set a minimum level of compensation as a lump sum which is quadruple the amount of the licence fee, could infringe the first sentence of Article 94(2) of Regulation No 2100/94 and be annulled on that basis.
22. In that regard, the referring court notes that, in order to offset the advantage gained by the infringer, Article 94(1) of the regulation provides for reasonable compensation, corresponding to the amount of the licence fee. In that context, the first sentence of Article 94(2) of the regulation could be interpreted as meaning that the holder may be entitled to compensation for further damage, in the event of intentional or negligent infringement, only if that damage can be demonstrated in concrete terms. According to the referring court, the case-law of the Court suggests that the setting, by way of a general rule, of a minimum level of damage is not compatible with the first sentence of Article 94(2) of Regulation No 2100/94.
23. In those circumstances, the Pfälzisches Oberlandesgericht Zweibrücken (Palatine Higher Regional Court, Zweibrücken) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
'Is Article 18(2) of [Regulation No 1768/95], in so far as a minimum level of compensation of quadruple the licence fee can be claimed under the conditions laid down therein, compatible with [Regulation No 2100/94], in particular with the first sentence of Article 94(2) of that regulation?'

Admissibility of the request for a preliminary ruling

24. In its observations, the Commission – without, however, openly submitting that the request for a preliminary ruling is inadmissible – observes that the circumstances surrounding the main proceedings, as set out in the order for reference, are unclear. It has doubts as to whether, in the present case, the conditions set out in Article 14(1) of Regulation No 2100/94 and in particular those of using the product of the harvest of a protected variety for the purposes of safeguarding agricultural production, for propagating purposes, in the field, on the farmer's own holding, were satisfied during the marketing years 2013/2014 to 2015/2016. The Commission states that, if that is not the case, that provision and the provision at issue are not relevant to the outcome of the dispute and the answer to the question referred for a preliminary ruling is not decisive in that regard. It points out, nevertheless, that that question whether the factual conditions laid down in Article 14 are met can be assessed only by the referring court, which is responsible for establishing all the relevant facts.
25. It should be noted that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court. Consequently, where the questions submitted by the national court concern the validity of a rule of EU law, the Court is, in principle, bound to give a ruling (judgment of 16 July 2020, Facebook Ireland and Schrems, C-311/18, EU:C:2020:559, paragraph 73 and the case-law cited).
26. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation or assessment of the validity of an EU rule which is sought bears no relation to the actual facts of the main action or its purpose, 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 (judgment of 28 April 2022, Caruter, C-642/20, EU:C:2022:308, paragraph 29 and the case-law cited).
27. In the present case, it is apparent from the order for reference that the national court has doubts, not as to whether the provision at issue is applicable to the dispute in the main proceedings, but as to whether it is valid in the light of Regulation No 2100/94, the first sentence of Article 94(2) thereof in particular. It is also apparent from the order for reference that MS argued, at first instance, that the damage caused to STV had been made good by the payment of reasonable compensation, within the meaning of Article 94(1) of Regulation No 2100/94, rather than by the payment of the planting fee, determined in accordance with Article 5(5) of Regulation No 1768/95. The latter provision relates to the equitable amount of remuneration to be paid to the holder pursuant to the fourth indent of Article 14(3) of Regulation No 2100/94, which presupposes that the

conditions set out in Article 14(1) of the regulation, in particular those of using the product of the harvest of a protected variety for the purposes of safeguarding agricultural production, for propagating purposes, in the field, on the farmer's own holding, are satisfied. The order for reference states, lastly, that the dispute of the parties to the main proceedings relates only to the amount of the damages to be paid on account of unauthorised planting.

28. As a result, it is not apparent, much less obvious, that the assessment of validity sought by the referring court bears no relation to the actual facts of the dispute in the main proceedings or its purpose or that the problem is hypothetical.

29. It follows that the request for a preliminary ruling is admissible.

Consideration of the question referred

30. By its single question, the referring court asks, in essence, whether the provision at issue is invalid in the light of the first sentence of Article 94(2) of Regulation No 2100/94, in so far as it provides, in the case of repeated and intentional infringement of the obligation to pay the equitable remuneration due under the fourth indent of Article 14(3) of that regulation, for compensation for the damage suffered by the holder in the amount of at least a lump sum calculated on the basis of quadruple the average amount charged for the licensed production of propagating material of protected varieties of the plant species concerned in the same area.

31. It should be noted that Article 13(2) of Regulation No 2100/94 provides that the authorisation of the holder is required, in respect of variety constituents or harvested material of the protected variety, inter alia, for production or reproduction (multiplication).

32. However, for the purposes of safeguarding agricultural production, Article 14(1) of the regulation provides that, by derogation from the obligation to obtain the authorisation of the holder, farmers may use, for the purposes of multiplication 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 protected variety included in the list of agricultural plant species listed in Article 14(2) of the regulation. The application of that derogation is subject to certain conditions being satisfied.

33. Article 14(3) of Regulation No 2100/94 (i) provides that those conditions are laid down in the implementing regulation referred to in Article 114 of the regulation, on the basis of criteria to give effect to that derogation and safeguard the legitimate interests of the breeder, defined in Article 11(1) of the regulation, and the farmer and (ii) sets out those various criteria. Those criteria laid down in the fourth indent of Article 14(3) of that regulation include the payment to the holder of equitable remuneration to be paid in respect of that use ('*equitable remuneration by way of derogation*'). That remuneration must be sensibly lower than the amount of the licence fee.

34. A farmer who is covered by the fourth indent of Article 14(3) of Regulation No 2100/94 but who does not pay the remuneration referred to therein to the holder cannot rely on the derogation provided for in Article 14(1) of the regulation and must be regarded as carrying out, without authorisation, one of the acts referred to in Article 13(2) of the regulation. Under Article 94(1) of that regulation, an action may be brought against such a farmer by the holder for an injunction in respect of the infringement or for payment of equitable remuneration, or both. If the infringement is intentional or negligent, the farmer is also obliged to pay damages to make good the damage suffered by the holder in accordance with Article 94(2) of the regulation (see, to that effect, **judgment of 25 June 2015, Saatgut-Treuhandverwaltung, C-242/14, EU:C:2015:422**, paragraph 22 and the case-law cited).

35. Given that Regulation No 1768/95 is intended to provide further detail in relation to the criteria laid down in Article 14(3) of Regulation No 2100/94 and that, in exercising its implementing powers, the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of that regulation, provided that they are not, inter alia, contrary to it (see, to that effect, judgment of 15 October 2014, Parliament v Commission, C-65/13, EU:C:2014:2289, paragraph 44 and the case-law cited), it is necessary to determine whether, by providing, by the provision at issue, for a minimum lump sum as compensation for the damage suffered by the holder, the Commission failed to have regard to Article 94(2) of Regulation No 2100/94 as interpreted by the Court.

36. According to the Court's case-law, Article 94 of Regulation No 2100/94 establishes for the holder of a Community plant variety right an entitlement to compensation which not only is full but which also rests on an objective basis, that is to say, it covers solely the damage which he or she has sustained as a result of the infringement, although that article cannot serve as a basis for the imposition of a flat-rate infringer supplement (see, to that effect, **judgment of 9 June 2016, Hansson, C-481/14, EU:C:2016:419**, paragraphs 33 and 43).

37. Article 94 of Regulation No 2100/94 cannot therefore be interpreted as providing a legal basis, to the benefit of the rightholder, which permits an infringer to be required to pay punitive damages, established on a flat-rate basis (**judgment of 9 June 2016, Hansson, C-481/14, EU:C:2016:419**, paragraph 34).

38. Rather, the extent of the compensation payable under Article 94 must reflect, as accurately as possible, the actual and certain damage suffered by that holder because of the infringement (**judgment of 9 June 2016, Hansson, C-481/14, EU:C:2016:419**, paragraph 35).

39. On the one hand, the purpose of Article 94(1) of Regulation No 2100/94 is that financial compensation should be paid in respect of the benefit which has been gained by the person who committed the infringement, that benefit corresponding to the amount equivalent to the licence fee which that person has failed to pay. The Court has stated in that regard that Article 94(1) does not provide for reparation for damage other than damage connected to the failure to pay '*reasonable compensation*' within the meaning of that provision

(**judgment of 9 June 2016, Hansson, C-481/14, EU:C:2016:419**, paragraph 31 and the case-law cited).

40. On the other hand, Article 94(2) of Regulation No 2100/94 concerns the '*further damage*' for which an infringer must compensate the holder of a Community plant variety right where the infringer has acted '*intentionally or negligently*' (**judgment of 9 June 2016, Hansson, C-481/14, EU:C:2016:419**, paragraph 32).

41. Regarding the extent of the compensation for the damage suffered, provided for in Article 94(2) of Regulation No 2100/94, the Court has observed that the holder of the variety infringed must produce evidence which establishes that his or her damage goes beyond the matters covered by the reasonable compensation provided for in Article 94(1) (**judgment of 9 June 2016, Hansson, C-481/14, EU:C:2016:419**, paragraph 56).

42. In that respect, the amount of the licence fee cannot in itself form the basis for determining that damage. In fact, such a fee enables the reasonable compensation provided for in Article 94(1) of Regulation No 2100/94 to be calculated and does not necessarily have any connection with the damage which has yet to be compensated (see, to that effect, **judgment of 9 June 2016, Hansson, C-481/14, EU:C:2016:419**, paragraph 57).

43. In any event, it is the court seised which must determine whether the damage pleaded by the holder of the variety infringed can be precisely established or whether it is necessary to set a lump sum which reflects the actual damage as accurately as possible (**judgment of 9 June 2016, Hansson, C-481/14, EU:C:2016:419**, paragraph 59).

44. The validity of the provision at issue in the light of the first sentence of Article 94(2) of Regulation No 2100/94 must be examined in the light of those considerations.

45. In the first place, it must be noted that the provision at issue sets a minimum lump sum calculated by reference to the average amount of the licence fee, although the amount of that fee cannot per se form the basis for determining the damage under Article 94(2) of Regulation No 2100/94, as recalled in paragraph 42 of the present judgment.

46. In the second place, the establishment of a minimum lump sum as compensation for the damage suffered by the holder means, as stated by the Commission in answer to a question put by the Court, that that holder is not required to prove the extent of the damage suffered, merely the existence of repeated and intentional infringement of the holder's rights. As recalled in paragraphs 38 and 41 of the present judgment, compensation under Article 94 of Regulation No 2100/94 must reflect, as accurately as possible, the actual and certain damage suffered by that holder, who must produce evidence which establishes that the damage referred to in Article 94(2) goes beyond the matters covered by the reasonable compensation provided for in Article 94(1).

47. The establishment of a minimum lump sum for compensation also means that there is an irrebuttable presumption regarding the minimum extent of that damage and limits the court's discretion, as that court can only increase the minimum lump sum established by the provision at issue, but not decrease it, even if – as acknowledged by the Commission in answer to a question put by the Court during the hearing on that point – the real damage can easily be established and proves to be lower than that minimum lump sum.

48. Lastly, according to the case-law recalled in paragraph 43 of the present judgment, compensation under Article 94(2) of Regulation No 2100/94 may be set as a lump sum only on the basis of an assessment carried out by the court seised. As a result, by providing for a minimum lump sum to make good the damage suffered by the holder, the provision at issue also limits the court's discretion in that regard.

49. In the third place, while, as recalled in paragraphs 37 and 38 of the present judgment and as noted by the Advocate General in point 83 of his Opinion, the extent of the compensation due under Article 94 of Regulation No 2100/94 must reflect, as accurately as possible, the actual and certain damage suffered by that holder without amounting to punitive damages, the provision at issue can, by establishing the level of compensation for such damage at a minimum lump sum calculated on the basis of quadruple the average amount of the licence fee, lead to punitive damages being awarded.

50. In the fourth place, regarding the Commission's arguments based on the **judgment of 25 January 2017, Stowarzyszenie Oławska Telewizja Kablowa (C-367/15, EU:C:2017:36)**, as observed by the Advocate General in points 87 and 88 of his Opinion, the case that gave rise to that judgment concerned the interpretation of 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), whereas, in the present case, the Court is called upon to assess the validity of a provision of Regulation No 1768/95, which is an implementing measure of Regulation No 2100/94 and, as noted in paragraph 35 of the present judgment, must as such comply with that regulation, Article 94(2) thereof in particular. In addition, that directive concerns all intellectual property rights, not only Community plant variety rights, and the scope of possible infringements of the rights it covers is broad. Consequently, even if that directive may, as the case may be, constitute a relevant aspect to take into account for the purposes of interpreting Regulation No 2100/94, it is important, however, to avoid attributing, under the guise of a textual interpretation of that regulation, a scope thereto which does not correspond to its wording and purpose regarding Community plant variety rights.

51. As is apparent from paragraphs 45 to 49 of the present judgment, in so far as it sets the amount of the compensation to be paid in relation to the licence fee, establishes an irrebuttable presumption as to the minimum extent of the damage suffered by the holder and limits the discretion of the court seised, the provision at issue is contrary to Article 94(2) of Regulation No 2100/94 as interpreted by the Court. The fact, raised by

STV and by the Commission, that that provision applies only in the case of repeated and intentional infringement of the obligation to pay equitable remuneration by way of derogation due under the fourth indent of Article 14(3) of that regulation, is not such as to alter that finding. Accordingly, by the adoption of the provision at issue, the Commission, having regard to Article 94(2) of Regulation No 2100/94, went beyond the scope of its implementing power.

52. It follows from all the foregoing considerations that the provision at issue is invalid in the light of the first sentence of Article 94(2) of Regulation No 2100/94, in so far as it provides, in the case of repeated and intentional infringement of the obligation to pay equitable remuneration by way of derogation due under the fourth indent of Article 14(3) of Regulation No 2100/94, for compensation for the damage suffered by the holder in the amount of at least a lump sum calculated on the basis of quadruple the average amount charged for the licensed production of propagating material of protected varieties of the plant species concerned in the same area.

Costs

53. 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 (Fourth Chamber) hereby rules:

Article 18(2) of Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Council Regulation (EC) No 2100/94 on Community plant variety rights, as amended by Commission Regulation (EC) No 2605/98 of 3 December 1998, is invalid.

OPINION OF ADVOCATE GENERAL M. SZPUNAR

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 27 October 2022 (1)
Case C-522/21
MS
v
Saatgut-Treuhandverwaltungs GmbH
(Request for a preliminary ruling from the Pfälzisches Oberlandesgericht Zweibrücken (Palatine Higher Regional Court, Zweibrücken, Germany))
(Reference for a preliminary ruling – Intellectual property – Protection of plant varieties – Regulation (EC) No 2100/94 – Derogation provided for in Article 14(3) – Article 94(2) – Infringement – Right to compensation – Regulation (EC) No 1768/95 – Article 18(2) – Compensation for damage – Lump sum calculated on the basis of quadruple the licence fee – Competence of the Commission – Assessment of validity)

I. Introduction

1. This reference for a preliminary ruling has arisen in the context of a dispute between a group of holders of plant variety rights and a farmer concerning the calculation of the amount of damage suffered as a result of the illegal planting by the farmer of one of the protected varieties.

2. The referring court seeks an assessment of the validity of Article 18(2) of Regulation (EC) No 1768/95 (2) (‘the provision at issue’), which sets a minimum lump sum for damages, in the light of the first sentence of Article 94(2) of Regulation (EC) No 2100/94. (3)

3. In so far as the doubts of that court stem from the Court’s interpretation of that provision of Regulation No 2100/94, the present case gives the Court the opportunity to revisit the interpretation of that provision.

II. Legal framework

A. European Union law

1. Regulation No 2100/94

4. Article 13 of Regulation No 2100/94, entitled ‘Rights of the holder of a Community plant variety right and prohibited acts’, provides in paragraphs 1 to 3:

‘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.

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. Article 14 of that regulation, entitled ‘Derogation from Community plant variety right’, reads as follows:

‘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.

2. The provisions of paragraph 1 shall only apply to agricultural plant species of:

…

(b) Cereals:

…

Hordeum vulgare L. – Barley

…

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, before the entry into force of this Regulation, in implementing rules pursuant to Article 114, on the basis of the following criteria:

– there shall be no quantitative restriction of the level of the farmer's holding to the extent necessary for the requirements of the holding,

– the product of the harvest may be processed for planting, either by the farmer himself or through services supplied to him, without prejudice to certain restrictions which Member States may establish regarding the organisation of the processing of the said product of the harvest, in particular in order to ensure identity of the product entered for processing with that resulting from processing,

– small farmers shall not be required to pay any remuneration to the holder; small farmers shall be considered to be:

…

– 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 ["licensed production"]; 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,

– 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; in organising that monitoring, they may not provide for assistance from official bodies,

– relevant information shall be provided to the holders on their request, by farmers and by suppliers of processing services; relevant information may equally be provided by official bodies involved in the monitoring of agricultural production, if such information has been obtained through ordinary performance of their tasks, without additional burden or costs. These provisions are without prejudice, in respect of personal data, to Community and national legislation on the protection of individuals with regard to the processing and free movement of personal data.'

6. Article 94 of that regulation, entitled '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.'

2. Regulation No 1768/95

7. Regulation No 1768/95 was adopted on the basis of Article 114 of Regulation No 2100/94.

8. Article 18 of Regulation No 1768/95, entitled 'Special civil law claims', provides in paragraph 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 …, without prejudice to the compensation of any higher damage.'

III. The facts giving rise to the dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

9. Saatgut Treuhandverwaltungs GmbH ('STV') is an association of holders of plant variety rights which has been tasked by its members to defend their rights and, in particular, to assert rights to information and entitlements to payment rights in its own name.

10. MS, the applicant in the main proceedings, is a farmer against whom an action has been brought at first instance by STV in order to obtain, inter alia, information on the unlawful planting of the 'KWS Meridian' winter barley variety, which is protected under EU law, which the latter carried out during the four marketing years 2012/2013 to 2015/2016.

11. The applicant in the main proceedings provided for the first time, during the proceedings between himself and STV, the figures relating to the processing services in respect of those seeds concerning those four marketing years, which were 24.5, 26, 34 and 45.4 quintals respectively.

12. Following the judgment at first instance, the applicant in the main proceedings paid, a posteriori, the average amount of the fee charged for licensed production for the marketing year 2015/2016 as reasonable compensation, pursuant to Article 94(1) of Regulation No 2100/94. (4)

13. STV sought the payment of additional damages, in the amount of quadruple the average amount of the fee charged for licensed production for the marketing years 2013/2014, 2014/2015 and 2015/2016, (5) as compensation under Article 94(2) of Regulation No 2100/94, read in conjunction with the provision at issue, by deducting the amount of the 'simple' licence fee for the production of propagating material of the protected variety, paid a posteriori by the applicant in the main proceedings.

14. The applicant in the main proceedings contested STV's entitlement to such a payment. In that regard, he maintained that the damage that the unauthorised conduct caused STV had been made good by the payment of the 'simple' licence fee rather than the planting fee, in accordance with Article 5(5) of

Regulation No 1768/95. He also submitted that the imposition of general and additional punitive damages was not compatible with the case-law of the Court.

15. By judgment of 4 December 2020, the Landgericht Kaiserslautern (Regional Court, Kaiserslautern, Germany) essentially upheld STV's claim, (6) referring to the 'clear wording' of the provision at issue.

16. The applicant in the main proceedings appealed against that judgment before the Pfälzisches Oberlandesgericht Zweibrücken (Palatine Higher Regional Court, Zweibrücken, Germany). In his view, the provision at issue does not comply with Article 94(2) of Regulation No 2100/94 and must be declared invalid. He states that that second provision cannot be understood as permitting the award to the holder of punitive damages on a lump-sum basis, in the present case of quadruple the amount of the licence fee, but should be understood as meaning that the damages should correspond as closely as possible to the damage actually suffered by the holder and arising with certainty from the infringement of his right.

17. STV submits that the provision at issue does not infringe the requirements of Article 94(2) of Regulation No 2100/94 and is consistent with the case-law of the Court. In view of the repeated and intentional infringement of its rights as a holder, setting a minimum level of compensation as a lump sum which is quadruple the amount of the 'simple' licence fee would, in its view, constitute fair and reasonable compensation.

18. The referring court considers that its decision depends exclusively on the validity of the provision at issue. It observes that that provision, by which the European Commission set a minimum level of compensation as a lump sum which is quadruple the amount of the licence fee, could infringe the first sentence of Article 94(2) of Regulation No 2100/94 and be annulled on that basis.

19. The referring court notes that Article 94(1) of Regulation No 2100/94 is intended to offset the benefit gained by the infringer, namely the farmer who does not benefit from the derogation from EU plant variety rights, within the meaning of Article 14 of that regulation, by providing for reasonable compensation in an amount which corresponds to the 'simple' licence fee. In that context, it states that the first sentence of Article 94(2) of that regulation could be interpreted as meaning that the holder may be entitled to compensation for further damage, in the event of intentional or negligent infringement, only if that damage can be demonstrated in concrete terms.

20. According to the referring court, the case-law of the Court suggests that a generalisation of the principle of minimum compensation does not comply with the first sentence of Article 94(2) of Regulation No 2100/94. (7) It recalls that an implementing regulation adopted on the basis of an enabling provision in the basic regulation may not derogate from the provisions of that regulation, to which it is subordinate, and should be annulled in the event of contradiction. (8)

21. In those circumstances, the Pfälzisches Oberlandesgericht Zweibrücken (Palatine Higher Regional Court, Zweibrücken) decided, by decision of 18 August 2021, lodged at the Court Registry on 24 August 2021, to stay the proceedings and to refer the following question to the Court for a preliminary ruling: 'Is [the provision at issue], in so far as a minimum level of compensation of quadruple the licence fee can be claimed under the conditions laid down therein, compatible with [Regulation No 2100/94], in particular with the first sentence of Article 94(2) of that regulation?'

22. Written observations were submitted by the parties to the main proceedings and the Commission. Those parties and the Commission also presented oral argument at the hearing held on 14 July 2022.

IV. Analysis

23. Before examining the validity of the provision at issue, it is necessary to determine whether the question referred for a preliminary ruling is admissible.

A. Admissibility

24. Before turning to its analysis of the substance of the case, the Commission states in its observations, without, however, openly submitting that the request for a preliminary ruling is inadmissible, that the circumstances surrounding the main proceedings, as set out in the order for reference, are hardly clear. It states that it has doubts as to whether, in the present case, the conditions set out in Article 14(1) of Regulation No 2100/94 and in particular that of using the product of the harvest of a protected variety for the purposes of safeguarding agricultural production, for propagating purposes, in the field, on his own holding, were satisfied during the marketing years 2013/2014 to 2015/2016, when the applicant in the main proceedings grew the protected variety in question. The Commission states that if that is not the case, the question referred for a preliminary ruling on the validity of the provision at issue would not be decisive for the outcome of the dispute. It points out, nevertheless, that that question can be assessed only by the referring court, which is responsible for establishing all the relevant facts.

25. In the first place, I must point out that it is settled case-law that, since the national court alone has jurisdiction to find and assess the facts in the case before it, the Court must in principle confine its examination to the matters which the court or tribunal making the reference has decided to submit to it and thus proceed on the basis of the situation which that court or tribunal considers to be established, and cannot be bound by suppositions raised by one of the parties to the main proceedings. (9)

26. In the second place, I would also recall that it is established that requests for a preliminary ruling relating to EU law enjoy a presumption of relevance. (10) The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, 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. (11)

27. However, that is not the case here.
28. I note, in the first place, that, while it is certainly true that the referring court has not stated the reasons why Article 14(1) and (3) of Regulation No 2100/94 is applicable to the dispute in the main proceedings, neither the applicant in the main proceedings nor STV disputes that that provision and, in principle, the provision at issue apply in the present case.
29. I would point out, in the second place, that it may be inferred from the wording of the question referred for a preliminary ruling that the referring court has doubts not as to whether the provision at issue is applicable, but solely whether it is consistent with Regulation No 2100/94 and, in particular, the first sentence of Article 94(2) thereof.
30. I note, in that regard, that STV states that it is not disputed that the applicant in the main proceedings reused on his own holding propagating material of the 'KWS Meridian' winter barley variety which he himself produced, without having satisfied the conditions required for planting, in particular during the marketing years 2013/2014 to 2015/2016.
31. I therefore consider that there is no doubt as to the admissibility of the present request for a preliminary ruling.

B. Substance

32. In order to propose an answer to the question referred for a preliminary ruling by the national court, I shall first clarify the relationship between the principle that the authorisation of the holder of the EU plant variety right is required, in respect of variety constituents or harvested material of the protected variety, inter alia, for production or reproduction (multiplication) and the derogation from that authorisation and, secondly, in the light of that relationship, I shall review the validity of the provision at issue itself.

1. General considerations on the relationship between the authorisation of the holder of the EU plant variety right and the derogation from that authorisation

33. I note that, under Article 13(2)(a) of Regulation No 2100/94, the authorisation of the holder of the EU plant variety right is required, in respect of variety constituents or harvested material of the protected variety, inter alia, for production or reproduction (multiplication). (12)
34. In the absence of such authorisation, Article 94(1)(a) of Regulation No 2100/94 provides for the possibility, for the holder, to bring inter alia an action for payment of reasonable compensation against the person who, without being authorised to do so, has effected such production or reproduction (multiplication). Moreover, if that person has intentionally or negligently dispensed with the required authorisation, the holder also has a right to compensation for the damage suffered, in accordance with Article 94(2) of that regulation. (13)
35. However, for the purposes of safeguarding agricultural production, Article 14(1) of Regulation No 2100/94 provides for a derogation from EU plant variety rights, commonly known as the 'farmer's privilege'. (14) That provision authorises farmers 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 protected variety included in the list of agricultural plant species set out in Article 14(2) of that regulation, such as, in the present case, the cereal 'Hordeum vulgare L. – Barley'.
36. In order to clarify the relationship between the principle of the authorisation of the holder and the conditions for derogation from that principle, I shall focus on, first, the conditions which the farmer must satisfy in order to be able to benefit from the derogation provided for in Article 14(3) of Regulation No 2100/94 and in particular that concerning the payment of 'equitable remuneration' and what distinguishes it from the 'reasonable compensation' provided for in Article 94(1) of that regulation. Secondly, I shall set out in detail the implementing rules on the conditions to give effect to the derogation provided for in Article 14(1) of Regulation No 2100/94, established by Regulation No 1768/95.

(a) The conditions laid down in Article 14(3) of Regulation No 2100/94

37. The derogation from EU plant variety rights is subject to the conditions laid down in Article 14(3) of Regulation No 2100/94. (15) The farmer's privilege therefore does not apply if the farmer does not comply with those conditions. They are laid down 'in [Regulation No 1768/95] pursuant to Article 114' of Regulation No 2100/94 on the basis of a series of criteria set out in Article 14(3) of that regulation, which make it possible, first, to give effect to that derogation and, secondly, to safeguard the legitimate interests of the breeder and of the farmer. (16)
38. Those criteria include, in the fourth indent of Article 14(3) of Regulation No 2100/94, the obligation for farmers to pay the holder an equitable remuneration which, in accordance with that provision, 'shall be sensibly lower than the amount charged for the licensed production'.
39. In that regard, it should be recalled that the Court has previously held that a farmer who does not pay such equitable remuneration to the holder when he or she uses the product of the harvest obtained by planting propagating material from a protected variety (17) cannot rely on Article 14(1) of Regulation No 2100/94 and, therefore, must be considered to have undertaken, without being authorised, one of the acts referred to in Article 13(2) of that regulation. (18) This means that he or she is not entitled to the farmer's privilege and must, to put it simply, 'go back to square one'. In other words, if, at the time of planting, the criteria laid down in Article 14(3) of that regulation are not met, the derogation does not apply and planting constitutes an infringement of the rights conferred on the holder by Article 13(2) of the same regulation.
40. Where applicable, the farmer is subject to Article 94 of Regulation No 2100/94. (19) He or she may therefore have to respond to an action brought against him or her by the holder for an injunction in respect of

the infringement or for payment of equitable remuneration 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. (20)

41. It seems to me appropriate to point out here the difference between the concept of 'equitable remuneration', contained in the fourth indent of Article 14(3) of Regulation No 2100/94, and that of 'reasonable compensation' contained in Article 94(1) of that regulation. The Court has already highlighted that, despite the fact that similar terms are used in the two provisions, they do not cover the same concept. (21) Thus, while 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, that referred to in 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. (22)

42. It follows that, according to the 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. (23) Any other interpretation could not guarantee either the objective or the effectiveness of that regulation. (24) I shall come back to this point later, which is extremely important when examining the question referred for a preliminary ruling. (25)

(b) The implementing rules on the conditions to give effect to the farmer's privilege: Regulation No 1768/95

43. I would point out that the regulation referred to in Article 114 of Regulation No 2100/94 is Regulation No 1768/95. (26) In accordance with Article 1 thereof, Regulation No 1768/95 establishes the implementing rules on the conditions to give effect to the derogation provided for in Article 14(1) of Regulation No 2100/94. (27)

44. Regulation No 1768/95 lays down inter alia, first, rules for determining the level of equitable remuneration (Article 5 of that regulation) (28) and, secondly, the moment when the individual obligation to pay it to the holder arises, under the fourth indent of Article 14(3) of Regulation No 2100/94, namely when the farmer actually makes use of the product of the harvest for propagating purposes in the field (Article 6 of Regulation No 1768/95).

45. Regulation No 1768/95 also provides, in Article 18 thereof, for special civil law claims in the event of non-compliance with the conditions governing the farmer's privilege.

46. The provision at issue thus provides that, in the case of repeated and intentional infringement of the obligation to pay equitable remuneration, laid down in the fourth indent of Article 14(3) 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 that regulation shall cover at least a lump sum calculated on the basis of the quadruple average amount charged for the licensed production, without prejudice to the compensation of any higher damage.

47. It is therefore that provision which is the subject of the question concerning validity raised by the referring court and which I shall examine in the light of those general considerations.

2. Review of validity

48. By its single question, the referring court asks, in essence, whether the provision at issue is invalid in the light of the first sentence of Article 94(2) of Regulation No 2100/94, in so far as it provides, in the case of repeated and intentional infringement of the obligation to pay 'equitable remuneration', pursuant to the fourth indent of Article 14(3) of that regulation, for a minimum level of compensation for the damage suffered by the holder in the amount of quadruple the average amount of the fee charged for licensed production.

49. In the context of this review, I shall set out, first of all, the reasons why it is appropriate to reject the arguments put forward by the applicant in the main proceedings concerning the Commission's lack of competence to adopt the provision at issue. Next, I shall analyse, in the light of the case-law of the Court, the normative content of Article 94(2) of Regulation No 2100/94, in the light of which the referring court has asked the question as to the validity of the provision at issue. Finally, I shall draw useful conclusions from that case-law in order to answer the question.

(a) The Commission's competence to adopt the provision at issue

50. The applicant in the main proceedings submits that the Commission lacked competence to adopt the provision at issue and, therefore, to determine the reasonable compensation to be paid under Article 94 of Regulation No 2100/94.

51. I do not concur with that approach.

52. I note that the Court's assessment of the validity of a provision of EU law must come within the context of the question referred to it for a preliminary ruling. (29)

53. In the present case, the question concerns the compatibility of the provision at issue in the light of the first sentence of Article 94(2) of Regulation No 2100/94 in particular. Consequently, by challenging the competence of the Commission to adopt the provision at issue, the applicant in the main proceedings seeks to broaden the question raised by the referring court. (30)

54. Moreover, it is clear that the review of the validity of the provision at issue which the referring court is asking the Court to carry out must take account of the nature and purpose of that measure, whose legal basis, as I stated in point 7 of this Opinion, is Article 14(3) of Regulation No 2100/94. (31) In that regard, Article 114 of Regulation No 2100/94, read in conjunction with Article 14(3) thereof, empowers the Commission to

establish the rules for implementing the derogation laid down in that provision. (32)

55. It follows that the Commission is empowered, on the basis of those provisions, to adopt an implementing regulation, such as Regulation No 1768/95, in order to establish the conditions to give effect to the derogation provided for in Article 14(1) of Regulation No 2100/94 and to safeguard the legitimate interests of the breeder and of the farmer. In that respect, as regards the purpose and reasoning of Regulation No 1768/95, it is clear from the second, third, tenth and eleventh recitals thereof that that regulation aims to establish such conditions and to specify, first, the connection between the right of the holder and the rights deriving from the provisions of Article 14 of Regulation No 2100/94 and, secondly, the connection between the authorisation granted to the farmer and the use of that authorisation.

56. Moreover, in so far as Regulation No 1768/95 seeks to clarify the criteria laid down in Article 14(3) of Regulation No 2100/94, which give effect to the derogation in question and safeguard the legitimate interests of the breeder and of the farmer, it is still necessary to determine whether, as requested by the referring court, the Commission, in providing in the provision at issue for a minimum level of compensation for the damage suffered by the holder in the amount of quadruple the average amount of the fee charged for licensed production, has failed to have regard to the content of Article 94(2) of Regulation No 2100/94, as interpreted by the Court.

57. In order to do so, I consider it necessary to recall briefly the relevant case-law relating to Article 94 of Regulation No 2100/94.

(b) The case-law relating to Article 94 of Regulation No 2100/94: the judgment in Hansson

58. The judgment in Hansson (33) seems to me to constitute a precedent on which the Court may usefully rely in order to answer the question referred for a preliminary ruling. In the case which gave rise to that judgment, the referring court sought, in essence, to ascertain what principles govern the setting and calculation of the compensation payable under Article 94 of Regulation No 2100/94.

(1) The nature of the compensation

59. As regards the nature of the compensation due under Article 94 of Regulation No 2100/94, the Court noted, in the first place, that it is apparent from the wording of Article 94(2) of that regulation that that provision concerns exclusively compensation for damage suffered by the holder of an EU plant variety right because of an infringement of the variety in question. (34)

60. First, the Court held that the purpose of Article 94(1) of Regulation No 2100/94 is that financial compensation should be paid in respect of the benefit which has been gained by the person who committed the infringement, that benefit corresponding to the amount equivalent to the licence fee which that person has failed to pay. (35) In that regard, the Court has stated that Article 94(1) does not provide for compensation for damage other than damage connected to the failure to pay reasonable compensation within the meaning of that provision. (36) Secondly, the Court noted that Article 94(2) of that regulation concerns the 'further damage' for which an infringer must compensate the holder where the infringer has acted 'intentionally or negligently'. (37)

61. According to the Court, it follows that Article 94 of Regulation No 2100/94 establishes for the holder of an EU plant variety right an entitlement to compensation 'which not only is full but which also rests on an objective basis, that is to say, it covers solely the damage which he [or she] has sustained as a result of the infringement'. (38) Therefore, it confirmed, following the Opinion of Advocate General Saugmandsgaard Øe, (39) that that provision cannot be interpreted as providing a legal basis, to the benefit of the rightholder, which permits an infringer to be required to pay punitive damages, established on a flat-rate basis. It added that, rather, the extent of the compensation payable under that provision must reflect, as accurately as possible, the actual and certain damage suffered by the holder of the plant variety right because of the infringement. (40)

62. The Court stated, in the second place, referring to recitals 17 and 26 of Directive 2004/48/EC, (41) and Article 13(1) thereof, (42) that such an interpretation is consistent with the objectives of that directive, which lays down a minimum standard concerning the enforcement of intellectual property rights in general. (43)

(2) The methods for setting compensation: the extent of the compensation

63. As regards the extent of the compensation, for the purposes of Article 94(2) of Regulation No 2100/94, the Court has held that it is for the holder of the variety infringed to produce evidence which establishes that his or her damage goes beyond the matters covered by the reasonable compensation provided for in Article 94(1) of that regulation. (44) To that end, the Court defined the extent of that compensation by pointing out that the fee normally payable for licensed production cannot in itself form the basis for determining that damage. In fact, such a fee enables the reasonable compensation provided for in Article 94(1) of that regulation to be calculated and does not necessarily have any connection with the damage which has yet to be compensated and for which compensation is provided for in Article 94(2) of the same regulation. (45)

64. In that regard, the Court recalled, first, that the circumstances which gave grounds, in the calculation of reasonable compensation, for increasing the fee normally payable for licensed production cannot be brought into account a second time in respect of the compensation provided for in Article 94(2) of Regulation No 2100/94. (46) It held, secondly, that it is the court seised of the dispute which must determine the extent to which the damage pleaded by the holder of the variety infringed can be precisely established or whether it is necessary to set a lump sum which reflects the actual damage as accurately as possible. (47)

(c) The challenge to the validity of the provision at issue, in the light of Article 94(2) of Regulation No 2100/94, as interpreted by the Court

65. The referring court asks, in essence, whether, as regards damage, a generalisation of the principle of a minimum lump sum which is quadruple the amount of the licence fee, laid down in the provision at issue, is consistent with Article 94(2) of Regulation No 2100/94, as interpreted by the Court.

(1) The arguments put forward by the applicant in the main proceedings, STV and the Commission

66. The applicant in the main proceedings submits that the provision at issue, at least the second part of it, is void and may easily be annulled or set aside, while maintaining the remainder of Regulation No 1768/95. He adds that the first part of that provision limits the obligation to compensate for damage, laid down in Article 94(2) of Regulation No 2100/94, in the case of an infringement of 'one or more varieties of the same holder'. Such a restriction of the scope and application of that provision is not found in the wording of that provision and does not follow from its content, with the result that he considers that the first part is also unlawful and should be annulled.

67. STV submits that the provision at issue was validly adopted by the Commission in accordance with the objectives and guidelines of Regulation No 2100/94 and cannot be declared invalid. It is also said to be common ground that the applicant in the main proceedings acted intentionally without the authorisation of the holder of the EU plant variety right. The conditions set out in Article 94(2) and Article 14(3) of Regulation No 2100/94, read in conjunction with the provision at issue, are therefore said to be undeniably satisfied.

68. The Commission, for its part, submits that the provision at issue complies with the requirements of Regulation No 2100/94 in so far as, in the conditions set out in that provision, a minimum level of compensation of quadruple the licence fee can be claimed.

69. More specifically, in its written observations, the Commission justifies the application of the minimum lump sum, laid down in the provision at issue, on the ground that, where the planting of a protected variety is not covered by the farmer's privilege, that is to say, in the event of illegal reseeding, the failure to pay the equitable remuneration, which is less than the usual licence fee, would constitute 'misuse' of that privilege, which would confer not only a right to payment of that fee under Article 94(1) of Regulation No 2100/94, but also a right to compensation for the damage suffered, in accordance with Article 94(2) of that regulation. According to the Commission, that compensation should then, where the abuse is repeated and intentional, be imposed, according to the minimum amount laid down in the provision at issue. (48)

70. According to the Commission, since Article 14 of Regulation No 2100/94 on the farmer's privilege governs the complex balance of interests between holders of plant variety rights and farmers, it would be appropriate for the infringement by a farmer, who benefits from that privilege but repeatedly and intentionally fails to comply with the obligation to pay an equitable remuneration, which is lower than the usual fee (fourth indent of Article 14(3) of that regulation), to be penalised more severely than a 'mere' case of an act subject to authorisation which is carried out intentionally or negligently without authorisation (Article 94(2) of that regulation). (49) The minimum lump sum at issue is said to correspond to a standard approach to the minimum damage generally suffered by holders of protected varieties.

71. In that regard, at the hearing, the Commission referred to the judgment in Stowarzyszenie Oławska Telewizja Kablowa, (50) in which the Court held that Article 13 of Directive 2004/48 must be interpreted as not precluding national legislation under which the holder of an intellectual property right that has been infringed may demand from the person who has infringed that right either compensation for the damage that he or she has suffered, taking account of all the appropriate aspects of the particular case, or, without him or her having to prove the actual loss, payment of a sum corresponding to twice the appropriate fee which would have been due if permission had been given for the work concerned to be used.

72. In addition, the Commission submitted at the hearing that the complexity of the objective of ensuring a balance between the interests of the holders of the protected plant variety right and those of farmers is due, inter alia, to the fact that the illegal reseeding takes place on the farmer's holding, which makes it difficult for the holders to control the use of the protected varieties. In those circumstances, it submitted that the measures must provide sufficient incentives to avoid, inter alia, favouring farmers who evade their obligation to pay equitable remuneration to the holder under the fourth indent of Article 14(3) of Regulation No 2100/94 over those who fulfil that obligation. That is particularly true since, in its view, 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.

(2) Assessment

73. In the first place, the arguments concerning the relevance of the minimum lump sum at issue must be rejected for the following reasons.

74. I would point out that the provision at issue provides that the liability to compensate the holder for any further damage pursuant to Article 94(2) of Regulation No 2100/94 is to cover at least a lump sum calculated on the basis of the quadruple average amount charged for the licensed production, without prejudice to the compensation of any higher damage.

75. Where the farmer complies with the conditions laid down in Article 14(3) of Regulation No 2100/94 and, in particular, pays the equitable remuneration for a marketing year, he or she pays, in essence, 50% of the fee payable for licensed production, (51) whereas, if he or she does not comply with those conditions (52) and if

the provision at issue is applied, (53) he or she pays, in essence, a minimum lump sum of 400% of the fee payable for that licensed production, thus four times 100% of the average amount charged, that is to say, an amount essentially equivalent to eight times the equitable remuneration required under Article 14(3) of Regulation No 2100/94, and for each marketing year in question. (54)

76. It is true that that minimum lump sum may be justified 'technically', according to the Commission's logic, (55) by the fact that the fee payable for authorised planting, where the farmer benefits from the derogation provided for in Article 14(1) of Regulation No 2100/94, cannot be used as a basis for calculating the reasonable compensation referred to in Article 94(1) of that regulation (56) and that, therefore, the farmer is required, in the event of illegal reseeding, to pay 100% of the fee payable for licensed production as reasonable compensation under that provision.

77. However, the wording of Article 94(2) of Regulation No 2100/94 and the conclusions drawn from the judgment in Hansson lead me to consider that such a minimum lump sum is not consistent with the wording of that provision.

78. First, the Court noted, in the judgment in Hansson, that Article 94(2) of Regulation No 2100/94 is intended to make good the damage suffered by the holder of a plant variety who is the victim of an infringement (57) and characterised that compensation as 'objective and full compensation for that damage'. It stated that, in order to obtain such compensation, the holder of the infringed variety must produce evidence which establishes that 'his [or her] damage goes beyond the matters covered by the reasonable compensation provided for in Article 94(1) [of that regulation]'. (58)

79. Secondly, it follows from the judgment in Hansson (59) that it is the court seised of the dispute which must determine whether the damage pleaded by the holder who was the victim of the infringement can be 'precisely' established or whether it is necessary to 'set a lump sum'. Thus, although the Court acknowledges, in that judgment, that the court seised of the dispute has the option to set the compensation as a lump sum, under Article 94(2) of Regulation No 2100/94, it is clear, in my view, that that decision is for that court to take and, in any event, that that compensation 'must reflect, as accurately as possible, the actual and certain damage suffered by the holder of the plant variety right because of the infringement'. (60) Consequently, according to the Court, Article 94 of that regulation must be interpreted as meaning that 'the right to compensation which it establishes for the holder of a plant variety right that has been infringed encompasses all the damage sustained by that holder, although that article cannot serve as a basis … for the imposition of a flat-rate "infringer supplement"'. (61)

80. However, as the Commission itself stated in response to a question put by the Court, that, when the provision at issue is applied, the holder who is the victim of infringement must not prove the exact extent of the damage suffered, but only the repeated and intentional infringement of his or her rights. Nevertheless, as I have stated, that holder must prove that his or her damage exceeds what is covered by the equitable remuneration, the assessment of the precise extent of the damage suffered or the possible determination of the lump sum being left to the court seised. (62)

81. Therefore, it would not be consistent with Article 94(2) of Regulation No 2100/94, as interpreted by the Court, first, to use the fee normally payable for licensed production, that is, 100% of that fee, as the basis for determining the damage suffered by the holder of the plant variety right, by multiplying that amount by four, as set out in the provision at issue, since such a fee is intended to enable the reasonable compensation provided for in Article 94(1) of that regulation to be calculated, without necessarily having any connection with the damage suffered by the holder, compensation for which is provided for in Article 94(2) of that regulation. (63)

82. Secondly, I would point out that, in the judgment in Hansson, the Court ruled out the possibility that Article 94 of Regulation No 2100/94 could be interpreted as 'providing a legal basis, to the benefit of the rightholder, which permits an infringer to be required to pay punitive damages, established on a flat-rate basis'. (64) In that regard, it added that the extent of the compensation payable under that provision must reflect, 'as accurately as possible, the actual and certain damage suffered by the holder of the plant variety right because of the infringement'. (65)

83. Therefore, it would also be contrary to Article 94(2) of Regulation No 2100/94, as interpreted by the Court, to make an assumption, governing the provision at issue, that the amount of compensation paid to the holder should be at least quadruple the average amount charged for licensed production. Contrary to the Commission's submissions, such an assumption would lead to punitive damages being awarded in so far as the former provision aims to compensate 'the holder for … damage' and only for the damage suffered. In that regard, I consider that the Commission's argument cannot be upheld when it claims, as it did at the hearing, that that provision corresponds to a standard approach typical of the minimum damage generally suffered by holders. (66)

84. In the second place, I infer from the use of the wording 'at least' in the provision at issue that the court, in its assessment of the damage pleaded by the holder of the variety infringed, and in the event that it sets a lump sum, is obliged to calculate the compensation for the damage suffered on the basis of the premiss, established by the Commission in Regulation No 1768/95, that the compensation should be at least quadruple the licence fee. (67) Moreover, in response to a question put by the Court on that point, the Commission acknowledged that, even if the actual damage could be easily established and proved to be less than the minimum lump sum laid down in the provision at issue, the court seised could, in the event of repeated and intentional infringement of the obligations under the provision at issue, increase that

amount but in no case reduce it, in the light of the wording of that provision.

85. That would mean that, even if the damage pleaded by the holder who is the victim of the infringement can be established 'precisely', the court seised would have to 'set a lump sum' when such a fixed sum is not necessary. Furthermore, in the event that that damage cannot be proved precisely, if the court decided to set a lump sum, that cannot be less than the minimum lump sum laid down in the provision at issue. (68) It is clear that such a limitation on the discretion of the court seised of the dispute would be contrary not only to the first sentence of Article 94(2) of Regulation No 2100/94, as interpreted by the Court, (69) but also to the principle of proportionality. Although, de lege ferenda, the Commission may provide for a minimum lump sum in respect of the licence fee, the provision which provides for it should allow the defendant to challenge that minimum lump sum, which should not be binding on the court seised.

86. In the third and last place, I consider that the arguments based on the judgment in Stowarzyszenie Oławska Telewizja Kablowa (70) are not relevant to the examination of the question of validity at issue in the present case. It seems to me that the facts of the case in the main proceedings are clearly different from those in the case which gave rise to that judgment.

87. First, in so far as Directive 2004/48 gives Member States a certain degree of discretion in its transposition and concerns not only intellectual property rights in respect of plant varieties but also all intellectual property rights which include industrial property rights, (71) any possible infringement of those rights may be varied and numerous. Accordingly, as Advocate General Saugmandsgaard Øe has pointed out, (72) even though that directive may, depending on the circumstances, be a relevant aspect to take into account for the purposes of interpreting Regulation No 2100/94, it is important, however, to avoid creating, under the guise of a textual interpretation of that regulation, directly applicable rights which are not enshrined by that regulation by importing them from that directive.

88. Secondly, and even more importantly, the case which gave rise to the judgment in Stowarzyszenie Oławska Telewizja Kablowa (73) concerned the interpretation of Directive 2004/48 whereas, in the present case, the Court is called upon to examine a question on the validity of a provision of Regulation No 1768/95, namely the provision at issue, which is an implementing measure and as such must comply with Regulation No 2100/94 and, in particular, with Article 94(2) thereof.

89. It follows that Article 94(2) of Regulation No 2100/94 does not allow the fixing of the minimum lump sum provided for in the provision at issue. The content of the provision at issue goes beyond that of Article 94(2) of that regulation. Moreover, as is clear from the preceding points, the arguments raised by STV and the Commission are not such as to undermine the Court's interpretation of the latter provision in the judgment in Hansson.

90. In those circumstances, I consider that the generalisation of the principle of compensation that is a minimum lump sum of quadruple the amount of the licence fee, laid down in the provision at issue, is not consistent with Article 94(2) of Regulation No 2100/94, as interpreted by the Court, even though, as STV and the Commission maintain, the provision at issue applies only in the case of repeated and intentional infringement of the obligation to pay equitable remuneration laid down in the fourth indent of Article 14(3) of that regulation.

91. Therefore, when adopting the provision at issue, the Commission exceeded the limits of its competence, in the light, in particular, of Article 94(2) of Regulation No 2100/94.

V. Conclusion

92. Having regard to all the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Pfälzisches Oberlandesgericht Zweibrücken (Palatine Higher Regional Court, Zweibrücken, Germany) as follows:

Article 18(2) of Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Council Regulation (EC) No 2100/94 on Community plant variety rights is invalid in the light of the first sentence of Article 94(2) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, in so far as that provision provides, in the case of repeated and intentional infringement of the obligation to pay equitable remuneration, pursuant to the fourth indent of Article 14(3) of Regulation No 2100/94, for a minimum level of compensation for the damage suffered by the holder of quadruple the average amount charged for the licensed production of propagating material of the same variety in the same area.

Sources

1 Original language: French.

2 Commission Regulation of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation No 2100/94 (OJ 1995 L 173, p. 14).

3 Council Regulation of 27 July 1994 on [EU] plant variety rights (OJ 1994 L 227, p. 1).

4 It is apparent from the order for reference that, since the customary simple licence fee was EUR 11.95 per quintal, the applicant in the main proceedings paid STV the sum of EUR 537.75 (EUR 11.95 x 45 quintals).

5 Namely, for those first two marketing years, respectively, EUR 932.10 and EUR 1 218.90, which correspond to quadruple the 'general' licence fee minus the 'simple' licence fee paid a posteriori of EUR 310.70 (EUR 11.95 x 26 quintals) and EUR 406.30 (EUR 11.95 x 34 quintals), thus a total amount of EUR 2 151 and, for the third marketing year, EUR 1 613.25, which corresponds to quadruple the 'general' licence fee minus the 'simple' licence fee.

6 With the exception of an amount of EUR 0.25.

7 Judgment of 5 July 2012, Geistbeck (C-509/10, 'the judgment in Geistbeck', EU:C:2012:416, paragraph 39), and judgment of 9 June 2016, Hansson (C-481/14, 'the

judgment in Hansson', EU:C:2016:419, paragraphs 32 to 34).

8 See judgment of 2 March 1999, Spain v Commission (C-179/97, EU:C:1999:109).

9 Judgment of 2 April 2020, Coty Germany (C-567/18, EU:C:2020:267, paragraph 22 and the case-law cited).

10 In the context of a question of validity, see, also, to that effect, judgment of 26 June 2007, Ordre des barreaux francophones et germanophone and Others (C-305/05, EU:C:2007:383, paragraph 18).

11 Judgment of 10 December 2018, Wightman and Others (C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited).

12 See, inter alia, judgment of 25 June 2015, Saatgut-Treuhandverwaltung (C-242/14, EU:C:2015:422, paragraph 20 and the case-law cited).

13 In that regard, the Court has already indicated the objective nature of that provision by holding that the comparison of its wording with that of Article 94(1) of that regulation shows that 'Article 94(1) does not contain any subjective element'; see judgment of 20 October 2011, Greenstar-Kanzi Europe (C-140/10, EU:C:2011:677, paragraph 48).

14 The seventeenth recital of Regulation No 2100/94 states that 'the exercise of [EU] plant variety rights must be subjected to restrictions laid down in provisions adopted in the public interest'. According to the eighteenth recital of that regulation, 'this includes safeguarding agricultural production; … that purpose requires an authorisation for farmers to use the product of the harvest for propagation under certain conditions'.

15 See, inter alia, judgment of 25 June 2015, Saatgut-Treuhandverwaltung (C-242/14, EU:C:2015:422, paragraph 20 and the case-law cited).

16 Those criteria concern, inter alia, the absence of any quantitative restriction on the farmer's privilege (first indent of Article 14(3)); the possibility for the farmer himself or herself to process the product of the harvest for planting (second indent of Article 14(3)); the exclusion of 'small farmers' from the obligation on farmers to pay equitable remuneration to the holder (third indent of Article 14(3)); the exclusive responsibility of holders to monitor compliance with that privilege (fifth indent of Article 14(3)); or the obligation for farmers to provide information to the holder (sixth indent of Article 14(3)).

17 This is therefore unlawful planting or, in other words, illegal reseeding.

18 See, to that effect, judgment of 10 April 2003, Schulin (C-305/00, EU:C:2003:218, paragraph 71); the judgment in Geistbeck (paragraph 23), and judgment of 25 June 2015, Saatgut-Treuhandverwaltung (C-242/14, EU:C:2015:422, paragraph 22).

19 See point 33 et seq. of this Opinion.

20 See, to that effect, judgment of 10 April 2003, Schulin (C-305/00, EU:C:2003:218, paragraph 71); the judgment in Geistbeck (paragraphs 23 and 25), and judgment of 25 June 2015, Saatgut-Treuhandverwaltung (C-242/14, EU:C:2015:422, paragraph 22).

21 Judgment in Geistbeck (paragraph 28). The use of the same terms, in particular in the French-language version, is misleading in this respect. 'The same is not true of other language versions, particularly the German and English versions'.

22 Judgment in Geistbeck (paragraphs 30 and 31).

23 See to that effect, judgment in Geistbeck (paragraph 32). Let us take an imaginary example: if the fee for authorised planting is EUR 10, the 'equitable remuneration' to be paid by the farmer under Article 14(1) of Regulation No 2100/94 would be EUR 5. However, in the same scenario, if the conditions of Article 14(3) of that regulation are not met, that farmer would not be entitled to his or her 'privilege' and would have to pay 'reasonable compensation', under Article 94(1) of that regulation, which would then be EUR 10.

24 See Opinion of Advocate General Jääskinen in Geistbeck (C-509/10, EU:C:2012:187, point 58).

25 See points 81 and 82 of this Opinion.

26 See point 37 of this Opinion.

27 See point 35 of this Opinion.

28 Commission Regulation (EC) No 2605/98 of 3 December 1998 amending Regulation No 1768/95 (OJ 1998 L 328, p. 6) added, inter alia, paragraph 5 to Article 5 of Regulation No 1768/95. That paragraph provides: '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.'

29 Judgment of 28 October 1982, Dorca Marina and Others (50/82 to 58/82, EU:C:1982:378, paragraph 13).

30 It is clear from the general considerations which I have just set out with regard to the relationship between the principle of the authorisation of the holder and the farmer's privilege that the arguments put forward by the applicant in the main proceedings in that regard are unfounded. See point 33 et seq. of this Opinion.

31 See, by analogy, judgment of 20 May 2021, Renesola UK (C-209/20, EU:C:2021:400, paragraph 31 et seq.).

32 See, in that regard, points 37 to 46 of this Opinion.

33 To recall, the dispute which gave rise to that judgment was between Mr Hansson, the holder of an EU plant variety right for a particular variety of marguerite, and Jungpflanzen, which had cultivated and distributed that flower variety under a different name for seven years, concerning compensation for the damage the former had suffered as a result of the unauthorised distribution of the variety concerned.

34 Judgment in Hansson (paragraph 30).

35 Judgment in Hansson (paragraph 31). That amount is, in essence, 100% of the fees set out in the licences for the production of certified seeds. In the example given in footnote 23 of this Opinion, this would be the payment of EUR 10.

36 As I have already stated in point 41 of this Opinion, a distinction must be drawn between such 'reasonable compensation' and the 'equitable remuneration' under Article 14(3) of that regulation. See, in that regard, also, point 42 of this Opinion.

37 Judgment in Hansson (paragraphs 31 and 32).

38 Judgment in Hansson (paragraph 33). Emphasis added. See, also, Opinions of Advocate General Saugmandsgaard Øe in Hansson (C-481/14, EU:C:2016:73, point 30), and of Advocate General Jääskinen in Geistbeck (C-509/10, EU:C:2012:187, point 40).

39 See his Opinion in Hansson (C-481/14, EU:C:2016:73, point 34): 'The use of the words "to compensate … for any further damage" seems to me to preclude any interpretation according to which that provision pursues a "punitive" aim, consisting of granting the holder compensation in excess of the amount needed to make reparation for the damage he [or she] has suffered.'

40 Judgment in Hansson (paragraphs 34 and 35). In his Opinion in that case (C-481/14, EU:C:2016:73, point 35), Advocate General Saugmandsgaard Øe stated that 'other provisions in Regulation No 2100/94 do, on the other hand, permit the imposition on the infringer of obligations which overlap with compensation for that harm. The objective of punishment may therefore be attained by means of criminal penalties which, under Article 107 of that regulation, … fall within the scope of the national law of the Member States in the absence of harmonisation at EU level'. Emphasis added.

41 Directive 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 and corrigendum OJ 2004 L 195, p. 16). Recital 17 of that directive states that 'the measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement'. Recital 26 of that directive states that 'with a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research'.

42 With regard to that directive, I would point out that, in response to a question referred for a preliminary ruling on the interpretation of Article 13 of the directive, entitled 'Damages', the Court held that that directive applies, in accordance with Article 2(1) thereof, without prejudice to the means which are or may be provided for, in particular, in national legislation, in so far as those means may be more favourable for rightholders. See judgment of 25 January 2017, Stowarzyszenie Oławska Telewizja Kablowa (C-367/15, EU:C:2017:36, paragraph 22). I shall return to that judgment in points 86 to 88 of this Opinion. Article 13(1) of Directive 2004/48 provides: 'Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement. When the judicial authorities set the damages: (a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement; or (b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.'

43 Judgment in Hansson (paragraphs 36 to 40).

44 Judgment in Hansson (paragraphs 33 to 43 and 56).

45 Judgment in Hansson (paragraph 57).

46 Judgment in Hansson (paragraph 58).

47 See judgment in Hansson (paragraph 59).

48 The Commission submitted at the hearing that such a minimum lump sum for damages would also enable the farmer to calculate the amount of compensation due in the event of repeated and intentional infringement on his or her part, thus contributing to the legal certainty of both the farmer and the holder of the protected variety.

49 For its part, STV submits that the provision at issue 'serves to restore the balance' between the interests of holders of plant variety rights and those of farmers by taking into account the disadvantages faced by the former in relation to the planting privilege of the latter. However, to me it is important to recall that it is the equitable remuneration, referred to in the fourth indent of Article 14(3) of Regulation No 2100/94, which is intended to establish such a balance. The provision at issue provides for the liability to compensate the holder for any further damage pursuant to Article 94(2) of Regulation No 2100/94 if the farmer concerned has repeatedly and intentionally not complied with his or her obligation pursuant to the fourth indent of Article 14(3) of Regulation No 2100/94.

50 Judgment of 25 January 2017 (C-367/15, EU:C:2017:36, paragraphs 23, 25, 26 and 31). See, for an opposing view, Opinion of Advocate General Sharpston in Stowarzyszenie Oławska Telewizja Kablowa (C-367/15, EU:C:2016:900). See, also, footnote 42 of this Opinion. As a reminder, in that

judgment, the Court stated that, although payment for a loss calculated on the basis of twice the amount of the hypothetical royalty will exceed the loss actually suffered so clearly and substantially that a claim to that effect could constitute an abuse of rights, it is apparent, however, from the observations made by the government concerned at the hearing that, under the legislation applicable in the main proceedings, a national court would not be bound in such a situation by the claim of the holder of the infringed right.

51 That is to say, 50% of the fees set out in the licences for the production of certified seeds.

52 Judgment in Hansson (paragraph 57).

53 That is to say, if 'such person has repeatedly and intentionally not complied with his obligation pursuant to Article 14(3) 4th indent of [Regulation No 2100/94]'.

54 It should be noted that, in response to a question put by the Court at the hearing, the Commission stated that the reason for introducing a minimum lump sum of that kind in the provision at issue is not apparent from the preparatory documents for that regulation.

55 See points 39 to 42 of this Opinion.

56 See, to that effect, judgment in Geistbeck (paragraph 32).

57 Judgments in Hansson (paragraph 46) and in Geistbeck (paragraph 36).

58 Judgment in Hansson (paragraphs 33 to 43 and 56). Emphasis added.

59 Paragraph 59.

60 Judgment in Hansson (paragraph 35). Emphasis added.

61 Or specifically, for the restitution of the profits and gains made by the infringer. Judgment in Hansson (paragraph 43).

62 See, in that regard, points 63 and 64 of this Opinion. It should be noted that the Commission observed at the hearing that, where the breeder can prove the exact extent of the damage suffered, the provision at issue does not allow the court seised to reduce the lump sum provided for in that provision.

63 See to that effect, judgment in Hansson (paragraph 57).

64 Judgment in Hansson (paragraph 34). As Advocate General Saugmandsgaard Øe pointed out in his Opinion in Hansson (C-481/14, EU:C:2016:73, point 35, footnote 9), the Commission had proposed, in 2013, to amend Regulation No 2100/94 so as to oblige the Member States to adopt effective, proportionate and dissuasive criminal penalties (Proposal for a Regulation of the European Parliament and of the Council on the production and making available on the market of plant reproductive material of 6 May 2013 (COM(2013) 262 final, p. 98)). That proposal was rejected by legislative decision of the European Parliament of 11 March 2014 (T7-0185/2014), and subsequently withdrawn by the Commission (OJ 2015 C 80, p. 20).

65 Judgment in Hansson (paragraph 35).

66 See, in that regard, point 70 of this Opinion.

67 In that regard, I recall that the second sentence of Article 94(2) of Regulation No 2100/94 provides that, 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. A contrario, it could be inferred from that provision that a specific provision in that regulation would be necessary in order to allow the adoption of a provision, such as the provision at issue, which provides for an increase in that right to compensation beyond the level of the damage suffered.

68 See footnote 67 of this Opinion. I would point out, in particular, that the second sentence of Article 94(2) of Regulation No 2100/94 provides for the possibility of reducing the amount of the compensation for damage suffered by the holder in cases of slight negligence, however that amount must not be less than the advantage derived from that infringement by the person who committed it.

69 Judgment in Hansson (paragraph 59).

70 Judgment of 25 January 2017 (C-367/15, EU:C:2017:36).

71 See, in that regard, Article 1 of Directive 2004/48.

72 See his Opinion in Hansson (C-481/14, EU:C:2016:73, point 52).

73 Judgment of 25 January 2017 (C-367/15, EU:C:2017:36).