JUDGMENT OF THE COURT (First Chamber)

5 July 2012

(Intellectual and industrial property – Community plant variety rights – Regulation (EC) No 2100/94 – 'Farmer's privilege' – Concept of 'reasonable compensation' – Compensation for damage suffered – Infringement)

In Case C-509/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 30 September 2010, received at the Court on 26 October 2010, in the proceedings

Josef Geistbeck,

Thomas Geistbeck

v

Saatgut-Treuhandverwaltungs GmbH,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, E. Levits (Rapporteur), J.-J. Kasel and M. Berger, Judges,

Advocate General: N. Jääskinen,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 18 January 2012,

after considering the observations submitted on behalf of:

– Messrs Geistbeck, by J. Beismann and M. Miersch, Rechtsanwälte,

– Saatgut-Treuhandverwaltungs GmbH, by K. von Gierke and C. von Gierke, Rechtsanwälte,

– the Greek Government, by X. Basakou and A.-E. Vasilopoulou, acting as Agents,

– the Spanish Government, by F. Díez Moreno, acting as Agent,

– the European Commission, by B. Schima, F. Wilman and M. Vollkommer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 March 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of certain provisions of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1) and of Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation No 2100/94 (OJ 1994 L 173, p. 14), as amended by Commission Regulation (EC) No 2605/98 of 3 December 1998 (OJ 1998 L 328, p. 6) ('Regulation No 1768/95').

2 The reference was made in the course of proceedings between two farmers, Josef and Thomas Geistbeck ('the Geistbecks'), and Saatgut-Treuhandverwaltungs GmbH ('STV') – a company which represents the interests of the holders of the rights relating to the protected plant varieties, Kuras, Quarta, Solara and Marabel – with regard to the planting of those varieties by the Geistbecks in a way which did not fully accord with the declaration made.

Legal context

Regulation No 2100/94

3 Under Article 11 of Regulation No 2100/94, entitlement to Community plant variety rights is vested in the 'breeder', that is to say, the 'person who bred, or discovered and developed the variety, or his successor in title'.

4 Article 13 of that regulation, entitled 'Rights of the holder of a Community plant variety right and prohibited acts', provides:

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

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

(a) production or reproduction (multiplication);

…

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

…'

5 Article 14(1) of Regulation No 2100/94, entitled 'Derogation from Community plant variety right' provides:

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

6 Article 14(3) of Regulation No 2100/94 provides:

'Conditions to give effect to the derogation provided 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:

…

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

…

– other farmers shall be required to pay an equitable remuneration to the holder, which shall be sensibly lower than the amount charged for the licensed production of propagating material of the same variety in the same area; the actual level of this equitable remuneration may be subject to variation over time, taking into account the extent to which use will be made of the derogation provided for in paragraph 1 in respect of the variety concerned,

…

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

7 Article 94 of Regulation No 2100/94, which deals with the civil law actions which may be brought in the event of the use of a plant variety in a manner which amounts to an infringement, provides:

'1. Whosoever:

(a) effects one of the acts set out in Article 13 (2) without being entitled to do so, in respect of a variety for which a Community plant variety right has been granted; …

…

may be sued by the holder to enjoin [sic] such infringement or to pay reasonable compensation or both.

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

8 The supplementary application of national law in the case of infringements is governed by Article 97 of Regulation No 2100/94, paragraph 1 of which provides:

'Where the party liable pursuant to Article 94 has, by virtue of the infringement, made any gain at the expense of the holder or of a person entitled to exploitation rights, the courts competent pursuant to Articles 101 or 102 shall apply their national law, including their private international law, as regards restitution.'

Regulation No 1768/95

9 Article 2(1) of Regulation No 1768/95 reads as follows:

'The conditions referred to in Article 1 shall be implemented both by the holder, representing the breeder, and by the farmer in such a way as to safeguard the legitimate interests of each other.'

10 Article 5 of Regulation No 1768/95, which sets out the rules regarding the remuneration due to the holder, states:

'1. The level of the equitable remuneration to be paid to the holder pursuant to Article 14(3), fourth indent of [Regulation No 2100/94] may form the object of a contract between the holder and the farmer concerned.

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

…

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

…'

11 Paragraph 1 of Article 14 of that regulation, which concerns checks to be carried out by the holder to make sure that the farmer has fulfilled his obligations, provides:

'For the purpose of monitoring, by the holder, compliance with the provisions of Article 14 of [Regulation No 2100/94] as specified in this Regulation, as far as the fulfilment of obligations of the farmer is concerned, the farmer shall, on request of the holder:

(a) provide evidence supporting his statements of information under Article 8, through disclosure of available relevant documents such as invoices, used labels, or any other appropriate device such as that required pursuant to Article 13(1)(a), relating to:

– the supply of services of processing the product of the harvest of a variety of the holder for planting, by any third person,

or

– in the case of Articles 8(2)(e), the supply of propagating material of a variety of the holder,

or through the demonstration of land or storage facilities;

(b) make available or accessible the proof required under Article 4(3) or 7(5).'

12 Under Article 18 of Regulation No 1768/95:

'1. A person referred to in Article 17 may be sued by the holder to fulfil his obligations pursuant to Article 14(3) of [Regulation No 2100/94] as specified in this Regulation.

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

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

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

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

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

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

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

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

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

'1. Must the "reasonable compensation" which a farmer must pay to the holder of a Community plant variety right in accordance with Article 94(1) of Regulation No 2100/94, because he has used propagating material of a protected variety obtained through planting and has not fulfilled the obligations laid down in Article 14(3) of Regulation No 2100/94 and Article 8 of Regulation No 1768/95, be calculated on the basis of the average amount of the fee charged for the licensed production of a corresponding quantity of propagating material of protected varieties of the plant

species concerned in the same area, or must the (lower) remuneration which would be payable in the event of authorised planting under the fourth indent of Article 14(3) of Regulation No 2100/94 and Article 5 of Regulation No 1768/95 be taken as a basis for the calculation instead?

2. In the event that only the remuneration for authorised planting must be taken as a basis for the calculation:

In the circumstances described above, may the holder, in the event of a single intentional or negligent infringement, calculate the damage for which he must be compensated in accordance with Article 94(2) of Regulation No 2100/94 as a lump sum based on the fee for the grant of a licence for the production of propagating material?

3. Is it permitted or even required, when assessing the "reasonable compensation" due under Article 94(1) of Regulation No 2100/94 or the further compensation due under Article 94(2) of that regulation, for the special monitoring costs of an organisation which protects the rights of numerous holders to be taken into account in such a way that double the compensation usually agreed, or double the remuneration due under the fourth indent of Article 14(3) of Regulation No 2100/94, is awarded?'

The questions referred to the Court

The first question

20 By its first question, the referring court essentially wishes to ascertain the information needed to determine the amount of the 'reasonable compensation' payable under Article 94(1) of Regulation No 2100/94 by a farmer who has not fulfilled the requirements incumbent on him under the fourth and sixth indents of Article 14(3) of that regulation. In particular, the referring court asks if it must take, as the basis for calculating that compensation, the fee payable for the licensed production of propagating material of the same variety in the same area – the 'C-Licence fee' – or the fee for authorised planting under the fourth indent of Article 14(3) of Regulation No 2100/94, which amounts, under Article 5(5) of Regulation No 1768/95, to 50% of the amounts payable for the licensed production of propagating material.

21 As a preliminary point, it should be recalled that, under Article 13(2) of Regulation No 2100/94, authorisation from the holder of the Community plant variety right is required, in respect of variety constituents or harvested material of the protected variety, inter alia, for production or reproduction (multiplication); for conditioning for the purposes of propagation; for offering for sale, selling or other marketing; and for stocking for those purposes (see *Schulin*, paragraph 46).

22 In that context, Article 14 of Regulation No 2100/94 constitutes a derogation from the rule that authorisation must be granted by the holder of the Community plant variety right (see, to that effect, *Schulin*, paragraph 47), in so far as use of the product of

the harvest obtained by the farmers, on their own holding, for propagating purposes in the field, is not conditional upon authorisation by the holder of the Community right, where they fulfil certain conditions expressly set out in Article 14(3) of that regulation.

23 In that regard, the Court has found that a farmer who does not pay equitable remuneration to the holder when he uses the product of the harvest obtained by planting propagating material from a protected variety cannot rely on Article 4(1) of Regulation No 2100/94 and must therefore be considered to have carried out, without being authorised, one of the acts referred to in Article 13(2) of that regulation (*Schulin*, paragraph 71).

24 As it is, the situation of the Geistbecks is similar to that of farmers who have not paid the 'equitable remuneration' provided for under the fourth indent of Article 14(3) of Regulation No 2100/94, in so far as, by not declaring a part of the product of the harvest that they had planted, they did not pay such remuneration.

25 It follows that the cultivation by the Geistbecks of seeds which they had not declared constitutes, as the referring court rightly pointed out, an 'infringement' for the purposes of Article 94 of Regulation No 2100/94. The rules for determining reasonable compensation, such as that payable by the Geistbecks to STV, should therefore be defined in accordance with that provision.

26 In that regard, the Geistbecks argue that, in so far as the terms used in the fourth indent of Article 14(3) and in Article 94(1) of Regulation No 2100/94 are almost identical, the 'reasonable compensation' due under Article 94(1) of Regulation No 2100/94 should be based on the remuneration for authorised planting.

27 That interpretation cannot, however, be accepted.

28 First, it should be noted that, although the terms '*rémunération équitable*' are used in both those provisions in the French-language version of Regulation No 2100/94, the same is not true of other language versions, particularly the German and English versions, as the Advocate General mentioned in point 43 of his Opinion. Accordingly, it cannot be inferred from the similarity of the expressions used in those provisions of Regulation No 2100/94 that they refer to the same concept.

29 Secondly, it should be noted that, as Article 14 of Regulation No 2100/94 derogates from the principle of Community plant variety rights, it must be interpreted restrictively and is not intended, therefore, to be applied in circumstances other than those expressly specified in that provision.

30 Accordingly, as the Advocate General stressed in points 45 to 47 of his Opinion, the objective underlying the concept of 'equitable remuneration' referred to in the fourth indent of Article 14(3) of Regulation No 2100/94, read in conjunction with Article 5(5)

of Regulation No 1768/95, is to establish a balance between the reciprocal legitimate interests of farmers and holders of plant variety rights.

31 On the other hand, Article 94(1) of Regulation No 2100/94, the wording of which draws no distinction depending on the status of the person committing the infringement, refers specifically to the payment of reasonable compensation in the context of an action for infringement.

32 It follows that, in the circumstances of the case before the referring court, the remuneration for authorised planting, for the purposes of Article 14 of Regulation No 2100/94, cannot be taken as a basis for calculating the 'reasonable compensation' referred to in Article 94(1) of that regulation.

33 As an alternative basis for calculating that remuneration, the referring court mentions the remuneration payable for production under licence: the C-licence fee.

34 As was pointed out in paragraph 23 above, a farmer who has not fulfilled his obligations, in particular those under Article 14(3) of Regulation No 2100/94, read in conjunction with Article 8 of Regulation No 1768/95, cannot rely on the privilege accruing to farmers under that provision.

35 In consequence, he must be regarded as a third party who, without authorisation, has carried out one of the acts referred to in Article 13(2) of Regulation No 2100/94.

36 In so far as Article 94 of Regulation No 2100/94 is intended to make good the loss suffered by the holder of a plant variety who is the victim of an infringement, it must be held that, in the case before the referring court, since the Geistbecks cannot rely on the 'farmer's privilege' – namely, the derogation from Community plant variety rights allowed under Article 14(1) of Regulation No 2100/94 and as provided for in Article 14(3) of that regulation – that loss amounts to at least the fee that a third party would have had to pay for a C-Licence.

37 Consequently, in order to determine, in the circumstances of the case before the referring court, 'reasonable compensation' as provided for under Article 94(1) of Regulation No 2100/94, it is appropriate to take as the basis for that calculation an amount equivalent to the remuneration payable for licensed production.

38 By way of challenge to that interpretation, the Geistbecks claim, first, that the quality of propagating material from an initial harvest would be inferior to that referred to in Article 13(2) of Regulation No 2100/94. However, an argument along those lines is not relevant as the propagation of protected material cannot affect the existence of the intellectual property right attaching to that material.

39 Nor can the Geistbecks legitimately argue, secondly, that to consider an amount equivalent to the fee payable for production under the C-Licence as the basis for

calculating the 'reasonable compensation' payable, under Article 94(1) of Regulation No 2100/94, by a farmer who has not fulfilled the requirements set out in Article 14(3) of that regulation, read in conjunction with Article 8 of Regulation No 1768/95, would amount to acknowledging that the provisions of Article 94 give rise to punitive compensation, an outcome which is not in keeping with the objective of that provision.

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

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

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

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

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

The third question

45 By its third question, the referring court seeks to know, first, if Article 94 of Regulation No 2100/94 is to be interpreted as meaning that the payment of compensation for costs incurred to monitor compliance with the rights of the plant

variety holder enters into the calculation of the reasonable compensation provided for under Article 94(1) of Regulation No 2100/94, or whether such a payment enters into the calculation of the compensation for damage provided for under Article 94(2). Secondly, the referring court asks whether, in cases where the holder claims such damage, that compensation may be calculated on a lump sum basis, corresponding to double the compensation usually agreed or double the equitable remuneration provided for in the fourth indent of Article 14(3) of Regulation No 2100/94.

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

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

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

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

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

51 In those circumstances, the answer to the third question is that the payment of compensation for costs incurred for monitoring compliance with the rights of the plant variety holder cannot enter into the calculation of the 'reasonable compensation' provided for under Article 94(1) of Regulation No 2100/94.

Costs

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

On those grounds, the Court (First Chamber) hereby rules:

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

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

[Signatures]

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* Language of the case: German.