Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 14 June 2012[1]

Case C-56/11

Raiffeisen-Waren-Zentrale Rhein-Main eG
v
Saatgut-Treuhandverwaltungs GmbH

(Reference for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany))

(Community plant variety rights — Regulation (EC) No 2100/94 — Article 14 — Farmers' privilege — Regulation (EC) No 1768/95 — Article 9 — Supplier of processing services — Obligation of that processor to provide information to the holder of a plant variety — Temporal scope of that obligation — Request for information presented by the holder of a plant variety — Conditions — Indications establishing the holder's right to information — No obligation to present evidence of the existence of such indications)

I – Introduction

1. By its reference for a preliminary ruling, the Oberlandesgericht Düsseldorf (Germany) raises the question of the interpretation of Article 14(3) of Regulation (EC) No 2100/94[2] ('the basic regulation') on Community plant variety rights and of Article 9(3) of Regulation (EC) No 1768/95[3] ('the implementing regulation') implementing rules on the agricultural exemption provided for in Article 14(3) of the basic regulation.

2. The questions referred for a preliminary ruling have been raised in proceedings between a cooperative association called Raiffeisen-Waren-Zentrale-Rhein-Main eG ('Raiffeisen'), which is a supplier of processing services, and another association, Saatgut-Treuhandverwaltungs GmbH ('STV'), a body representing the interests of the holders of plant variety rights.[4] The dispute concerns a request for information from STV to Raiffeisen pursuant to Article 14(3), sixth indent, of the basic regulation, and Article 9(2) and (3) of the implementing regulation, in order to obtain information relating to certain marketing years for certified seed.

3. The questions referred for a preliminary ruling thus highlight the three-way relationship between the holders of protected plant rights, the farmers who make use of the derogation provided for in Article 14 of the basic regulation – also known as the 'farmers' privilege' – and the seed processing companies to which the holders may present, under the system established by the farmers' privilege, requests for information regarding the varieties which belong to the holders and which are the subject of processing services.

1 — Original language: French.

2 — Council Regulation of 27 July 1994 (OJ 1994 L 227, p. 1).

3 — Commission Regulation of 24 July 1995 (OJ 1995 L 173, p. 14).

4 — For further information on the activities of STV, see Case C-182/01 *Jäger* [2004] ECR I-2263, paragraph 17).

4. This reference for a preliminary ruling forms part of a series of references made by German courts concerning the interpretation of the basic regulation and the implementing regulation.[5] This reference concerns, more specifically, the temporal scope of the obligation of the supplier of processing services to provide information to the holder of a plant variety right, and the conditions which must be satisfied by a request for information presented by the holder to a supplier of processing services.

II – Legal framework

A – *The basic regulation*

5. According to Article 11(1) of the basic regulation, the Community plant variety right belongs to the breeder, defined as '[t]he person who bred, or discovered and developed the variety, or his successor in title'.

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

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

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

(a) production or reproduction (multiplication);

…

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

…'

7. The farmers' privilege is provided for in Article 14(1) of the basic regulation in the following terms:

'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.'

8. The conditions to give effect to the farmers' privilege and to safeguard the legitimate interests of the breeder and of the farmer are governed by Article 14(3) of that regulation. It provides, *inter alia*, in its second and sixth indents, as follows:

'– the product of the harvest may be processed for planting, either by the farmer himself or through services supplied to him ...

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

5 — See Case C-305/00 *Schulin* [2003] ECR I-3525; *Jäger*; Case C-336/02 *Brangewitz* [2004] ECR I-9801; and Joined Cases C-7/05 to C-9/05 *Deppe and Others* [2006] ECR I-5045. See also my Opinion in Case C-509/10 *Geistbeck*, pending before the Court.

B – *The implementing regulation*

9. Article 2 of the implementing regulation is worded as follows:

‘1. 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.

2. The legitimate interests shall not be considered to be safeguarded if one or more of these interests are adversely affected without account being taken of the need to maintain a reasonable balance between all of them, or of the need for proportionality between the purpose of the relevant condition and the actual effect of the implementation thereof.’

10. Article 9(2) and (3) concerns the information to be provided by the processor to the holder if no contract has been concluded between the holder and the processor:

‘2. … the processor shall, without prejudice to information requirements under other Community legislation or under legislation of Member States, on request of the holder, be required to provide a statement of relevant information to the holder. The following items shall be considered to be relevant:

(a) the name of the processor, the place of his domicile and the name and address registered for his business;

(b) the fact whether the processor has supplied a service of processing the product of the harvest belonging to one or more varieties of the holder for planting, where the variety or varieties were declared or otherwise known to the processor;

(c) if the processor has supplied such service, the amount of the product of the harvest belonging to the variety or varieties concerned, which has been processed for planting, by the processor, and the total amount resulting from that processing;

(d) the dates and places of the processing referred to in (c); and

(e) the name and address of the person or persons to whom he has supplied the service of processing referred to in (c), and the respective amounts.

3. The information under paragraph 2(b), (c), (d) and (e) shall refer to the current marketing year and to one or more of the three [6] preceding marketing years for which the holder has not yet made an earlier request in accordance with the provisions of paragraphs 4 or 5; however, the first marketing year to which the information refers, shall be the one in which the first of such requests was made in respect of the variety or varieties and the processor concerned.

4. Article 8(4) shall apply correspondingly.

…’

III – The main proceedings, the questions referred for a preliminary ruling and the procedure before the Court of Justice

11. Raiffeisen is a farming cooperative which offers farmers seed processing services by which it conditions harvested material for storage and future planting.

6 — The numeral adjective ‘three’ appears in all the other language versions of the implementing regulation. See point 25 et seq. of this Opinion.

12. Those services are offered, on the one hand, to the holders of plant variety rights, represented inter alia by STV, an association of holders of plant variety rights who, under planting contracts, have arranged for certified seeds to be propagated for marketing, and, on the other hand, to farmers who plant seeds in accordance with the farmers' privilege established in Article 14(3) of the basic regulation.

13. It is apparent from the order for reference that Raiffeisen carried out processing operations for various farmers for the marketing years 2005/2006 and 2006/2007, in connection with the growing of crops under contract for the holders of plant variety rights represented by STV.

14. After it had received statements relating to the growing of crops under contract from the farmers concerned, STV sent two series of requests for information to Raiffeisen concerning the processing operations it carried out. Some of those requests were presented after the end of the marketing year concerned.

15. Raiffeisen did not reply favourably to those requests, relying, in that regard, on three series of grounds for its refusal. First, it considered that the request for information should contain the indications that it carried out processing operations subject to the obligation to provide information laid down in the sixth indent of Article 14(3) of the basic regulation. Second, it considered that only a request for information made in the marketing year to which the information relates was relevant in law. Third, no indication of possible planting of seeds can be derived at all from processing operations which have taken place in connection with the growing of crops under contract for the holder.

16. STV brought an action against Raiffeisen for a response to the aforementioned requests for information. The court at first instance granted STV's application relating to information, holding that there was no limitation period for making requests for information, and that the statements of planting under contract constituted sufficient indications establishing the supplier's obligation to provide information, since a farmer who plants under a propagation contract has a specific possibility of planting the product of the harvest. Raiffeisen brought an appeal against that judgment before the Oberlandesgericht Düsseldorf.

17. Against that background, by decision received by the Court on 8 February 2011, the Oberlandesgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the obligation of the supplier of processing services to provide information laid down in the sixth indent of Article 14(3) of [the basic regulation] and Article 9(2) and (3) of [the implementing regulation] become established only if the request for information from the holder of the variety right is received by the supplier of processing services before the expiry of the marketing year (or the most recent marketing year where there are several) concerned by the request?

(2) If Question 1 is answered in the affirmative:

Is there a request for information "complying with the time-limit" where the holder claims in his request that he has some indication that the supplier of processing services has processed or intends to process for planting harvested material of the protected variety which the farmer named in the request has obtained by planting from propagating material of the protected variety, or must the supplier of the processing services also be furnished with evidence of the claimed indication in the request for information (for example, by providing a copy of the farmer's statements of planting the product of the harvest)?

(3) Can indications establishing the obligation of the supplier of processing services to provide information be derived from the fact that the supplier of processing services, as the agent of the holder of the plant variety right, performs a propagation contract for the production of consumption-related seed of the protected variety, which the holder of the plant variety right has concluded with the farmer effecting propagation, where and because the farmer is in fact granted the possibility, in performing the propagation contract, of using some of the propagation seed for planting?'

18. Written observations were submitted by the parties in the main proceedings and by the Spanish Government and the European Commission. The parties in the main proceedings and the Commission were represented at the hearing of 15 March 2012.

IV – Analysis

A – *Preliminary observations*

19. First of all, it is necessary to highlight the key elements of the system which underlies the farmers' privilege. According to the case-law of the Court of Justice, Article 14 of the basic regulation establishes a balance between, on the one hand, the interests of the holders of plant variety rights and, on the other, those of the farmers.

20. The farmers' privilege, which is the right of farmers, without the prior authorisation of the holder, to plant the product of the harvest obtained by planting propagating material of a variety subject to the privilege, is coupled with their obligation to provide information and to pay the holder of a plant variety right an equitable remuneration, which preserves the reciprocal legitimate interests of farmers and holders in their direct relations. [7]

21. As regards, secondly, the role of the supplier of processing operations, the second indent of Article 14(3) of the basic regulation specifies that the product of the harvest may be processed for planting either by the farmer or by a supplier of processing services. The right of that processor to carry out operations linked to the processing of the product of the harvest is therefore derived from the farmers' privilege. [8] The obligation of the suppliers of processing operations, like Raiffeisen in the present case, to provide information to the holder is based on the sixth indent of Article 14(3) of the basic regulation. The scope of that obligation and the specific rules which apply to it are set out in Article 9 of the implementing regulation.

22. For the purposes of examining the questions referred for a preliminary ruling, it is therefore necessary to keep in mind the requirement for balance which thus underlies the scheme established by Article 14 of the basic regulation and the implementing regulation.

7 — See, to that effect, the judgment in *Brangewitz*, paragraph 43. See also point 46 of my Opinion in *Geistbeck*.

8 — *Brangewitz*, paragraph 44.

B – *The temporal scope of the obligation to provide information*

23. The Court has already had the opportunity to express its views on the scope of the obligation of suppliers of processing operations to provide information. According to the Court, the holder must be authorised to present a request to a supplier of processing operations for information concerning one of his varieties subject to the privilege from a supplier of processing services where he has some indication that the latter has processed or intends to process the product of the harvest obtained by planting propagating material of that variety for planting. [9]

24. However, the Court has not expressed its views on the temporal aspects of the processor's obligation to provide information under Article 9(3) of the implementing regulation, which are the subject of the present case.

1. The period covered by the request

25. I should point out, first of all, that Article 9(2) of the implementing regulation specifies the content of the information which the supplier of processing operations is required to give. Article 9(3) governs the period to which the information to be provided under the second part of Article 9(2) refers. That period corresponds, as a rule, to the current marketing year and to one or more of the three preceding marketing years, in accordance with the first part of Article 9(3). [10]

26. In that regard, it should be pointed out that the language versions of Article 9(3) of that regulation diverge. Whereas the majority of the language versions, such as the versions in Spanish, Danish, German, English, Italian, Hungarian, Finnish and Swedish refer to one or more of the three preceding marketing years, the French version omits the numeral adjective 'three'.

27. Reference only to the French language version may therefore suggest that the possibilities for making a request for information are not limited in time. However, since it is impossible to draw definite conclusions solely from that divergence, it is necessary to examine the provision at issue in its context taking into account, in particular, its objective. [11]

28. The implementing regulation seeks to establish, as expressly stated in Article 2(2), a balance between the interests concerned. I consider that it would be contrary to that balance to interpret Article 9(3) of that regulation as meaning that a request for information may concern an unlimited number of preceding marketing years. On the contrary, in order to ensure the balance, required by that regulation, between the holder's need for information and interests of the supplier of processing operations, it is necessary to work on the assumption that the request for information referred to in Article 9 may cover up to three previous marketing years.

29. Moreover, a contrary interpretation would conflict with the need for legal certainty of the suppliers of processing operations, because they would be required to keep indefinitely information which might be required by the holders.

9 — *Brangewitz*, paragraph 53. See also *Schulin*, paragraph 63.

10 — According to Article 7(2) of the implementing regulation, the marketing year starts on 1 July of a given year and ends on 30 June of the subsequent calendar year.

11 — As is apparent from the case-law, the need for a uniform interpretation of the various language versions of a provision of European Union law requires that, in the case of divergence between those language versions, the provision in question be interpreted by reference to the purpose and general scheme of the rules of which it forms part. See, in that regard, inter alia, Case C-585/10 *Møller* [2011] ECR II-13407, paragraph 26 and the case-law cited.

30. That interpretation is, furthermore, corroborated by a reading of Article 8(3) of the implementing regulation. It is true that that article governs the farmer's obligation to provide information but, since its content is almost identical to that of Article 9 of the same regulation, a parallel may be drawn with it. In that regard, I note, as does the Commission, that the presence of the word 'three' in the corresponding provision of Article 8(3) of the regulation may be interpreted as expressing the legislature's wish to place a temporal limit on the scope of the request for information in accordance with the objective of establishing a balance between the interests concerned.

2. Limitations concerning the period covered by the request

31. It is apparent from the wording of Article 9(3) of the implementing regulation that the period to which the processor's obligation to provide information refers is, however, subject to a dual limitation. First, under the first part of Article 9(3) of that regulation, that obligation ceases for any marketing year for which the holder has already made a request for information.

32. Secondly, the second part of Article 9(3) of the implementing regulation also states that the first marketing year to which the information refers shall be the one 'in which the first of such requests was made in respect of the variety or varieties and the processor concerned'. [12]

33. The obligation of the supplier of processing operations to provide information is thus subject to the presentation of a request for information by the holder. Moreover, that request relates initially only to the marketing year during which that holder invokes his right to receive information. Furthermore, under the first part of Article 9(3) of the implementing regulation, information may be required for a period extending to the three preceding marketing years provided that the holder has already requested the supplier of processing operations for information during the first of the preceding marketing years.

34. In other words, in the case of a first request concerning one or more varieties, the request may concern only the marketing year during which it has been presented to the processor. In the light of the need to ensure a balance between the interests concerned, a supplier of processing operations who has not yet received a request for information for a variety must therefore be protected against any retroactive obligation to provide information.

35. That does not apply where a request for information concerning a specific variety has already been made previously to the supplier of processing operations. In that situation, the period for which the necessary information must be provided is defined by the first part of Article 9(3). In other words, the date of the request for information and the 'current marketing year' are the starting point for calculating the three preceding marketing years affected by a request for information.

C – *The indications to be provided by the holder*

36. In addition to the temporal aspects of the obligation of the supplier of processing operations to provide information which have just been referred to, the request for a preliminary ruling concerns, as a subsidiary matter, the nature of the indications to be provided by the holder in support of his request for information in accordance with Article 9(3) of the implementing regulation.

12 — As regards the farmer's obligation to provide information, it should be pointed out that Article 8(3) of the implementing regulation contains a simlar provision.

37. It should be pointed out, first of all, that the request for a preliminary ruling does not state whether, in the present case, it is a question of a 'first' request within the meaning of the second part of Article 9(3) of that regulation. Consequently, it is also necessary to reply to the second question, by which the national court asks whether indications of planting or an operation for the purpose of planting must further be justified by evidence contained in the request for information for this to give rise to the processor's obligation to provide information, and therefore for it to comply with the time-limits within the meaning of the second part of Article 9(3) of the implementing regulation.

1. The holder's obligation to have some indication that the processor has carried out or intends to carry out processing operations

38. I should like to point out at the outset that the implementing regulation does not expressly require the holder to identify in his request for information the indications of planting which he has. The fact remains that the existence of the evidence relied on is in an unwritten condition, extracted by the Court of Justice in the aforementioned judgments in *Schulin* and *Brangewitz,* which must, in any event, be satisfied.

39. In that regard, I note that, in his opinion in *Brangewitz*, Advocate General Ruiz-Jarabo Colomer drew a convincing distinction between the requirements which give rise to the obligation to provide information of farmers, on the one hand, and of suppliers of processing operations, on the other. [13]

40. First of all, as is apparent from the judgement in *Schulin*, the holder cannot present a request for information to a farmer simply because the latter belongs to that profession. On the contrary, he must have some indication that the farmer has used or will use the derogation provided for in Article 14 of the basic regulation. [14]

41. Secondly, with regard to the suppliers of processing operations, there is a strong likelihood that seed-processing undertakings will, in the exercise of their profession, process propagating material from a protected variety. In light of the fact that, if they have not signed a contract, the seed-processing undertaking is not connected to the holder by any legal relationship at all, and of the fact that farmers use such undertakings when they rely on the derogation, it appears logical that holders should be entitled to seek information from both in order to assert their right to receive equitable remuneration. [15]

42. According to that reasoning, the indications to be put forward for the purposes of presenting a request for information to a farmer are more numerous than in the case of a request made to the suppliers of processing operations. However, the Court does not seem to have followed the Advocate General's proposal set out above, observing that the holder must be authorised to present a request for information to a supplier of processing operations concerning one of his varieties affected by the farmers' privilege provided that *he has some indication that the latter has processed or intends to process* the product of the harvest obtained by planting propagating material of that variety for planting. [16]

13 — See point 34 et seq. of the Opinion of Advocate General Ruiz-Jarabo Colomer in *Brangewitz*.

14 — *Schulin*, paragraph 57.

15 — See point 37 et seq. of the Opinion of Advocate General Ruiz-Jarabo Colomer in *Brangewitz*. The Advocate General also observed, in point 38 of his Opinion, that 'where a holder requests information from a processor ..., the holder must ascertain, first of all, whether the processor has processed seeds belonging to any of his varieties, and, if that is the case, the holder may then go on to enquire about quantities, dates, places and recipients of the service. If, for the purpose of contacting a supplier of processing services, the legislature had intended that a holder must have an indication that the supplier concerned had processed protected material at his facility (for example, using the information which farmers are required to provide under Article 8(2)(d) of Regulation No 1768/95), Article 9 would have been worded to the effect that the processor was merely required to confirm information of which the holder was already aware. However, as is clear from Article 9(2)(b) and (e), that is not the case.'

16 — *Brangewitz*, paragraph 53.

43. Consequently, it seems that the Court does not draw a distinction between the different addressees of the requests for information presented by the holder. I shall therefore conduct my analysis on the basis of that premiss.

2. The holder is under no obligation to adduce evidence of the existence of indications

44. According to the aforementioned reasoning of the Court, it is therefore sufficient if the holder has some indication that processing operations have been carried out or are planned by the supplier for him to be able to present a request for information. On the other hand, the Court did not require the holder to adduce evidence of such indication.

45. As regards the nature of the indications which establish the holder's right to present a request for information and the obligation of the supplier of processing operations to provide him with information, it is necessary, first, to point out the particular importance of the need to safeguard the reciprocal legitimate interests of the holder and the farmer, in accordance with Article 14(3) of the basic regulation and Article 2 of the implementing regulation.

46. In that regard, it must be made clear that, while the obligation of the supplier of processing services to provide information depends on the use by a farmer of the derogation laid down in Article 14(1) of the basic regulation and his decision to have recourse to the services of the processor, it is linked to the plant varieties which he has processed, not to his customer the farmer. [17] Consequently, when the holder presents a request for information to the supplier of processing services, the latter is required to provide the relevant information relating not only to the farmers for whom the holder has some indication that the processor has provided or intends to provide such services but also to all other farmers for whom he has provided or intends to provide them, where the variety in question has been declared or is otherwise known to him. [18]

47. In order to meet the need for balance which underlies the farmers' privilege, in particular in connection with the implementing regulation which implements that privilege, the holder must be authorised to request information from a supplier of processing operations where he has an indication that the processor has processed or intends to process, for planting, harvested material obtained by planting propagating material of that variety.

48. Indeed, under Article 9(2) of the implementing regulation, the supplier of processing operations is required to provide the holder with a statement of relevant information, the content of which is specified by that provision. Such a statement is necessary where the holder has only an indication of the fact that the supplier of processing services has processed or intends to process the product of the harvest obtained by farmers by planting propagating material of a variety of the holder for planting. [19]

49. As is apparent from the case-law of the Court of Justice, the acquisition of propagating material of a protected plant variety which belongs to the holder must be considered to be such an indication. [20] Similarly, I incline to the view that the information provided by farmers in accordance with Article 8 of the implementing regulation may constitute indications which establish the obligation of the supplier of processing operations to provide information.

17 — *Brangewitz*, paragraph 62.

18 — *Brangewitz*, paragraph 65.

19 — *Brangewitz*, paragraphs 61 and 63. See also, as regards the farmer's obligation to provide information, the judgment in *Schulin*, paragraphs 63 and 64.

20 — *Schulin*, paragraph 65.

50. Following the example of the Commission, I consider that it is for the courts of the Member States to determine case by case whether or not such indications within the meaning of the case-law exist. In their assessment, they must take into account all the specific factors and circumstances of the case in hand. In that regard, indications required by the case-law may, for example, be inferred from a planting under contract of a protected variety in order to produce marketable seeds under a licence granted by the holder.

51. Finally, it should be pointed out that the circumstances which give rise to the holder's right to information both from the former and from the supplier of processing operations are few. Consequently, the fact that a planting or processing operation has been carried out or, at least, is planned, for such a planting, may constitute a relevant indication, since such factors establish the rights of the holder under Article 14(3) of the basic regulation.

V – Conclusion

52. In the light of all the foregoing conclusions, I propose that the Court reply to the questions referred for a preliminary ruling by the Oberlandesgericht Düsseldorf as follows:

1. The obligation of the supplier of processing services to provide information under the sixth indent of Article 14(3) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, and Article 9(2) and (3) of Commission Regulation (EC) No 1768/95 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation No 2100/94 becomes established provided that the request for information presented by the holder is received by the supplier of processing services before the expiry of the marketing year (or the most recent marketing year where there are several) concerned by the request. Nevertheless, if it is the 'first of such requests' within the meaning of the second part of Article 9(3) of Regulation No 1768/95, such a request must be presented during the current marketing year.

2. It is not necessary for a request for information, presented in accordance with the second part of Article 9(3) of Regulation No 1768/95, to be accompanied by evidence of the existence of the indications referred to in the request for information. Accordingly, it is sufficient for the holder to state in his request that he has some indication that the supplier of processing services has processed or intends to process for planting harvested material which a given farmer has obtained by planting propagating material of the protected variety.

3. It is for the national court to assess the facts of the case before it taking account of all the circumstances of the case in order to determine whether there are indications that the supplier of processing services has carried out, or intends to carry out, such operations.