Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 18 September 2019[1]

Case C-176/18

Club de Variedades Vegetales Protegidas
v
Adolfo Juan Martínez Sanchís

(Request for a preliminary ruling
from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling — Community plant variety rights — Regulation (EC) No 2100/94 — Article 13(2) and (3) — Effects of community plant variety rights — Cumulative protection scheme — Planting of variety constituents and harvesting the fruit — Distinction between acts effected in respect of variety constituents and those concerning harvested material — Concept of 'unauthorised use of variety constituents' — Article 95 — Provisional protection)

I. Introduction

1. By its request for a preliminary ruling, the Tribunal Supremo (Supreme Court, Spain) asks the Court to interpret Article 13(2) and (3) of Regulation (EC) No 2100/94 on Community plant variety rights.[2]

2. The request has been made in proceedings between Club de Variedades Vegetales Protegidas ('CVVP'), an entity mandated to assert the rights of the holder of a Community plant variety right for mandarin trees, and the owner of an agricultural undertaking. CVVP alleges that the latter planted trees of that protected plant variety and harvested and marketed the fruit, without obtaining authorisation from the rightholder or paying an equitable remuneration.

3. The referring court asks, in essence, whether, where plants belonging to a protected plant variety were purchased by a farmer from a nursery in the time between publication of the application for a Community plant variety right and grant thereof, the planting of those plants and the harvesting and subsequent sale of the fruit require, on the one hand, the payment of an equitable remuneration to the plant breeder, in so far as those acts were effected during that time and, on the other, authorisation from the plant breeder, to the extent that those acts continue after the grant of Community protection.

1 Original language: French.

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

II. Legal context

A. Regulation No 2100/94

4. Article 5(2) and (3) of Regulation No 2100/94 provides:

‘2. For the purpose of this Regulation, “variety” shall be taken to mean a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a plant variety right are fully met, can be:

– defined by the expression of the characteristics that results from a given genotype or combination of genotypes,

– distinguished from any other plant grouping by the expression of at least one of the said characteristics,

and

– considered as a unit with regard to its suitability for being propagated unchanged.

3. A plant grouping consists of entire plants or parts of plants as far as such parts are capable of producing entire plants, both referred to hereinafter as “variety constituents”.’

5. In accordance with Article 13(1) to (3) of that regulation:

‘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 authorization of the holder:

(a) production or reproduction (multiplication);

(b) conditioning for the purpose of propagation;

(c) offering for sale;

(d) selling or other marketing;

(e) exporting from the Community;

(f) importing to the Community;

(g) stocking for any of the purposes mentioned in (a) to (f).

The holder may make his authorization 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 unauthorized 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.’

6. Article 94 of that regulation, entitled 'Infringement', states in paragraph 1 thereof:

'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.'

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

B. The UPOV Convention

8. The European Union is party to the International Convention for the Protection of New Varieties of Plants.[3] Article 13 of that convention, entitled 'Provisional Protection', is worded as follows:

'Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder's right and the grant of that right. Such measures shall have the effect that the holder of a breeder's right shall at least be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 14. A Contracting Party may provide that the said measures shall only take effect in relation to persons whom the breeder has notified of the filing of the application.'

9. In accordance with Article 14 of the UPOV Convention:

'(1) [*Acts in respect of the propagating material*] *(a)* Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

(i) production or reproduction (multiplication),

(ii) conditioning for the purpose of propagation,

(iii) offering for sale,

(iv) selling or other marketing,

(v) exporting,

(vi) importing,

(vii) stocking for any of the purposes mentioned in (i) to (vi), above.

3 Signed under the aegis of the International Union for the Protection of New Varieties of Plants (UPOV) on 2 December 1961, as revised at Geneva on 10 November 1972, 23 October 1978 and 19 March 1991 ('the UPOV Convention'). The Union acceded to that convention by Council Decision 2005/523/EC of 30 May 2005 approving the accession of the European Community to the [UPOV Convention] (OJ 2005 L 192, p. 63).

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [*Acts in respect of the harvested material*] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)*(a)* in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.'

III. The dispute in the main proceedings, the questions referred and the procedure before the Court

10. On 22 August 1995, Nadorcott Protection SARL filed an application for a Community plant variety right in respect of a variety of mandarin trees, named Nadorcott, with the Community Plant Variety Office ('the CPVO'). The application was published in the *Official Gazette of the Community Plant Variety Office* of 22 February 1996.

11. The CPVO awarded the grant on 4 October 2004, which was published in the *Official Gazette of the Community Plant Variety Office* of 15 December 2004.

12. The Federación de Cooperativas Agrícolas Valencianas (Federation of Agricultural Cooperatives of Valencia, Spain) challenged that decision before the Board of Appeal of the CPVO. The appeal suspended the grant of the plant variety right until it was dismissed by decision of 8 November 2005, published in the *Official Gazette of the Community Plant Variety Office* of 15 February 2006.

13. The decision of the Board of Appeal of the CPVO was contested before the General Court of the European Union. That action did not have suspensory effect on the rights derived from the grant of the plant variety and was rejected.[4]

14. Nadorcott Protection granted Carpa Dorada SA an exclusive licence of the rights to the Nadorcott plant variety. Carpa Dorada SA appointed the appellant in the main proceedings, CVVP, to bring proceedings based on the infringement of those rights against the respondent, Mr Adolfo Juan Martínez Sanchís.

15. Mr Martínez Sanchís is the owner of two parcels of land on which 506 trees of the Nadorcott plant variety were planted in Spring 2005 and 998 trees in Spring 2006, respectively. The plants were purchased from a nursery open to the public in the time between publication of the application for the protection of that variety and grant thereof on 15 February 2006. Since then, a total of 100 trees have been replaced on those parcels of land.

16. CVVP brought a claim against Mr Martínez Sanchís on the ground that he had infringed the rights which under the Nadorcott plant variety right belong to its holder and licensee by planting, grafting and commercially exploiting trees of that variety. In particular, CVVP brought, on the one hand, proceedings for provisional protection in respect of the infringements that took place before the grant of the variety right and, on the other, infringement proceedings in respect of infringements that took place after that date. In addition to a declaration of infringement, CVVP sought the cessation of those acts, including the marketing of the fruit obtained from planting that variety. CVVP also requested compensation for the loss incurred as a result of the infringements relating to before and after 15 February 2006, and publication of the judgment.

4 Judgment of 31 January 2008, *Federación de Cooperativas Agrarias de la Comunidad Valenciana* v *CPVO — Nador Cott Protection (Nadorcott)* (T-95/06, EU:T:2008:25).

17. The court at first instance dismissed the application on the basis that the action was time-barred in accordance with Article 96 of Regulation No 2100/94.[5] In addition, that court considered, in essence, that the conditions provided for in Article 13(3) of that regulation were not satisfied and therefore the holder of the plant variety right was not in a position to oppose the acts effected in respect of the harvested material of the protected variety. Accordingly, the court found that the holder had not established that the reproduction of the mandarin trees in the nursery had taken place without his authorisation or that he had not had a reasonable opportunity to exercise his right at the reproduction stage in respect of those variety constituents.

18. On appeal, the Audencia (High Court, Spain) held that the action was not time-barred and dismissed the action because Mr Martínez Sanchís had purchased the plants in an establishment open to the public, at a time before the grant of the plant variety and apparently in accordance with the law. In those circumstances, the Audencia took the view that, pursuant to Article 85 of the Spanish Commercial Code, the acquisition of the plants by Mr Martínez was unchallengeable.

19. CVVP brought an appeal on a point of law before the Tribunal Supremo (Supreme Court) against the judgment in the appeal proceedings. By decision of 6 March 2018, received at the Court on 7 March 2018, that court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) When a farmer has purchased some plants belonging to a plant variety from a nursery (establishment owned by a third party) and planted them before the grant of the variety right has come into effect, in order for the subsequent activity of that farmer of collecting the successive harvests to be covered by the "ius prohibendi" in Article 13(2) of Regulation No 2100/94, must the requirements under Article 13(3) be satisfied for Article 13(2) to be interpreted as relating to harvested material? Or must Article 13(2) be interpreted as meaning that the activity of harvesting is an act of production or reproduction of the variety which results in "harvested material", whose prohibition by the holder of the plant variety does not require the conditions in Article 13(3) to be satisfied?

(2) Is an interpretation to the effect that the cumulative protection scheme covers all of the acts listed in Article 13(2) [of Regulation No 2100/94] that refer to "harvested material" and also the harvest itself, or that it covers only acts subsequent to the collection of that harvested material, whether the storage or marketing of that material, compatible with Article 13(3) of [that regulation]?

(3) In applying the scheme for extending the cumulative protection to "harvested material", provided for in Article 13(3) of Regulation No 2100/94, in order for the first condition to be satisfied, is it necessary for the purchase of the plants to have taken place after the holder obtained Community protection for the plant variety, or is it sufficient that at that time the plant variety enjoyed provisional protection, as the purchase took place in the period between publication of the application and the grant of the plant variety right coming into effect?'

20. CVVP, Mr Martínez Sanchís, the Greek Government and the European Commission submitted written observations. CVVP, the Greek Government and the Commission were represented at the hearing on 16 May 2019. Mr Martínez Sanchís responded in writing, on 15 May 2019, to the questions raised by the Court for the purpose of the hearing.

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

IV. Analysis

A. The first and second questions

21. The first two questions referred for a preliminary ruling, which I shall examine together, concern the demarcation of the respective scope of Article 13(2) and (3) of Regulation No 2100/94.

22. Those provisions define the effects of community plant variety rights by establishing a 'cumulative protection scheme' which consists of a 'primary' right covering variety constituents and a 'secondary' right covering harvested material.[6]

23. Under that scheme, all of the acts referred to in Article 13(2) of Regulation No 2100/94 require, on the one hand, the authorisation of the holder where they concern the *variety constituents* themselves.[7] The concept of 'variety constituents' means, in accordance with Article 5(3) of that regulation, 'entire plants or parts of plants as far as such parts are capable of producing entire plants'.

24. On the other, Article 13(3) of Regulation No 2100/94 provides that where the acts set out in paragraph 2 concern *harvested material*, the authorisation of the holder is required only if two conditions are met. First, the harvested material must have been obtained through the unauthorised use of variety constituents.[8] Second, the holder must not have had reasonable opportunity to exercise his right in relation to the said variety constituents.

25. The primary and secondary rights described above amount, respectively, to protection schemes covering 'propagated material' and 'harvested material' established in Article 14(1) and (2) of the UPOV Convention, the wording of which is largely reproduced in Regulation No 2100/94. As is apparent from the preparatory work on and wording of that regulation, the scheme established by it is based on that set out in the UPOV Convention.[9] The elements of interpretation relating to that convention are therefore relevant for the interpretation of that regulation.

26. Against that background, the referring court asks, by its first and second questions, whether acts such as *planting* trees of a protected variety and *harvesting the fruit* are covered by the primary right established in Article 13(2) of Regulation No 2100/94,[10] so that they require the authorisation of the holder of the plant variety right irrespective of whether the conditions set out in Article 13(3) have been met.[11]

6 See judgment of 20 October 2011, *Greenstar-Kanzi Europe* (C-140/10, EU:C:2011:677, paragraph 26). Article 13(4) of Regulation No 2100/94 provides, moreover, for a so-called 'third' right covering products obtained directly from propagating or harvested material of the protected variety. That right is outside the scope of the present case.

7 The concept of 'holder' of the Community plant variety right used in Article 13(1) to (4) of Regulation No 2100/94 differs to that of 'breeder' defined in Article 11 of that regulation as the 'person who bred, or discovered and developed the variety, or his successor in title'. The person who discovered and developed the variety falls within the scope of the 'breeder' before the grant of the plant variety right, after which time he also becomes the 'holder' of the plant variety right.

8 As argued by CVVP and the Commission, the first condition set out in Article 13(3) of Regulation No 2100/94 may be regarded as the specific expression of the general rule of exhaustion set out in Article 16 thereof. In accordance with that provision, 'the Community plant variety right shall not extend to acts concerning any material of the protected variety … which has been disposed of to others by the holder or with his consent, in any part of the Community, or any material derived from the said material' unless such acts involve further propagation of the variety in question, except where such propagation was intended when the material was disposed of or the export of variety constituents into a third country which does not protect the variety constituents, except where the exported materials are for final consumption purposes.

9 See Commission of the European Communities, Proposal for a Council Regulation (EEC) on Community plant variety rights of 30 August 1990 (COM(90) 347 final, p. 2). See, also, recital 29 of Regulation No 2100/94.

10 The concept of 'planting' is used in that context to refer to the planting of a variety constituent and all acts related to maintaining that constituent which seek to maximise the production of flowers or fruit.

11 Provided of course that that right is not exhausted in accordance with Article 16 of Regulation No 2100/94. In the present case, CVVP claims, without being challenged in that regard by the other interested parties, that the holder's plant variety right has not been exhausted, in so far as he did not authorise the propagation of trees of the Nadorcott plant variety by the nursery.

27. The significance of those questions in the resolution of the dispute in the main proceedings consists, moreover, in establishing whether acts related to the *marketing of fruit* are covered by the secondary right established in Article 13(3) of Regulation No 2100/94, even though the sale of the plants to Mr Martínez Sanchís took place before the grant of the variety right. That issue is related to the third question referred for a preliminary ruling, and for that reason I shall address it in the second part of my analysis. [12]

28. According to CVVP, planting protected variety constituents and the harvesting of fruit amount to acts relating to the 'production' of those constituents covered by the primary right established in Article 13(2)(a) of Regulation No 2100/94. By contrast, Mr Martínez Sanchís, the Greek Government and the Commission consider that neither the planting of protected variety constituents, nor harvesting the fruit from protected variety constituents, amount to acts effected in respect of variety constituents covered by the primary right established in Article 13(2) of that regulation.

29. I share the latter view.

30. In that regard, the *wording* of Article 13(2)(a) of Regulation No 2100/94, in so far as it refers to acts of production or reproduction in respect of variety constituents — in contrast with harvested material referred to in Article 13(3) — describes, according to the usual meaning of those words, acts related to the production of new varieties rather than the production of fruit.

31. On this view, the argument put forward by CVVP that the concept of 'production' necessarily covers acts related to planting and the harvesting of fruit, except to deprive that concept of specific content in its own right which is separate from that of the concept of 'reproduction' used in the same provision, cannot be upheld. I take the view that the joint use of those two words simply makes it clear that the acts referred to in Article 13(2)(a) of Regulation No 2100/94 cover both the propagation of variety constituents by means of vegetative propagation (by grafting, inter alia) [13] and the multiplication of variety constituents through the generation of new genetic material. [14]

32. Moreover, the *history* of the UPOV Convention, as revised in 1991, reveals the intention of its authors not to include the use of reproductive material for the purpose of producing a harvest amongst the acts which require the authorisation of the breeder. That inclusion was, nevertheless, specifically referred to in Article 14(1)(a) of that convention as initially proposed by the UPOV [15] — a reference which would, moreover, have been unnecessary if the concept of 'production', also referred to in that provision, already covered such use. [16]

33. In that regard, several proposals for amendments to support the insertion of the use of reproductive material for the production of cut flowers or fruit among the acts referred to in Article 14(1)(a) of the UPOV Convention, put forward during the Diplomatic Conference which led to its adoption, motivated the creation of a working group mandated to examine that issue. [17] As observed by the Commission at the hearing, that working group and, subsequently, the authors of the UPOV Convention rejected those proposals.

12 See points 42 and 43 of this Opinion.

13 Accordingly, in the event that Mr Martínez Sanchís propagated the trees of the Nadorcott plant variety by grafting — as was, according to the order for reference, alleged by CVVP in its action and subject to verification by the referring court — CVVP could rely on the primary right provided for in Article 13(2)(a) of Regulation No 2100/94. I would point out, in that regard, that CVVP has not made any such allegations in the proceedings before the Court and that Mr Martínez Sanchís disputes the fact that he committed acts relating to the multiplication of those variety constituents.

14 See, to that effect, Würtenberger, G., van der Kooij, P., Kiewiet, B. and Ekvad, M., *European Union Plant Variety Protection*, 2nd ed., Oxford University Press, Oxford, 2015, p. 128.

15 See Article 14(1)(a)(viii) of the Basic Proposal prepared by the UPOV (Records of the Diplomatic Conference for the revision of the International Convention for the Protection of New Varieties of Plants, Geneva, 1991) ('the Records of the 1991 Diplomatic Conference'), Basic Texts, p. 28 and Summary Minutes, paragraphs 859 to 876).

16 See, in that regard, in particular, Records of the 1991 Diplomatic Conference, Summary Minutes, paragraphs 1024 and 1534.2.

17 Records of the 1991 Diplomatic Conference, Summary Minutes, paragraphs 1005 to 1030.

34. It was decided, in balance, to recognise, in Article 14(1)(b) of the UPOV Convention (the content of which is reproduced in the last sentence of Article 13(2) of Regulation No 2100/94), the breeder's power to make the authorisation of the acts for which his consent is required subject to certain contractual conditions and restrictions.[18] These may concern, inter alia, the methods for planting the variety constituents and harvesting the fruit from variety constituents, the multiplication of which is subject to the breeder's authorisation.[19]

35. Consequently, Article 14(1)(a) of the UPOV Convention and Article 13(2) of Regulation No 2100/94 do not entitle the holder of the plant variety right to prohibit the exploitation as such of variety constituents with a view to the production of a crop. As the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties (CIOPORA) found 'with regret and bitterness' in response to the decision adopted during the Diplomatic Conference, the UPOV Convention, by means of Article 14(2) thereof (which, I would point out, corresponds to Article 13(3) of Regulation No 2100/94), 'did no more than to give the breeder an indirect means — through the cut flower or fruit — of controlling after the act any propagating material that had escaped his control under Article 14(l)(a) [of that convention]'.[20]

36. In the light of the foregoing, I consider that acts related to planting protected variety constituents and the harvesting of fruit do not fall within the scope of acts in respect of protected variety constituents referred to in Article 13(2) of Regulation No 2100/94. Consequently, the holder is not entitled to invoke the primary right established by that provision against the farmer who has effected such acts. The holder may, however, invoke the secondary right provided for in Article 13(3) of that regulation to oppose, in respect of harvested material, the acts listed in paragraph 2 of that article (such as the marketing of fruit), provided that the two conditions set out in paragraph 3 of that article have been met.[21]

B. The third question

37. The third question referred for a preliminary ruling concerns the relationship between the secondary right provided for in Article 13(3) of Regulation No 2100/94 and the provisional protection scheme established in Article 95 of that regulation. By its question, the referring court asks whether, in order to meet the first condition set out in Article 13(3) of that regulation — according to which the harvested material must have been obtained through the 'unauthorised use' of variety constituents of the protected variety — the purchase of the plants must have taken place after the grant of Community protection.

38. As a preliminary point, I would point out the distinction made by Regulation No 2100/94 between the 'provisional protection' and 'definitive protection' schemes of plant variety rights.

18 Records of the 1991 Diplomatic Conference, Summary Minutes, paragraphs 1529.2, 1529.3 and 1543. See, also, the Report of the Working Group which is included in the conference documents (Records of the 1991 Diplomatic Conference, p. 145 to 148).

19 For example, in the case giving rise to the judgment of 20 October 2011, *Greenstar-Kanzi Europe* (C-140/10, EU:C:2011:677, paragraph 10), the agreements between the breeder of the protected variety of apple trees and the members of the marketing network of fruit from that variety of trees involved 'specifications' containing restrictions on, inter alia, the production of those fruits.

20 Records of the 1991 Diplomatic Conference, Summary Minutes, paragraph 1534.3.

21 That conclusion is without prejudice to the right of the holder, to which CVVP, Mr Martínez Sanchís and the Commission refer, to oppose the acts set out in Article 13(2) of Regulation No 2100/94 done in respect of harvested material, even where the conditions set out in paragraph 3 of that article have not been met, provided that the harvested material can be used for further reproduction (see, in that regard, UPOV Council, 'Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention', 24 October 2013 ('the Explanatory Notes on Acts in Respect of Harvested Material'), p. 4, paragraph 3). In such circumstances, the harvested material amounts, in reality, to 'variety constituents' as defined in Article 5(3) of that regulation. The rights of the holder of a Community plant variety right are, however, limited by Article 14(1) of that regulation according to which 'notwithstanding Article 13(2), and for the purposes of safeguarding agricultural production, farmers are authorized 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'. In the present case, CVVP stated that the fruits of the Nadorcott variety cannot be used for the generation of new trees of that variety, which can only be obtained by asexual reproduction techniques such as grafting.

39. Those schemes concern the remedies available to the breeder in the event that a third party effects one of the acts set out in Article 13(2) of Regulation No 2100/94. In accordance with Article 94(1)(a) of that regulation, the breeder may bring an action to enjoin an infringement and/or to pay an equitable remuneration against whosoever effects one of those acts without being entitled to do so, in respect of a variety for which a Community plant variety right has been granted. Article 95 of that regulation provides that, where a person has, in the time between publication of the application for a Community plant variety right and grant thereof ('the provisional protection period'), effected an act 'that he would be prohibited from performing subsequent thereto', he may only be required to pay reasonable compensation. [22]

40. So far as concerns the interpretation of Article 13(3) of Regulation No 2100/94, none of the interested parties which submitted observations to the Court dispute, *in the first place*, that the concept of 'use' set out therein refers to the performance of any of the acts set out in Article 13(2). [23] That conclusion is easily understood in the light of the objective and general logic of the cumulative protection scheme established by those provisions. The purpose of that scheme is to enable the breeder to assert his rights over the fruit produced from the protected variety constituents where the latter has not been able to bring proceedings against the person who has effected an act set out in Article 13(2) in respect of the variety constituents themselves. [24]

41. In the present case, the acts referred to in Article 13(2) of Regulation No 2100/94 concern variety constituents, in respect of which the date is relevant for the purpose of verifying whether the first condition provided for in Article 13(3), consisting of the multiplication and marketing of those plants by the nursery (to which 'the purchase of plants' mentioned in the third question referred for a preliminary ruling corresponds), has been met. It follows, however, from the answer I propose for the first and second questions referred that acts related to the planting and the harvesting of fruit do not fall within the scope of acts in respect of protected variety constituents within the meaning of Article 13(2) of Regulation No 2100/94.

42. This highlights the link between those two questions, on the one hand, and the third question referred for a preliminary ruling, on the other. By its arguments put forward in response to the first and second questions referred, CVVP seeks to establish that the first condition set out in Article 13(3) of Regulation No 2100/94 has been met in the present case, so far as concerns acts related to the marketing of fruit subsequent to the grant of the plant variety right, *regardless of the answer that the Court gives to the third question referred*.

43. CVVP's approach is explained by the fact that, while the propagation and sale of mandarin trees by the nursery took place during the provisional protection period, acts related to planting the trees and the harvesting of fruit by the farmer continued after the grant of the plant variety right. By regarding those acts to be similar to acts related to the production of variety constituents covered by the primary right provided for in Article 13(2)(a) of Regulation No 2100/94, CVVP claims that acts related to planting mandarin trees and the harvesting of fruit constituted 'unauthorised use' of protected variety constituents, within the meaning of Article 13(3), even though that concept covers only acts performed in respect of those constituents after the grant of the plant variety right.

44. That argument should be rejected for the reasons set out in my analysis of the first and second questions referred.

22 That provision implements the obligation placed on the contracting parties to the UPOV Convention under Article 13 thereof to provide 'measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder's right and the grant of that right'.

23 See, to that effect, with regard to the corresponding provision in Article 14(2) of the UPOV Convention, UPOV Council, 'Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention', 6 April 2017 ('UPOV Council Guidance'), p. 57.

24 See, also, in that regard, Records of the 1991 Diplomatic Conference, Summary Minutes, paragraphs 915 to 934.

45. *In the second place*, the interested parties which submitted observations to the Court dispute, by contrast, the meaning of the expression 'unauthorised' used in Article 13(3) of Regulation No 2100/94.

46. On the one hand, according to CVVP, unauthorised use of variety constituents occurs whenever any act referred to in Article 13(2) of Regulation No 2100/94 is effected without the consent of the breeder. CVVP observes that, during the provisional protection period, the breeder is not entitled to prohibit the performance of such an act — the breeder may only request equitable remuneration under Article 95 of that regulation. Consequently, any such act effected during that period would amount to unauthorised use, even where equitable remuneration had been paid to the breeder, since the latter could not consent to its performance. [25]

47. On the other, Mr Martínez Sanchís and the Commission claim, in essence, that, in so far as the acts listed in Article 13(2) of Regulation No 2100/94 do not require authorisation from the breeder during the provisional protection period, those acts cannot be regarded as 'unauthorised use' of the variety constituents if they have been effected during that period. In the alternative, the Commission claims, in the same way as the Greek Government, that those acts must, if effected during the provisional protection period, be regarded as unauthorised if they have not given rise to the payment of an equitable remuneration. [26]

48. The substance of the position adopted by Mr Martínez Sanchís and by the Commission is, in my view, unambiguous in the light of the general logic of the provisional protection scheme and the secondary right.

49. I would point out, in that regard, that the rights which Article 13(3) of Regulation No 2100/94 confers on the holder in respect of harvested material are secondary, in that they may be invoked only in situations where the breeder cannot exercise his rights under Article 13(2) against the person (in the present case, the nursery) who has effected one or more of the acts referred to in that provision (in the present case, multiplication and marketing) in respect of the protected variety constituents. [27]

50. On this view, the concept of 'unauthorised use' seems to me to have meaning only to the extent that one of the acts listed in Article 13(2) of Regulation No 2100/94 has been effected in respect of the variety constituents without the consent of the breeder *even though his authorisation was required*. It is only when the requirement to obtain the consent of the breeder has not been met that the latter may assert his rights over the harvested material.

51. Article 95 of Regulation No 2100/94 does not establish a prior authorisation system; merely a system of payment of remuneration to the breeder. [28] During the provisional protection period, the holder is not entitled to prohibit the acts listed in Article 13(2) of that regulation. Consequently, the performance of those acts, even when not accompanied by the payment of an equitable remuneration, cannot be regarded as the unauthorised use of protected variety constituents, since they did not take place in disregard of any obligation of prior authorisation.

25 In other words, CVVP considers that the payment of an equitable remuneration by any person who has effected an act referred to in Article 13(2) of Regulation No 2100/94 in respect of the variety constituents covered by the application for a plant variety right does not exhaust the rights of the holder over the variety constituents or the harvested material derived therefrom (see, in that regard, footnote 8 of this Opinion).

26 The Commission, whilst arguing in favour of this single approach in its written observations, stated at the hearing that it only advocates this approach in the alternative.

27 See points 35 and 40 of this Opinion.

28 That system is based on the one provided for in Article 13 of the UPOV Convention. With regard to the origin of that provision, I would observe that provisional protection, having first been left to the discretion of the States Parties to the UPOV Convention, constitutes an obligation on their part only since its revision in 1991. The preparatory work which led to that revision does not shed any light on the relationship between provisional protection, on the one hand, and the secondary right, also established at that time, on the other.

52. In that regard, Article 95 of Regulation No 2100/94 provides that the breeder 'may require' reasonable compensation from any person who has 'effected an act that he would be prohibited from performing [after the provisional protection period]'. That wording makes it apparent that no act, whether it concerns variety constituents or harvested material, requires the consent of the breeder before the grant of definitive protection. It also makes clear that, during the provisional protection period, the failure to pay an equitable remuneration to the breeder does not mean that the act in question is illegal.[29] The effects of the provisional protection scheme differ to those of the definitive protection scheme provided for in Article 94(1)(a) of that regulation, which may be invoked against whosoever 'effects one of the acts set out in Article 13(2) without being entitled to do so'.

53. Moreover, in accordance with Article 19(1) of Regulation No 2100/94,[30] the term of the Community plant variety right runs *from the date of the grant of the right*. That right differs, in that regard, from that established under the European patent system, the term of which is calculated *from the date of filing the application*.[31] I take the view that the fact that the provisional protection period in respect of plant variety rights is not calculated on the basis of the term of definitive protection, but added to it as separate protection in the interest of the breeder, serves to justify the fact that the scope of provisional protection is different to that of definitive protection, since only the latter concerns acts effected in respect of harvested material in the light of the first condition set out in Article 13(3) of Regulation No 2100/94.

54. The interpretation that I advocate is, moreover, supported by certain explanatory documents adopted by the UPOV Council.[32] According to those documents, the concept of 'unauthorised use', within the meaning of Article 14(2) of the UPOV Convention, refers to 'acts in respect of propagating material which require the authorisation of the breeder … but which have been effected where such authorisation was not obtained'.[33] The UPOV Council states that the performance of unauthorised acts implies that the breeder's right 'has been granted and is in force'.

55. In the light of those considerations, I consider that Article 13(3) of Regulation No 2100/94 protects the rightholder only to the extent that the acts referred to in Article 13(2) have been effected in respect of variety constituents without his authorisation being obtained *after the grant of the plant variety right*.

56. That reading is not invalidated by the fact, pointed out by CVVP, that the economic value of fruit-growing varieties such as those at issue in the main proceedings lies mainly in their capacity to produce fruit. That fact cannot call into question the architecture of the plant variety protection system consisting, primarily, of a primary right in respect of variety constituents and, secondarily, in so far as the breeder has not been able to assert his primary right, a secondary right in respect of harvested

29 Some comparison may be made between the scheme established in Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10). In accordance with that provision, Member States may provide for an exception to the reproduction right of the rightholder of any copyright for the purpose of making copies for private use, on condition that the rightholder receives fair compensation. In the judgment of 21 April 2016, *Austro-Mechana* (C-572/14, EU:C:2016:286, paragraph 48), the Court held that, where a Member State provides for such an exception, the making of copies for private use, despite requiring the payment of fair compensation to the rightholder of the copyright, constitutes an act authorised by national law.

30 That provision incorporates the content of Article 19(2) of the UPOV Convention.

31 See Article 63(1) of the Convention on the Grant of European Patents, signed in Munich on 5 October 1973, as revised in 2000.

32 Explanatory Notes on Acts in Respect of Harvested Material, p. 4, paragraph 4, and UPOV Council Guidance, p. 57. Although not binding, those documents provide useful guidance for the interpretation of the UPOV Convention and corresponding provisions of Regulation No 2100/94.

33 Such acts are also considered to be unauthorised where they are not undertaken in accordance with the conditions and limitations established by the breeder's authorisation pursuant to Article 14(1)(b) of the UPOV Convention. See UPOV Council Guidance, p. 57. It seems to me, however, to follow from applying, by analogy, the reasoning followed in the judgment of 20 October 2011, *Greenstar-Kanzi Europe* (C-140/10, EU:C:2011:677, paragraphs 41 to 43) that only the breach of a condition or limitation relating directly to the essential features of the Community plant variety right may affect the consent of the rightholder for the purposes of applying Article 13(3) of Regulation No 2100/94.

material. In the context of that cumulative protection scheme, the economic value associated with the ability to harvest the fruit from variety constituents over the years may be reflected in the amount of remuneration ('royalties') set by the breeder in respect of the acts, referred to in Article 13(2) of Regulation No 2100/94, effected in respect of those constituents themselves.

57. That interpretation cannot be called into question by the arguments put forward by CVVP that such an interpretation would allow interested parties to reproduce the variety constituents during the provisional protection period and, therefore, continue harvesting them without the breeder being remunerated. The fact that the breeder cannot assert his rights over the harvested material under Article 13(3) of Regulation No 2100/94 does not prevent him from requesting equitable remuneration from the nurseryman who has propagated and sold the variety constituents.

58. That protection may, admittedly, be ineffective if the breeder cannot assert his rights against the latter. I take the view that such a consequence is, however, related to the balance that the provisional protection scheme establishes between the interests, on the one hand, of the breeder and, on the other, the purchaser of variety constituents propagated and sold during the provisional protection period. As noted, in essence, by the Commission, there is no reason to consider that such a scheme, although it is aimed at encouraging the breeder to make the variety constituents available to third parties following the publication of the application for a Community plant variety right and, if appropriate, to make a commercial profit,[34] has the purpose of guaranteeing that the latter does not incur any risk when he chooses to do so.

59. In the light of those considerations, the first condition provided for in Article 13(3) of Regulation No 2100/94 cannot be met in a situation such as that at issue in the main proceedings.

60. On the one hand, in so far as acts related to propagating and marketing variety constituents have been effected by the nursery before the grant of the variety right, those acts cannot be considered to be an unauthorised use of those constituents within the meaning of that provision.

61. On the other, since, in the light of the answer I propose for the first and second questions referred for a preliminary ruling, acts related to planting and the harvesting of fruit effected by the farmer do not fall within the scope of Article 13(2) of Regulation No 2100/94, those acts — even after the grant of the variety right — also cannot give rise to an unauthorised use of variety constituents.

62. I conclude that where plants belonging to a plant variety are purchased from a nursery in the time between publication of the application for a Community plant variety right and grant thereof, the purchaser may — during and after that period — freely grow those plants, as well as harvest and sell the fruit.

V. Conclusion

63. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Tribunal Supremo (Supreme Court, Spain) as follows:

(1) Article 13(2) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights must be interpreted as meaning that acts related to planting variety constituents of a protected variety and the harvesting of fruit do not fall within the category of acts referred to in that provision, the performance of which is subject to the authorisation of the rightholder.

34 See, to that effect, Würtenberger, G., van der Kooij, P., Kiewiet, B. and Ekvad, M., *European Union Plant Variety Protection*, op. cit., p. 198.

(2) Article 13(3) of Regulation (EC) No 2100/94 must be interpreted as meaning that the concept of 'unauthorised use' of protected variety constituents does not include acts effected in respect of those constituents, such as multiplication or marketing, in the time between publication of the application for a Community plant variety right and grant thereof.