OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 7 July 2011 [1]

I — Introduction

1. This reference for a preliminary ruling from the Hof van Cassatie (Court of Cassation) (Belgium) concerns the interpretation of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, [2] as amended by Council Regulation (EC) No 873/2004 of 29 April 2004. [3]

2. This case will lead the Court to give a ruling on the specific problems posed by the Community plant variety rights system in the more general context of intellectual property, in particular as regards the difference between the distinct systems of rights provided for by that regulation for propagating material (in this case, Nicoter apple trees), on the one hand, and harvested material (in this case, Kanzi apples), on the other.

3. The Court is asked to answer the question whether the holder of a Community plant variety right may invoke his exclusive rights, in accordance with Regulation No 2100/94, in order to bring an action for infringement against third parties, or whether, on the contrary, his rights must be considered to be exhausted, where a person enjoying the right of exploitation has sold to third parties material of the variety covered by the Community plant variety right without imposing on them the limitations which should have been imposed under the licensing contract concluded between the person enjoying the right of exploitation and the holder of the Community plant variety right.

II — Legal context

A — *The 1991 UPOV Convention*

4. At international level, the protection of new varieties of plants forms the subject-matter of a convention, signed on 2 December 1961 and revised in 1991 (the '1991 UPOV Convention'). The European Community

1 — Original language: French.
2 — OJ 1994 L 227, p. 1.
3 — OJ 2004 L 162, p. 38, 'Regulation No 2100/94'.

acceded to that convention in 2005.[4] Community legislation is largely based on the provisions of that convention.

B — *Regulation No 2100/94*

5. The fourteenth recital in the preamble to Regulation No 2100/94 is worded as follows:

'Whereas, since the effect of a Community plant variety right should be uniform throughout the Community, commercial transactions subject to the holder's agreement must be precisely delimited; whereas the scope of protection should be extended, compared with most national systems, to certain material of the variety to take account of trade via countries outside the Community without protection; whereas, however, the introduction of the principle of exhaustion of rights must ensure that the protection is not excessive'.

6. Article 11(1) of Regulation No 2100/94 provides:

'The person who bred, or discovered and developed the variety, or his successor in title, both – the person and his successor – referred to hereinafter as "the breeder", shall be entitled to the Community plant variety right.'

7. According to 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 authorisation of the holder:

(a) production or reproduction (multiplication);

(b) conditioning for the purpose of propagation;

(c) offering for sale;

(d) selling or other marketing;

(e) exporting from the Community;

4 — See Council Decision 2005/523/EC of 30 May 2005 approving the accession of the European Community to the International Convention for the Protection of New Varieties of Plants, as revised at Geneva on 19 March 1991 (OJ 2005 L 192, p. 63).

(f) importing to the Community;

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

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

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

8. Article 16 of Regulation No 2100/94, headed 'Exhaustion of Community plant variety rights', provides as follows:

'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:

(a) involve further propagation of the variety in question, except where such propagation was intended when the material was disposed of;

or

(b) involve an export of variety constituents into a third country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.'

9. Under Article 27 of that regulation, headed 'Contractual exploitation rights':

'1. Community plant variety rights may form in full or in part the subject of contractually granted exploitation rights. Exploitation rights may be exclusive or non-exclusive.

2. The holder may invoke the rights conferred by the Community plant variety right against a person enjoying the right of exploitation who contravenes any of the conditions or limitations attached to his exploitation right pursuant to paragraph 1.'

10. Article 94 of Regulation No 2100/94, headed '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; or

…

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

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

11. Article 104 of Regulation No 2100/94, headed 'Entitlement to bring an action for infringement', is worded as follows:

'1. Actions for infringement may be brought by the holder. Persons enjoying exploitation rights may bring such actions unless that has been expressly excluded by agreement with the holder in the case of an exclusive exploitation right or by the Office pursuant to Articles 29 or 100(2).

2. Any person enjoying exploitation rights shall, for the purpose of obtaining compensation for damage suffered by him, be entitled to intervene in an infringement action brought by the holder.'

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

12. The facts in the main proceedings before the Hof van Cassatie between Greenstar-Kanzi Europe NV ('GKE'), of the one part, and Mr Hustin and Mr Goossens, of the other part, may be summarised as follows. [5]

A — *Nicolaï NV and Better3fruit NV*

13. I shall begin by explaining the role of the two companies which are not parties to the main proceedings.

14. Nicolaï NV ('Nicolaï') is the breeder of a new variety of apple trees, namely Nicoter. That is the only variety to produce apples which are marketed under the Kanzi trade mark, provided they satisfy certain quality requirements. [6] In order to prevent a dilution of the quality of the variety and of the trade mark, a system equivalent to a selective

5 — It should be pointed out that the account of the facts raises a number of problems: the parties to the main proceedings disagree on several issues of fact and of law; the main proceedings are interlocutory proceedings and the person enjoying the right of exploitation (Nicolaï NV) is not a party to the main proceedings.

6 — In 2009, there were 3 156 000 apple trees of the Nicoter variety in Europe, producing 25 000 tonnes of apples. Around three quarters of those apples met the quality requirements for the Kanzi trade mark. See *European Fruit Magazine*, No 12, 2009, p. 6 (see the website www.fruitmagazine.eu).

distribution network was introduced, involving specifications containing restrictions on the production of the trees and on the production, preservation, selection and marketing of the fruits.

15. On 27 April 2001 Nicolaï filed an application in respect of apple trees of the Nicoter variety, which was then published in the *Official Gazette of the Community Plant Variety Office* on 15 June 2001.

16. On 3 September 2002 the plant variety right associated with that application was brought into Better3fruit NV ('Better3fruit') by Nicolaï.

17. Better3fruit is therefore the holder of the Community plant variety right granted for trees of the Nicoter variety.

18. Better3fruit is also the proprietor of the trade mark for Kanzi apples.

19. In 2003, Better3fruit and Nicolaï concluded a licensing contract ('the licensing contract' [7]) enabling Nicolaï to acquire an exclusive right to grow and market apple trees of the Nicoter variety.

7 — The licensing contract is not dated.

20. The licensing contract stipulates that Nicolaï '… would not transfer or sell any licensed product unless the other party signed in advance the grower's licence in Annex 6 (in the case of a grower) or the marketing licence in Annex 7 (in the case of a business partner)'.

21. The licensing contract concluded in 2003 between Better3fruit and Nicolaï was annulled on 20 January 2005.

B — *The main proceedings between GKE and Mr Hustin and Mr Goossens*

22. On a date which is a matter of disagreement between the parties to the main proceedings, GKE acquired, for Nicoter apple trees, the exclusive exploitation rights provided for by the plant variety right. GKE thus became the person enjoying the right of exploitation in the place of Nicolaï. [8]

23. On 24 December 2004, Nicolaï sold 7 000 apple trees of the Nicoter variety to Mr Hustin. In that transaction, Mr Hustin did not undertake to comply with any particular

8 — The document on which GKE's rights are based was not included in the documents put before the Court. It appears to be a licensing contract, concluded between GKE and a company called 'EFC BVBA', which had, in turn, concluded a licensing contract with Better3fruit, the holder of the Community plant variety right.

conditions with regard to the growing of Kanzi apples or the sale of the harvest.

24. On 4 December 2007, it was established that Mr Goossens was selling apples bearing the name Kanzi. It became apparent that those apples had been supplied to him by Mr Hustin.

25. GKE then brought an action against Mr Hustin and Mr Goossens. On 29 January 2008, the president of the Rechtbank van Koophandel te Antwerpen (Antwerp Commercial Court), hearing an application for interim measures, held that both Mr Hustin and Mr Goossens had infringed GKE's plant variety right. In the president's view, Mr Goossens had also infringed the protection afforded to the Kanzi trade mark by trade mark law.

26. The Hof van Beroep te Antwerpen (Antwerp Court of Appeal) reversed that decision by judgment of 24 April 2008. That court held that there was no infringement on the part of Mr Hustin and Mr Goossens of GKE's plant variety right, nor was there an infringement of its rights in the trade mark, since the limitations referred to in the licensing contract were not enforceable against Mr Hustin and Mr Goossens.

27. GKE lodged an appeal in cassation against that judgment of the Hof van Beroep te Antwerpen. The Hof van Cassatie, uncertain as to the scope to be given to the rule of exhaustion laid down in Article 16 of Regulation No 2100/94, decided to stay the proceedings and to refer the following two questions to the Court for a preliminary ruling:

'(1) Should Article 94 of Regulation No 2100/94 …, read in conjunction with Articles 11(1), 13(1) to (3), 16, 27 and 104 of [that r]egulation … be interpreted in such a way that the holder or the person enjoying the right of exploitation may bring an action for infringement against anyone who effects acts in respect of material which was sold or disposed of to him by a licensee of the right of exploitation if the limitations in the licensing contract between the licensee and the holder of the Community plant variety right that were stipulated to apply in the event of the sale of that material were not respected?

(2) If so, is it of significance for the assessment of the infringement that the person effecting the aforementioned act is aware or is deemed to be aware of the limitations thus imposed in the said licensing contract?'

28. In its order for reference, the Hof van Cassatie has referred to the Court's case-law on the exhaustion of a trade mark proprietor's rights, making particular reference to the question of whether or not the exhaustion of the rights associated with a Community plant variety right should be interpreted

more narrowly, in view of the specific features of the plant variety rights system.

29. Written observations have been submitted by GKE, Mr Hustin and Mr Goossens, the Spanish Government and the European Commission. None of the parties has asked for a hearing to be held.

30. In respect of the main proceedings, it should be noted from the outset that the order for reference did not indicate whether or not Better3fruit had brought an action against Nicolaï, which failed to ensure that Mr Hustin complied with conditions of the contract. [9] There is clearly no contractual link between GKE and Mr Hustin.

IV — Analysis

A — *The first question referred*

1. Preliminary observations

31. By its first question the referring court seeks guidance as to the scope of the exhaustion of a plant variety right in the situation where a contract is concluded in respect of material sold or disposed of by a person enjoying the right of exploitation to a third party in infringement of the limitations stipulated in the licensing contract between the person enjoying the right of exploitation and the holder of the plant variety right.

32. There have been very few references for a preliminary ruling in connection with Regulation No 2100/94. [10] In particular, the scope of the holder's rights and the exhaustion of the Community plant variety right are unprecedented issues for the Court.

33. It is important to point out that Regulation No 2100/94 provides for different levels of rights.

34. First, there is a 'primary' right, which covers variety constituents in accordance with Article 13(2) of Regulation No 2100/94. Harvested material, for its part, is covered by a 'secondary' right, which, although also referred to in Article 13(2), is significantly

9 — According to the jurisdiction clause contained in the licensing contract, the courts in Louvain (Belgium) would have jurisdiction to hear and determine such an action.

10 — See Case C-305/00 *Schulin* [2003] ECR I-3525; Case C-182/01 *Saatgut-Treuhandverwaltungsgesellschaft* [2004] ECR I-2263; Case C-336/02 *Brangewitz* [2004] ECR I-9801; and Joined Cases C-7/05 to C-9/05 *Saatgut-Treuhandverwaltung* [2006] ECR I-5045.

restricted by paragraph 3 of the same article. [11] Thus, although variety constituents and harvested material are both covered by the term 'material', [12] within the meaning of Article 13(2), the right laid down for each category is nonetheless different.

35. Regulation No 2100/94 lays down a more extensive right in respect of variety constituents (in this case, apple trees) than for harvested material (here, apples). [13] Thus the holder's authorisation is required for acts of marketing the apple trees as variety constituents, pursuant to Article 13(2), but, as far as apples are concerned, as harvested material, such authorisation is required only in the situations provided for in Article 13(3). I would point out that that essential distinction in the field of plant variety rights may be seen more clearly in the 1991 UPOV Convention. [14]

36. As to the position of Mr Goossens, who sold Kanzi apples and thus harvested material, it must be noted that the authorisation of the holder of the plant variety right for selling or any other marketing is required only if the harvested material was obtained through the unauthorised use of variety constituents of the protected variety, and unless the holder has had reasonable opportunity to exercise his right in relation to the said variety constituents.

2. The principle of exhaustion of intellectual property rights

37. Although its exact meaning varies across the various branches of intellectual property law, the principle of exhaustion is a basic rule of European intellectual property law. It follows from that principle that, if, at the time of

11 — As far as the implementing rules for Regulation No 2100/94 are concerned, it should be noted that Article 13(4) thereof also provides for the possibility of establishing a 'tertiary' right, for products obtained directly from material of the protected variety. To my knowledge, such a provision has not been adopted, and, in any event, that issue is not relevant to the present case. In practice, such a tertiary right would, for example, be applicable to the juice obtained from apples (secondary right) from a protected variety of apple trees (primary right).

12 — I would point out that use of the terms 'variety constituents' and 'material' is not consistent in Regulation No 2100/94. See Würtenberger, G., et al, *European Community Plant Variety Protection,* Oxford University Press, Oxford, 2009, pp. 119 to 120.

13 — It seems to me that apples, which contain pips, should be regarded as 'harvested material' and not as 'variety constituents', given that the pips cannot be directly used to produce entire plants with the same characteristics as those which are protected. See Würtenberger, G., et al, op. cit., p. 118.

14 — Article 14 of the 1991 UPOV Convention, headed 'Scope of the Breeder's Right', sets out separately acts in respect of the propagating material (paragraph 1), acts in respect of the harvested material (paragraph 2), acts in respect of certain products (paragraph 3) and possible additional acts (paragraph 4).

the initial marketing, the holder of the right was able to enjoy the economic value of his exclusive right with regard to the goods covered by the right, those goods are subject to free movement. [15]

38. In EU law, that principle was initially laid down by the Court's case-law on the free movement of goods and on the rules governing competition, but the legislative acts of the European Union concerning various intellectual property rights generally contain a provision setting out that principle. [16] Case-law on exhaustion essentially concerns trade marks, but those issues have also been addressed in other contexts. [17]

39. The EU legislative acts in which the exhaustion of an intellectual property right is enshrined provide that the right is exhausted when the goods covered by the right in question have been put on the market in any place in the territory of the European Union by the holder of the right or with his consent. In addition, the provisions in question usually set out the situations in which exhaustion does not occur.

40. Furthermore, those legislative acts often contain a provision relating to contractual exploitation rights. Thus, Article 27 of Regulation No 2100/94 provides for the possibility of granting a right relating to the Community plant variety right. In addition, those legislative acts authorise the holder to invoke his property rights against a person enjoying the right of exploitation who contravenes any of the conditions or limitations attached to the licensing contract. [18]

15 — See, to that effect, Joined Cases C-414/99 to C-416/99 *Zino Davidoff and Levi Strauss* [2001] ECR I-8691, paragraph 33; Case C-244/00 *Van Doren + Q* [2003] ECR I-3051, paragraph 26; and Case C-16/03 *Peak Holding* [2004] ECR I-11313, paragraph 40.

16 — See Article 5(5) of Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products (OJ 1987 L 24, p. 36); Article 7 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), repealed by Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25) (see Article 7 thereof); Article 13 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), repealed by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1) (see Article 13 thereof); Article 15 of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28); Article 4(2) 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); and Article 21 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

17 — See, for example, Case 19/84 *Pharmon* [1985] ECR 2281, paragraphs 16 and 26, on the exhaustion of patent rights in the case of compulsory licences granted for a parallel patent; Case T-198/98 *Micro Leader* v *Commission* [1999] ECR II-3989, paragraph 34, as regards Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42); and Case C-479/04 *Laserdisken* [2006] ECR I-8089, paragraph 27, concerning Directive 2001/29.

18 — See Article 8(2) of Directive 2008/95 and Article 22(2) of Regulation No 207/2009.

41. The Community plant variety rights system appears to be similar in several ways to the patent protection system. However, having regard to the absence of case-law in that area and to the information contained in the order for reference, an appropriate starting point would be a comparison with trade mark law.

42. In trade mark law, the issue of exhaustion has been analysed, in particular, in *Peak Holding*.[19] In that case, the Grand Chamber of the Court analysed the effects of failure to comply with a prohibition on reselling in a contract of sale relating to goods bearing a trade mark concluded between the proprietor of the trade mark and an operator established in the European Economic Area (EEA). The Court took the view that such a prohibition on reselling concerns only the relations between the parties to that act. Therefore, that stipulation does not mean that there is no putting on the market within the meaning of Article 7(1) of Directive 89/104 and thus does not preclude the exhaustion of the proprietor's exclusive rights in the event of unlawful resale in the EEA.

43. A later judgment appears not to follow the same approach. In *Copad*, the First Chamber of the Court analysed the effects of failure to comply with a provision in a licensing contract concerning luxury goods. The Court stated that a licensee who puts goods bearing a trade mark on the market in disregard of a provision in a licensing contract does so without the consent of the proprietor of the trade mark where it is established that the provision in question is included in those listed in Article 8(2) of Directive 89/104.[20]

44. In the present case, several parties have inferred from *Copad* that there was a link between the interpretation of the effects of the licensing contracts referred to in Article 27(2) of Regulation No 2100/94 and the exhaustion provided for in Article 16 of the same regulation. However, unlike Article 8(2) of Directive 89/104, Article 27(2) of Regulation No 2100/94 does not contain any list which places restrictions on the provisions of a licensing contract, failure to comply with which on the part of the person enjoying the right of exploitation would make it possible for the holder to invoke the rights conferred on him by the plant variety right.

45. GKE appears to be arguing that exhaustion is not possible if the person enjoying the right of exploitation has infringed a condition or limitation attached to the licensing contract, whatever that might be, since, in such a case, there would be no consent on the part of the holder of the right to the disposal of the material of the protected variety to a third

19 — Cited in footnote 15, paragraph 56.

20 — Case C-59/08 *Copad* [2009] ECR I-3421, paragraph 51.

party. For its part, the Commission takes the view that a single infringement by the person enjoying the right of exploitation of one of the conditions or limitations relating to acts which, according to Article 13(2) of Regulation No 2100/94, require the authorisation of the holder may prevent exhaustion.

46. This case does not directly concern the interpretation of Directive 89/104, even though the latter is mentioned in the order for reference. Nonetheless, I have to point out here that I do not concur with the Court's interpretation in *Copad*, cited above.

47. First, the provisions of the EU legislative acts which provide that the holder may invoke his intellectual property right against the person enjoying the right of exploitation do not contain any guidance as to whether that right may also be relied on against third parties in the context of exhaustion. That issue is covered by a separate provision. [21]

48. Second, those provisions are intended to confer on the holder the possibility of invoking the means of legal protection provided for in the legislative act concerned, which are specific to intellectual property law, against the person enjoying the right of exploitation, in addition to the protection conferred by the ordinary law of contract. [22]

49. Third, an interpretation which links the holder's consent, within the context of exhaustion with regard to third parties, to contractual conditions which necessarily bind only the parties seems to me to impede competition and the free movement of goods in a way which is incompatible with the Court's case-law, in particular as regards the possibility of invoking the territorial limitations imposed on the person enjoying the right of exploitation against third parties.

50. In any event, even if the Court sought to follow the approach which seems to have been adopted in *Copad* in the context of Directive 89/104, that would clash with the wording of the relevant articles of Regulation No 2100/94, namely Articles 16 and 27

21 — See, in that regard, Articles 17, 27 and 94 of Regulation No 2100/94.

22 — That idea is expressed more clearly in Article 32(2) of Regulation No 6/2002 ('Without prejudice to any legal proceedings based on the law of contract, the holder may invoke the rights conferred by the Community design against a licensee who contravenes any provision in his licensing contract …'). See also Article 8(2) of Directive 2008/95; Article 22(2) of Regulation No 207/2009; and Article 8(2) of Directive 2001/29.

of that regulation, which differs from that of Articles 7 and 8 of Directive 89/104.

51. As I have already pointed out, Article 27(2) of Regulation No 2100/94 does not contain any list of conditions or limitations which the holder may invoke against the person enjoying the right of exploitation. [23]

52. If the Court were to adopt the approach proposed by the Commission, it would follow that infringement of one of the conditions or limitations relating to the acts set out in Article 13(2) of Regulation No 2100/94 would impede exhaustion of the holder's rights, in the absence of consent on his part. [24] Consequently, since a licensing contract would relate to the Community plant variety rights referred to in Article 27(1) of that regulation, those stipulations would be enforceable against third parties. However, to me that hardly seems compatible with the fourteenth recital of Regulation No 2100/94, according to which the introduction of the principle of exhaustion of rights must ensure that the protection is not excessive.

23 — On the other hand, the list of conditions in Article 8(2) of Directive 89/104 is exhaustive (see *Copad*, paragraph 20).

24 — It should be borne in mind that the terms of a licensing contract are usually confidential, and they may, in intra-Community trade, be written in a language that the other parties to the contract with the person enjoying the right of exploitation or their clients do not understand.

53. Article 16 of Regulation No 2100/94 lays down strict conditions for non-exhaustion and the latter particularly concerns cases of unauthorised further propagation. In addition, the act which causes exhaustion is the disposal of the material of the protected variety to others by the holder or with his consent.

54. Therefore the Community plant variety right does not extend to acts concerning any material of the protected variety (or any material derived from the said material) which has been disposed of to others by the holder or with his consent in any part of the Community, unless such acts involve further propagation of the variety in question which was not intended when the material was disposed of.

55. The right is therefore exhausted pursuant to Article 16 of Regulation No 2100/94 once disposal to a third party has taken place, unless the third party concerned propagates the variety without prior authorisation.

56. Although that is a matter for investigation by the referring court, I note that, according to GKE, under the licensing contract of 8 November 2001, Better3fruit granted to Nicolaï the exclusive right to grow and

market Nicoter apple trees, as well as the use of the rights associated with those trees.

57. In my view, the fact that Nicolaï may not have complied with its obligations, the purpose of which is to protect selectivity in the production and marketing of Kanzi apples, by failing to require the other parties to conclude in advance either a grower's licence or a marketing licence, [25] does not support the conclusion that Nicolaï disposed of material of the protected variety without the holder's consent. By the right it granted to Nicolaï, Better3fruit expressly authorised Nicolaï to sell Nicoter apple trees. By disposing of the marketing rights in the protected material to Nicolaï in that way, Better3fruit exploited the economic value of its exclusive right. If Nicolaï does not comply with its contractual obligations towards Better3fruit, it is the latter, and not a third party, which must bear the consequences. In my view, an infringement of the conditions attached to prior authorisation cannot be treated in the same way, in law, as an absence of authorisation enforceable on others.

58. As regards the scope of Article 94 of Regulation No 2100/94, it is true that it refers only to Article 13(2) of that regulation. However, that article must be read in conjunction with Article 13(3), [26] since the application of paragraph 2 to harvested material, in this case, apples, is subject to the conditions set out in paragraph 3.

59. In the light of the foregoing, I propose that the Court should answer the first question in the negative.

60. The second question was asked in the alternative, should the Court answer the first question in the affirmative. As I propose that the answer to the first question should be in the negative, I will make the following observations as regards the second question only in the alternative.

B — *The second question referred*

61. By its second question, the Hof van Cassatie wishes to ascertain whether, if the Court decides that it is appropriate to answer the

25 — As mentioned in Annexes 6 and 7 to the licensing contract between the holder of the plant variety right and the person enjoying the right of exploitation (referred to in point 20 of this Opinion).

26 — See, to that effect, Würtenberger G., et al, op. cit., p. 173.

first question in the affirmative, it is of significance that the person effecting the abovementioned act is aware or is deemed to be aware of the limitations thus imposed in the licensing contract, for the purpose of establishing whether or not the rights are exhausted.

62. In my view, the question whether or not a third party who effects acts in respect of protected material is of good faith is irrelevant if the holder's right is not to be regarded as exhausted.

63. It should be noted that Article 94(1) of Regulation No 2100/94 sets out the conditions under which the holder of the Community plant variety right may sue a person who commits an infringement with a view to enjoining the infringement and/or receiving payment of reasonable compensation or both.

64. Article 94(2) lists the situations in which the holder may, in addition, bring an action against a person who commits an infringement in order to obtain compensation for the damage caused by the latter. That provision provides that, for the holder to be able to claim such compensation, the person who committed the infringement must have acted intentionally or negligently. In cases of slight negligence, such claims may be reduced according to the degree of such slight negligence.

65. It seems to me that the provisions of EU law on intellectual property have recourse only to objective criteria as regards the notion of infringement and the possibility of invoking means of preventive legal protection. [27] Therefore, subjective elements cannot be taken into consideration, except for the purpose of compensation for the damage caused by the infringement. [28] Accordingly, I concur with the Commission's observation that the absence of a subjective element in Article 94(1) in the form of a requirement of an intentional or negligent action, combined with reference to such an element in paragraph 2 of that article, confirms that subjective elements, such as awareness of provisions in a licensing contract, do not in principle play any role in the assessment of an infringement or in the right to bring an action against the person who committed that infringement. At the very most, those elements are taken into consideration when discussing compensation for the damage caused, in other words necessarily after it has been established that there is an infringement.

27 — That also applies as regards the notion of exhaustion (see *Zino Davidoff and Levi Strauss*, paragraphs 63 to 66).

28 — Nevertheless, Article 5(6) of Directive 87/54 appears to make an exception to that principle. According to that provision, '[a] person who, when he acquires a semiconductor product, does not know, or has no reasonable grounds to believe, that the product is protected by an exclusive right conferred by a Member State in conformity with this Directive shall not be prevented from commercially exploiting that product. However, for acts committed after that person knows, or has reasonable grounds to believe, that the semiconductor product is so protected, Member States shall ensure that on the demand of the rightholder a tribunal may require, in accordance with the provisions of the national law applicable, the payment of adequate remuneration'.

V — Conclusion

66. In the light of all the foregoing considerations, I propose that the Court should answer the questions referred by the Hof van Cassatie as follows:

(1) Article 94 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, as amended by Council Regulation (EC) No 873/2004 of 29 April 2004, read in conjunction with Articles 11(1), 13(1) to 13(3), 16, 27 and 104 of that regulation must be interpreted as meaning that the holder or the person enjoying the right of exploitation may not bring an action for infringement against a third person who has effected acts in respect of material which was sold or disposed of to him by a licensee of the right of exploitation if the latter has been authorised to sell or dispose of the protected material in any part of the European Union and if the limitations in the licensing contract between the licensee and the holder of the Community plant variety right that were stipulated to apply in the event of the sale of that material were not respected.

(2) There is no need to reply to the second question referred.

In the alternative, the Court should answer that, for the purpose of an assessment of the infringement, it is not of significance that the third party effecting the abovementioned acts is aware or is deemed to be aware of those limitations contained in the licensing contract.