OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 9 February 2006 [1]

I — Introduction

1. The Court of Justice has given several rulings [2] on the Community legislation concerning plant varieties [3] although the matters raised to date related to the information which must be provided, or the holder's right to request it, in order to calculate the remuneration for the use of the so-called farmer's exemption or farmer's privilege.

2. The five questions referred by the Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling under Article 234 EC do not concern the amazing compositions which a mannerist painter created on his canvases, giving the optical illusion of a portrait by representing all kinds of flowers, fruit and vegetables, [4] but the equitable remuneration payable for the exercise of that prerogative to the holder of a variety protected by Community law.

3. The German Bundesgerichtshof has been prompted to ask for a preliminary ruling by the diverging decisions of the lower German courts in similar cases.

II — Legislative framework

4. The 'farmer's privilege' was introduced by Council Regulation (EC) No 2100/94 of 27

1 — Original language: Spanish.

2 — Judgments in Case C-305/00 *Schulin* [2003] ECR I-3525, and my Opinion delivered on 21 March 2002; Case C-182/01 *Saatgut-Treuhandverwaltungsgesellschaft* [2004] ECR I-2263, and my Opinion delivered on 7 November 2002; and Case C-336/02 *Brangewitz* [2004] ECR I-9801, and my Opinion delivered on 17 February 2004.

3 — See below, heading II. For an overall view of the history of the legal protection of plant varieties, I refer to my Opinion in *Schulin*, mentioned in the previous footnote.

4 — Especially in the series of paintings *The Seasons* or *The Elements* of the Milanese artist Giuseppe Arcimboldo (1527–1593); his art led him to assemble objects thematically linked to the title of the work, such as, for example, *The Librarian* or *The Jurist*, in order to achieve that result.

July 1994 on Community plant variety rights ('the basic regulation'). [5]

5. Article 14 is headed 'Derogation from Community plant variety right': Article 14(1) provides:

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

6. Article 14(2) limits the scope of application of that rule to a few fodder plants such as, for example, chickpea, yellow lupin and lucerne, some cereals, potatoes and certain oil and fibre plants, such as swede rape, turnip rape and linseed. [6]

7. The exercise of this derogation is governed by Article 14(3), which provides:

'Conditions to give effect to the derogation provided for in paragraph 1 and to safeguard the legitimate interests of the breeder and of the farmer shall be established, before the entry into force of this Regulation, in implementing rules pursuant to Article 114, on the basis of the following criteria:

...

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

— small farmers shall not be required to pay any remuneration to the holder; ...

5 — OJ 1994 L 227, p. 1.

6 — Flowers are therefore explicitly excluded. In literature, Oscar Wilde, in his short story 'The nightingale and the rose', tells of a cruel method of making roses red: a nightingale presses her breast against the thorns of a white rose-bush, sprinkling it with her blood and turning the pale petals of its flowers crimson; the student who owns the rose-bush is therefore able to offer his beloved that scarlet flower which she has demanded in exchange for dancing with him until dawn.

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

— ...'

8. The form of this right has been amended in Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Council Regulation (EC) No 2100/94 on Community plant variety rights ('the implementing regulation').[7] Article 5, in Chapter 3, deals with that payment in the following terms:

'1. The level of the equitable remuneration to be paid to the holder pursuant to Article 14(3), fourth indent of the basic regulation may form the object of a contract between the holder and the farmer concerned.

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

If no licensed production of propagating material of the variety concerned has taken place in the area in which the holding of the farmer is located, and if there is no uniform level of the aforesaid amount throughout the Community, the level of remuneration shall be sensibly lower than the amount which is normally included, for the above purpose, in the price at which propagating material of the lowest category qualified for official certification, of that variety is sold in that area, provided that it is not higher than the aforesaid amount charged in the area in which that propagating material has been produced.

3. The level of remuneration shall be considered to be sensibly lower within the meaning of Article 14(3), fourth indent of the basic regulation as specified in paragraph 2 above, if it does not exceed the one necessary to establish or to stabilise, as an economic factor determining the extent to which use is made of the derogation, a reasonably balanced ratio between the use of licensed propagating material and the planting of the product of the harvest of the

7 — OJ 1995 L 173, p. 14.

respective varieties covered by a Community plant variety right. Such ratio shall be considered to be reasonably balanced, if it ensures that the holder obtains, as a whole, a legitimate compensation for the total use of his variety.'

9. Regulation (EC) No 2605/98 ('the third regulation') [8] has added four paragraphs to this provision, of which only paragraphs 4 and 5 are of interest here; they provide:

'4. Where in the case of paragraph 2 the level of remuneration is the subject of agreements between organisations of holders and of farmers, with or without participation of organisations of processors, which are established in the Community at Community, national or regional level respectively, the agreed levels shall be used as guidelines for the determination of the remuneration to be paid in the area and for the species concerned, if these levels and the conditions thereof have been notified to the Commission in writing by authorised representatives of the relevant organisations and if on that basis the agreed levels and conditions thereof have been published in the "Official Gazette" issued by the Community Plant Variety Office.

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

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

10. In order to reply to the questions referred by the Bundesgerichtshof, it is also necessary to consider recitals 5 and 6 in the preamble to the third regulation, according to which:

'...

it is appropriate to ensure that the agreements are made operational as Community guidelines in respect of the level of remuneration, for the respective areas and the respective species;' and

8 — Commission Regulation (EC) No 2605/98 of 3 December 1998 amending Regulation (EC) No 1768/95 (OJ 1998 L 328, p. 6).

'in areas or for species, to which such agreements do not apply, the remuneration to be paid shall in principle be 50% of the amounts charged for the licensed production of propagating material, modulated by an appropriate sliding scale, where such scale has been established in respect of the respective national plant variety rights;

...'

III — The facts and the questions referred for a preliminary ruling

11. Pending before the Bundesgerichtshof are four actions concerning the equitable nature of the remuneration to be paid for the planting of harvested material of seed protected by the European legislation on plant varieties.

12. The appellant in three of those actions, an organisation of holders of plant variety rights in the form of a limited liability company, is responsible for safeguarding those rights, and especially for enforcing rights to information and payment.

13. That association claims payment of remuneration for the planting of the following plant varieties protected by Community law:

— 'Theresa' winter barley and winter wheat of the varieties 'Bandit', 'Contur' and 'Titmo', planted in the 1998/99 marketing year by Mr Deppe, the original defendant in Case C-7/05, who died during the proceedings and has been replaced by his heirs.

— Potatoes of the variety 'Solara', planted in the 1999/2000 period by Mr Hennings, the defendant in Case C-8/05.

— Potatoes of the same variety, winter barley of the varieties 'Theresa' and 'Duet', and wheat of the variety 'Ritmo', grown in the fields of Mr Lübbe, the defendant in Case C-9/05, in the 1998/99 season.

14. The three farmers informed the appellant in the main proceedings of those plantings and refused to subscribe to the cooperation agreement on agriculture and

plant breeding (Kooperationsabkommen Landwirtschaft und Pflanzenzüchtung; 'the 1996 cooperation agreement') concluded on 3 June 1996 between the German Farmers' Union (Deutscher Bauernverband e.V.) and the Federal Association of German Plant Breeders (Bundesverband Deutscher Pflanzenzüchter e.V.), published in the *Official Gazette of the Community Plant Variety Office* on 16 August 1999. In 2000, the two professional associations concluded a new agreement, which was to apply from the 2001 harvest and provided for remuneration of up to 60% of the licence fee for certified seed ('certified seed fee'). In successive updates the remuneration charged is only as much as 45% in some cases.

15. The various holders of plant variety rights authorised the appellant to recover their fees, which, for the marketing year 1998/99, the appellant calculated at 80% of the certified seed fee payable by farmers who had not concluded any agreement.

16. When the three farmers refused to pay the respective sums claimed in that regard, Saatgut-Treuhandverwaltungs GmbH brought proceedings before the Landgericht Braunschweig (Regional Court, Braunschweig) which upheld most of its claims.

17. However, the Oberlandesgericht (Higher Regional Court) dismissed the appellant's appeals, [9] in which it sought payment of the amounts calculated on the basis of 80% of the certified seed fee mentioned above. [10]

18. After an appeal had been lodged on a point of law, the Bundesgerichtshof, considering that the outcome of the case depended on the interpretation of the Community legislation, in particular Article 5(2), (4) and (5) of the implementing regulation, decided to suspend proceedings and refer the following questions to the Court of Justice for a preliminary ruling pursuant to Article 234 EC:

'(1) Is the requirement that the level of remuneration for the planting of harvested material within the meaning of Article 5(2) of Regulation (EC) No 1768/95 be "sensibly lower" than the amount charged for the licensed production of propagating material of the same variety in the same area satisfied also if the remuneration is calculated at a flat rate of 80% of that amount?

9 — In Mr Hennings' case, it increased the farmer's debt by EUR 55.73, together with interest, but did not allow the appeal in respect of the rest of the EUR 668.55 claimed by the appellant.

10 — The amounts of the claims in the appeals lodged in the three actions on a point of law are EUR 181.41 in Case C-7/05, EUR 612.82 in Case C-8/05 and EUR 605.86 in Case C-9/05.

(2) Does Article 5(4) and (5) of Regulation (EC) No 1768/95, as amended by Regulation (EC) No 2605/98, contain a commitment in value terms with respect to the level of remuneration for the planting of harvested material in the event of statutory assessment?

If so, does that commitment, as the expression of a general idea, also apply to plantings of harvested material occurring before Regulation (EC) No 2605/98 entered into force?

(3) Does the guideline function of an agreement between organisations of holders of plant variety rights and farmers within the meaning of Article 5(4) of Regulation (EC) No 1768/95, as amended by Regulation (EC) No 2605/98, include the possibility, in the event of statutory assessment, of the essential elements (calculation parameters) of that agreement being applied also where, at the time of the calculation of the statutory remuneration, not all of the parameters lying within the sphere of the planter of the harvested material and required for calculation based on the agreement are known to the holder and he is not entitled to be notified of the relevant facts by the farmer?

If so, does such an agreement, if it is to perform a guiding function along these lines, presuppose, for its effectiveness, compliance with the requirements laid down in Article 5(4) of Regulation (EC) No 1768/95, as amended by Regulation (EC) No 2605/98, also where it was concluded before the latter regulation entered into force?

(4) Does Article 5(5) of Regulation (EC) No 1768/95, as amended by Regulation (EC) No 2605/98, set an upper limit on the remuneration under contractual and/or statutory remuneration arrangements?

(5) Can an agreement between professional organisations be used as a guideline within the meaning of Article 5(4) of Regulation (EC) No 1768/95, as amended by Regulation (EC) No 2605/98, if it exceeds the rate of remuneration of 50% of the amount defined in Article 5(5) of that regulation?'

IV — Procedure before the Court of Justice

19. The three orders for reference from the Bundesgerichtshof, made on 11 October 2004, were lodged at the Registry of the Court of Justice on 14 January 2005, and joined on 26 January 2005, on account of the connection in subject-matter.

20. Observations were submitted, within the time-limit laid down in Article 20 of the EC Statute of the Court of Justice, by Saatgut-Treuhandverwaltungs GmbH, the heirs of Mr Deppe, Mr Hennings, Mr Lübbe, the German Government and the Commission.

21. The representatives of the parties in the main proceedings and of the Commission presented oral argument at the hearing held on 12 January 2005.

V — Analysis of the questions referred for a preliminary ruling

A — *Preliminary points*

22. The rules governing the farmer's privilege reflect the perfect balance of a debate enlivened by antithetical views. On the one hand, there is the vision of the Community's agricultural policy, in which the aim of increasing the fruits of that activity was still paramount, [11] as Article 14(1) of the basic regulation makes clear when it authorises farmers to exercise that exclusive right 'for the purposes of safeguarding agricultural production ...'.

23. On the other hand, there is the position of the holders of plant variety rights, who are protected by the industrial policy, of research and development, and determined to achieve a suitable legislative framework for promoting their activities in the Union. In those circumstances, it is not surprising that the dispute has been fierce or that the compromise reached has been regarded as acceptable. [12]

24. It may be wondered whether, with the subsequent developments in the arrangement of the agriculture markets, more geared to free competition, [13] that privilege would have arisen; in any event, the third regulation should be regarded as taking a tentative step in that direction, by giving a stronger role to the agreements concluded between breeders' and farmers' associations.

11 — Borchardt, K.-D., 'Die Reform der gemeinsamen Agrarpolitik — Perspektiven und Herausforderungen für Landwirte und Juristen', in *Europa und seine Verfassung — Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag*, Nomos, Baden-Baden, 2005, p. 473 et seq., especially pp. 475 to 477. Also, Leidwein, A., *Europaisches Agrarrecht*, Second ed., NWM, Vienna, 2004, p. 76 et seq.

12 — Kiewiet, B., 'Régime de protection communautaire des obtentions végétales', in *Comptes rendus de l'Academie d'agriculture de France*, Volume 83 (1997), No 2, p. 5 et seq., especially p. 9.

13 — On the CAP reform, see Blumann, C., 'La réforme de la politique agricole commune', in *Cahiers de droit europeen*, Nos 3 and 4, 2004, p. 297 et seq., see also Bianchi, D., 'Y a-t-il encore quelque chose de "commun" dans la nouvelle Politique agricole commune?', in *Revue trimestrielle de droit européen*, No 3, July-September 2005, p. 623 et seq.

B — *Equitable remuneration (Question 1)*

25. The national court wishes to know whether remuneration of 80% of the certified seed fee satisfies the requirement that it be 'sensibly lower' than the amount charged for the licensed production of propagating material, in accordance with Article 5(2) of the implementing regulation.

26. Before continuing, it would be useful to give a brief outline of the current system established by the three regulations. They provide the essential structure for the remuneration of breeders in three possible situations: the contract between the holder of the plant variety right and the farmer; [14] the agreements between organisations of holders of plant variety rights and farmers; [15] and, secondary to those solutions, the level of the remuneration is determined according to certain guidelines laid down in the regulations. [16] Since Mr Deppe, Mr Hennings and Mr Lübbe had not concluded any individual contract with a breeder nor subscribed to any agreement, we must turn to the third situation.

27. Article 14(3), fourth indent, of the basic regulation imposes on the legislature, as a criterion for assessing equitable remuneration, an amount 'sensibly lower' than that stipulated for licensed production, a point emphasised by the implementing regulation, which, in Article 5(2), supplements the provision by warning that the remuneration must be 'sensibly lower' than that amount; furthermore, the third regulation sets the amount to be paid for the licensed use of protected seed at 50%. [17]

28. It should also be pointed out that the criterion also applies to 'the lowest category qualified for official certification, of the same variety in the same area', according to Article 5(2) of the implementing regulation, to which Article 5(5) refers. As regards that category, it can only be the one which represents the lowest cost for the farmer.

29. It is clear from these assumptions that the fees which have to be paid to the holder of the plant variety right, for taking advan-

14 — Article 5(1) of the implementing regulation.

15 — Article 5(4) of the implementing regulation, introduced by virtue of Article 1 of the third regulation.

16 — Article 5(2) of the implementing regulation if there is no contract, and Article 5(5) if there is no agreement.

17 — The provision must be read in conjunction with the seventh recital in the preamble to the regulation, which moderates its impetuosity, stating that 'the remuneration to be paid shall in principle be 50% of the amounts ...', which does not, however, diminish the importance of the figure stated.

tage of the exception, has to be much lower than the certified seed fee.

30. Remuneration of 80% does not therefore seem appropriate, although, as the Commission points out in its observations, it is necessary to distinguish between the situations according to whether they have occurred before or after the third regulation came into force. Since there is a specific regulation for the latter, they should be examined first.

31. Article 5(5) of the implementing regulation provided that a figure of 40% of the certified seed fee was to apply for a limited time and in certain circumstances. After a short period,[18] the 50% in Article 5(4) applies again. The ninth recital in the preamble to the regulation explains that the provision is designed to encourage agreements between organisations of breeders and farmers by fixing a level even lower than the norm.

32. Two consequences may be drawn: first, that agreed solutions are preferable and that, in order to achieve them, pressure is put on one of the parties; secondly, that if there is no consensus the remuneration by which the holder of the variety right receives statutory compensation is about 50%, although it is suggested that the interest of one of the contracting parties may increase it slightly in the course of negotiations. The agreement concluded in 2000 by the professional associations of farmers and breeders, which provided for a remuneration of up to 60% of those fees, should be interpreted in this light.

33. The rules governing use of the exemption before the third regulation came into force are laid down in Article 14 of the basic regulation and Article 5(1) to (3) of the implementing regulation. According to this last provision, the level of remuneration is to be considered to be sensibly lower only if it does not exceed the one necessary to establish or to stabilise a reasonably balanced ratio between the use of licensed propagating material and the planting of the product of the harvest and if it ensures that the holder obtains legitimate compensation for the use of his variety.

34. In my view, other points must be considered. Thus, a 20% reduction, although it may seem generous in the business world, is less so in the context of the exemption of the farmer who, in fact, cultivates the

18 — Between the use of the agricultural exemption before the application of an agreement and 1 April 1999.

product with his own work and effort, improving it with the richness of his soil. [19] Moreover, the planter has no influence on another of the factors in the calculation of the final cost, the certified seed fee, since he is not involved in the licensing contracts for producing propagation material, and, in the last analysis, external factors determine the amount which has to be paid to the breeder, who does have considerable influence.

35. The defendants in the main actions have alleged distortion of competition caused by the monopoly of Saatgut-Treuhandverwaltungs GmbH of the market, and also maintain that the criteria laid down in the regulations for assessing whether remuneration is equitable require local, regional and national details to be taken into consideration.

36. All these factors, which affect the equitable nature of the 'sensibly lower' remuneration for exercising the farmer's privilege, therefore depend on the particular circumstances of each case and must be evaluated by the competent court. [20]

37. In the light of the foregoing conclusions, I suggest that the Court reply to Question 1 that a remuneration of 80% for the use of the agricultural exemption provided for in Article 14(3) of the basic regulation does not satisfy the requirement that it be 'sensibly lower' than the amount charged for licensed production of propagating material, within the meaning of Article 5(2) of the implementing regulation, subject always to the national court's assessment of the other relevant circumstances of each case.

C — *The criteria for assessing the amount of the remuneration (Question 2)*

38. In the first part of Question 2, it is asked whether, for the purposes of assessing the

19 — I do not know whether it is possible to speak of antagonistic interests, because it gives the impression that everyone has to benefit from the plant variety; it is reprehensible to profit from friends and from another person's work, as Aesop's fable 'The Goat and the Vine' teaches us. A goat was eating the tender shoots of a vine, which asked him: 'Why are you hurting me? Is there no grass? Just you wait! When you are sacrificed, I myself will be the one to supply the wine for the libation!' (free translation). There would be much more subtlety in the world, if plants had such character, or if they were capable of speech, like the vain rose which the Little Prince grew in his garden. He says: 'We should never listen to the flowers. We should simply look at them and breathe in their perfume. Mine gave her fragrance to my planet, but I did not know how to enjoy it'. Saint-Exupéry, A., *Le petit prince*, Chapter 8 (free translation).

20 — Accordingly, the differences between the judgments of the German courts mentioned in the introduction to this Opinion may reveal regional differences; however, that does not alter my conviction that to set the remuneration at 80% goes beyond what is reasonable and is excessive.

breeder's fees, Article 5(4) and (5) of the implementing regulation contain a commitment in value terms with respect to the level of remuneration.

39. From the wording of those provisions it is clear, as regards Article 5(4), that those criteria must be referred to in the agreements concluded between organisations of holders and of farmers, which serve as guidelines if they satisfy the other requirements of that paragraph and of Article 5(2) and (3).

40. On the other hand, Article 5(5) fixes the amount of the remuneration for using the farmer's privilege at 50%, subject only to possible modulation by a national sliding scale, in accordance with the seventh recital in the preamble to the third regulation.

41. Reference is made in the second part of the question to a possible retroactive application of that commitment, as the expression of a general idea, to plantings of harvested material occurring before that regulation entered into force.

42. Article 5(4) and (5) of the implementing regulation, at issue in this case, supplement the scheme in force until their adoption, with new components, namely the guideline function of the agreements between the associations concerned and the percentage indicated. The Commission maintains that it is contrary to legal certainty to make the effects of the third regulation apply retroactively to transactions of that kind concluded before those provisions came into force. However, the Commission fails to understand that Article 5(5) of the implementing regulation introduces a scheme which is completely different from the original version.

43. Accordingly, the two references in that provision to Article 5(2) show that the aim is to improve and clarify it. Consequently, even if it cannot be applied to previous situations, it still serves as a guideline for assessing the amount of remuneration.

44. For the reasons stated, I suggest that the Court reply to the second question referred for a preliminary ruling that Article 5(5) of the implementing regulation contains a commitment in value terms with respect to the level of the breeder's remuneration; it does not have retroactive effect, but may guide the assessment of the calculation of the cost of plantings occurring before Article 5(5) came into force.

D — *The guideline function of the agreements between associations of breeders and farmers (Questions 3 and 5)*

45. In the first part of Question 3, the national court asks about the scope of an agreement between organisations of holders of plant variety rights and of farmers if not all of the information needed for calculating the amount of the equitable remuneration for use of the exemption is known or obtainable, and the second part concerns the procedural requirements of those agreements. Those procedural aspects should be considered first.

46. It is clear from Article 5(4) of the implementing regulation that for those agreements to be used as guidelines, their levels of remuneration and conditions must have been notified to the Commission and published in the *Official Gazette of the Community Plant Variety Office.*

47. Given the essential nature of those requirements and the lack of any distinction in that regard between agreements concluded before or after the third regulation came into force, it must be inferred that that time factor has no bearing and that it is sufficient if those two requirements are met.

48. Since it is of that nature, its scope extends to all farmers covered by the aforementioned scheme in the territory to which the agreement applies. The reply to the first part of Question 3 is based on this fundamental premiss.

49. It has already been stated that the reason for endowing the agreements between the aforementioned organisations with such power lies in the resolve to promote them, with the implied aim of avoiding cumbersome transactions. It should also be pointed out they must act as a beacon lighting the way for farmers who have not subscribed to the agreements between associations, since they seek to encourage recalcitrant farmers to join, wishing to avail themselves of the official calculation in the hope that it will cost less, assuming that the union to which they belong has managed to include other advantages in its text, in addition to a percentage adjusted to their interests.

50. Therefore, any calculation criterion serves as a reference for claiming remunera-

tion from farmers who have not signed any agreement. However, precisely because of its nature as a guideline, it is not simply imposed without further ado, and the observations made in respect of Question 1 become relevant again, whenever a percentage value is challenged because it seems too high.

51. Finally, it must be explained, in relation to Question 5, that Article 5(5) of the implementing regulation establishes 50% as appropriate remuneration for the breeder, provided that the transaction is not of the kind described in Article 5(4). From the organisation of the two provisions, it is clear that the second is subsidiary. In accordance with the principle of free will, the percentage in the agreement binds those who have agreed to be bound and fulfils a guideline function for those who have not. If an agreement has not been concluded, Article 5(5) applies; as I have already pointed out, it provides guidance where there are objections to the equitable remuneration, a situation which applies only to a farmer who has not signed any agreement.

52. In the light of the foregoing considerations, I suggest that the Court of Justice reply to Questions 3 and 5 that the guideline function of the agreements between organisations of holders of plant variety rights and of farmers, for the purposes of Article 5(4) of the implementing regulation, means that the calculation parameters shall be fully applicable to the assessment of the equitable remuneration, provided that they have been notified to the Commission and published in the *Official Gazette of the Community Plant Variety Office*, bearing in mind that they may be used only in connection with Article 5(4), not with Article 5(5).

E — *The scope of the 50% amount laid down in Article 5(5) of the implementing regulation (Question 4)*

53. The Bundesgerichtshof wishes to know whether that percentage constitutes an upper limit for determining the remuneration payable under contract or in accordance with the provisions of the implementing regulation.

54. First, the provision at issue does not govern contractual arrangements, so the question is irrelevant in that respect.

55. Secondly, it is clear from the wording of the provision that the relative value stated is mandatory and does not merely represent an upper or lower limit. The fact that the

Community legislature has included an exception in the second sentence of that provision does not invalidate that observation since, as is pointed out in the statement of reasons of the third regulation, it is only applicable for a limited period of time in order to provide for an incentive for a speedy conclusion of further agreements between breeders' and farmers' organisations before a specific date.

56. In the light of these observations, I suggest that the reply to Question 4 should be that Article 5(5) of the implementing regulation lays down an unalterable value, not an upper limit, for the amount of the remuneration where this has to be determined in accordance with its provisions in the absence of an agreement between the holder of the plant variety right and the farmer.

VI — Conclusion

57. In the light of all the foregoing, I suggest that the Court of Justice give the following reply to the questions referred for a preliminary ruling by the Bundesgerichtshof:

(1) A remuneration of 80% for the use of the agricultural exemption provided for in Article 14(3) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights does not satisfy the requirement that it be

'sensibly lower' than the amount charged for licensed production of propagating material, within the meaning of Article 5(2) of Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation No 2100/94, subject always to the national court's assessment of the other relevant circumstances of each case.

(2) Article 5(5) of Regulation No 1768/95, as amended by Commission Regulation (EC) No 2605/98 of 3 December 1998, contains a commitment in value terms with respect to the level of the breeder's remuneration; it does not have retroactive effect, but may guide the assessment of the calculation of the cost of plantings occurring before Article 5(5) came into force.

(3) The guideline function of the agreements between organisations of holders of plant variety rights and of farmers, for the purposes of Article 5(4) aforementioned, means that the calculation parameters shall be fully applicable to the assessment of the equitable remuneration, provided that they have been notified to the Commission and published in the *Official Gazette of the Community Plant Variety Office,* bearing in mind that they may be used only in connection with Article 5(4), not with Article 5(5).

(4) Article 5(5) of Regulation No 1768/95, as amended by Regulation No 2605/98, lays down an unalterable value, not an upper limit, for the amount of the remuneration where this has to be determined in accordance with its provisions in the absence of an agreement between the holder of the plant variety right and the farmer.