Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

9 June 2016*

(Reference for a preliminary ruling — Intellectual and industrial property — Community plant variety rights — Regulation (EC) No 2100/94 — Infringement — Reasonable compensation — Compensation for damage — Costs of proceedings and out-of-court expenses)

In Case C-481/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), made by decision of 16 October 2014, received at the Court on 30 October 2014, in the proceedings

Jørn Hansson

v

Jungpflanzen Grünewald GmbH,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, F. Biltgen, A. Borg Barthet, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 12 November 2015,

after considering the observations submitted on behalf of:

— Mr Hansson, by G. Würtenberger, Rechtsanwalt,

— Jungpflanzen Grünewald GmbH, by T. Leidereiter, Rechtsanwalt,

— the European Commission, by B. Schima, F. Wilman, I. Galindo Martín and B. Eggers, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 February 2016,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1) and of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16).

2 The request has been made in proceedings between Mr Jørn Hansson and Jungpflanzen Grünewald GmbH ('Jungpflanzen') concerning compensation for the damage resulting from infringements of a Community plant variety right.

Legal context

Regulation No 2100/94

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

4 Article 13 of Regulation No 2100/94, which is entitled 'Rights of the holder of a Community plant variety right and prohibited acts', provides:

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

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

(a) production or reproduction (multiplication);

(b) conditioning for the purpose of propagation;

(c) offering for sale;

(d) selling or other marketing;

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

...'

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

'1. Whosoever:

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

…

may be sued by the holder to enjoin 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.'

6 The supplementary application of national law regarding infringement is governed by Article 97 of Regulation No 2100/94, which provides:

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

…'

Directive 2004/48

7 Recital 17 of Directive 2004/48 states that 'the measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement'.

8 Recital 26 of the directive states:

'With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.'

9 According to Article 2(1) of Directive 2004/48:

'Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.'

10 Article 13 of Directive 2004/48 provides:

'1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;

or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.'

11 Article 14 of that directive provides:

'Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.'

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

12 Mr Hansson has, since 1999, been the holder of Community plant variety right EU 4282, with the denomination 'Lemon Symphony', which belongs to the species Cape marguerite.

13 During the period 2002 to 2009 Jungpflanzen cultivated and distributed the flower variety SUMOST 01, with the denomination 'Summerdaisy's Alexander'.

14 Taking the view that those two denominations in fact related to the same variety of flower, Mr Hansson made an application for interim measures before the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) seeking an injunction to prevent Jungpflanzen from marketing that variety. Both that application and the appeal brought by Mr Hansson before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) were dismissed on the ground that he had not established an infringement in respect of the variety with the denomination 'Lemon Symphony'.

15 However, in the main action Mr Hansson obtained an order requiring Jungpflanzen to pay compensation for the damage resulting from the sale of flowers with the denomination 'Summerdaisy's Alexander', which represented an infringement in respect of the 'Lemon Symphony' variety.

16 As regards compensation for the loss sustained, the Landgericht Düsseldorf (Regional Court, Düsseldorf), in the proceedings at first instance, awarded Mr Hansson EUR 66231.74, plus interest, on the basis of Article 94 of Regulation No 2100/94. That corresponded to the amount that he had claimed in respect of the licence fee which Jungpflanzen should have paid him for the 1 512 630 plants of the protected variety which it had sold between 2002 and 2009.

17 The Landgericht Düsseldorf (Regional Court, Düsseldorf) did not, however, uphold Mr Hansson's other claims, which related to payment of a supplement to the licence fee calculated at half of the amount of the fee claimed, namely EUR 33 115.89, plus default interest, and reimbursement of the costs related to the proceedings in an amount of EUR 1967.35, plus default interest. That court held,

inter alia, that Mr Hansson was not entitled to claim compensation in the form of an 'infringer supplement' for which Jungpflanzen would be liable, since punitive damages are not provided for by Regulation No 2100/94, Directive 2004/48 or national law.

18 Both parties appealed against that judgment before the referring court.

19 According to that court, it is not disputed that Jungpflanzen committed an infringement involving the protected variety at issue in the main proceedings. However, the parties disagree on the extent of both the 'reasonable compensation' with regard to the infringement and the compensation for damage which may be claimed under Article 94 of Regulation No 2100/94.

20 The Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) takes the view that reasonable compensation should be set in the light of the licence payments that should normally have been made to the holder of a Community right, on the basis of the licence agreements that were actually signed during the period concerned by the infringement.

21 As regards the imposition of an 'infringer supplement', the referring court doubts whether Article 94(1) of Regulation No 2100/94 may serve as a basis for an automatic flat-rate increase in the compensation set.

22 It nonetheless considers that any form of increase should take account of the characteristics specific to the protected variety to which the infringement relates and of the practical consequences that follow from the infringement. In addition, the reasonable compensation provided for in Article 94(1) of Regulation No 2100/94 should include interest on the annual remuneration at five points above the basic rate.

23 Since the referring court considers that Jungpflanzen acted in bad faith, it wishes to be given guidance on the method for calculating the compensation, as referred to in Article 94(2) of Regulation No 2100/94, for damage suffered by the holder of a Community plant variety right. The question arises in particular as to whether the normal market licence fee charged in the same area may be taken as a reference in this regard and whether that amount should be increased in the light of considerations specific to the protected variety infringed and to the practical consequences that follow from the infringement.

24 In any event, the referring court considers that Article 94(2) of Regulation No 2100/94 can neither serve as a basis for a flat-rate increase representing an 'infringer supplement' nor make it possible for the person who committed the infringement to be ordered to indemnify the holder of the protected variety for all the costs (travel, meetings, time invested) he has incurred in the course of the main action as well as for the costs of the proceedings for interim measures.

25 In those circumstances, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the determination of the "reasonable compensation" which an infringer must pay to the holder of a Community plant variety right pursuant to Article 94(1)(a) of Regulation No 2100/94 because he has effected the acts set out in Article 13(2) of that regulation without being entitled to do so, must, in addition to the normal market fee charged in the same area for a licence to effect the acts specified in Article 13(2) of Regulation No 2100/94, a specific "infringer supplement" also be applied on a flat-rate basis in every case? Does this follow from the second sentence of Article 13(1) of Directive 2004/48?

(2) In the determination of the "reasonable compensation" which an infringer must pay to the holder of a Community plant variety right pursuant to Article 94(1)(a) of Regulation No 2100/94 because he has effected the acts set out in Article 13(2) of that regulation without being entitled to do so, must, in addition to the normal market fee charged in the same area for a licence to effect the acts specified in Article 13(2) of Regulation No 2100/94, account also be taken in an individual case of the following considerations or circumstances as factors that increase the compensation payable:

(a) In the determination of the market licence fee by reference to licence agreements concluded and accounts settled for the variety in relation to which rights were infringed, the fact that, in the relevant period, as a result of special characteristics, the variety in question had a unique market position?

If consideration may be given to this factor in an individual case:

may the compensation be increased only if the characteristics giving rise to the variety's unique position are included the description of the variety for the purposes of the plant variety right?

(b) In the determination of the market licence fee by reference to licence agreements concluded and accounts settled for the variety in relation to which rights were infringed, the fact that, at the time when the infringing variety was introduced, the variety in relation to which rights were infringed had been very successfully marketed and, as a result, the infringer saved on the costs of introducing itself the infringing variety on to the market?

(c) The fact that, in terms of time and having regard to the number of plants sold, the magnitude of the rights infringement in relation to the applicant's variety was greater than average?

(d) The consideration that the infringer, unlike a licensee, does not face the risk of having to pay a licence fee (that cannot be returned) in relation to the variety in question although the plant variety right for such variety is subject to legal challenge and may subsequently be declared null and void?

(e) The fact that the infringer, unlike the usual situation in the case of licensees, was not required to account for sales on a quarterly basis?

(f) The consideration that the holder of the plant variety right bears the risk in relation to inflation, which is of significance because of the considerable period involved in pursuing legal action?

(g) The consideration that, as a result of having to pursue legal action, the holder of the plant variety right, unlike the situation in which he obtains income through the granting of licences in relation to the variety in question, cannot plan the income to be obtained through this variety?

(h) The consideration that, where rights relating to the variety in issue are infringed, the holder of those rights bears both the general risks associated with litigation and, ultimately, the risk that judgment may not be enforceable against the infringer?

(i) The consideration that, in the case of an infringement of plant variety rights resulting from the unauthorised actions of the infringer, the holder of those rights is deprived of the freedom to determine whether the infringer may be allowed to use the variety in respect of which the holder holds the rights?

(3) In the determination of the "reasonable compensation" which an infringer must pay to the holder of a Community plant variety right pursuant to Article 94(1)(a) of Regulation No 2100/94 because he has effected the acts set out in Article 13(2) of that regulation without being entitled to do so, must account also be taken of interest payable at a usual rate of default interest on the annual compensation amount if it is to be presumed that contracting parties acting reasonably would have provided for the payment of interest of that kind?

(4) In the calculation of "further damage resulting from the act in question" for which an infringer must compensate the holder of a Community plant variety right pursuant to the first sentence of Article 94(2) of Regulation No 2100/94 because he has effected the acts set out in Article 13(2) of that regulation without being entitled to do so, must the market licence fee normally charged in the same area for [those] acts … be taken as the basis for that calculation?

(5) If the answer to Question 2 is in the affirmative:
   (a) In the calculation of the 'further damage' pursuant to the first sentence of Article 94(2) of Regulation No 2100/94 on the basis of a market licence, must account be taken in an individual case of the considerations and circumstances set out in Question 2(a) to (i) and/or of the fact that, by reason of having to pursue legal action, the holder of the plant variety right is required personally to spend a commensurate amount of time in identifying the infringement and dealing with the matter and to carry out investigations regarding the infringement of the plant variety right to the extent to which this is usual in infringement cases of this kind such as to justify a premium over and above the market licence fee?
   (b) In the calculation of "further damage" pursuant to the first sentence of Article 94(2) of Regulation No 2100/94 on the basis of a market licence, must a specific "infringer supplement" be applied on a flat-rate basis in every case? Does this follow from the second sentence of Article 13(1) of Directive 2004/48?
   (c) In the calculation of "further damage" pursuant to the first sentence of Article 94(2) of Regulation No 2100/94 on the basis of a market licence, must account be taken of interest payable at a usual rate of default interest on the annual compensation amount if it is to be presumed that contracting parties acting reasonably would have provided for the payment of interest of that kind?

(6) Must the first sentence of Article 94(2) of Regulation No 2100/94 be interpreted to mean that the infringer's profit constitutes "further damage" within the meaning of that provision which can be claimed in addition to reasonable compensation pursuant to Article 94(1) of that regulation or, in the event that the wrongdoing was intentional or negligent, can the infringer's profit be claimed under the first sentence of Article 94(2) only as an alternative to reasonable compensation pursuant to Article 94(1)?

(7) Is the right to compensation for damage specified in Article 94(2) of Regulation No 2100/94 precluded by national legislation according to which the holder of the plant variety right ordered by decision having the force of law to pay the costs of interlocutory proceedings in which a temporary injunction was sought on the basis of an infringement of plant variety rights cannot claim reimbursement of those costs on the basis of arguments of substantive law even if, in the main proceedings relating to the same plant variety right infringement, his action is successful?

(8) Is the right to compensation for damage specified in Article 94(2) of Regulation No 2100/94 precluded by national legislation according to which an injured party, outside of the strict framework of an action for costs, cannot claim for his own time spent in the extrajudicial and judicial pursuit of a compensation claim if the time spent does not exceed what is normal in the circumstances?'

Consideration of the questions referred

26 By its questions, the referring court seeks, in essence, to ascertain what principles govern the setting and calculation of the compensation payable under Article 94 of Regulation No 2100/94.

27 Some of those questions concern the actual nature of the two forms of redress under Article 94, others concern, more specifically, the factors on the basis of which the reasonable compensation provided for in Article 94(1) is calculated as well as those that are the basis for calculating compensation under Article 94(2) for damage suffered by the rightholder.

28 It is therefore appropriate to start by considering together the questions which relate to the nature of the forms of compensation provided for by Article 94 of Regulation No 2100/94, before going on to specify the factors to be taken into account for the purpose of setting the 'reasonable compensation' for which Article 94(1) provides and the compensation referred to in Article 94(2) for damage suffered by the holder of an infringed variety.

Consideration of the questions relating to the nature of the compensation provided for in Article 94 of Regulation No 2100/94

29 By Questions 1, 5(b) and 6, the referring court seeks to ascertain whether Article 94 of Regulation No 2100/94 must be interpreted as meaning that it requires the damages awarded as compensation for the loss caused by an act specified in Article 13(2) of the regulation to be increased by an 'infringer supplement'. It also asks whether Article 94 must be interpreted to the effect that it may provide a legal basis for requiring the infringer to make restitution of the profits that he has made from that infringement.

30 In the first place, it is apparent from the wording of paragraphs 1 and 2 of Article 94 of Regulation 2100/94 that this article concerns exclusively compensation for damage suffered by the holder of a Community plant variety right because of an infringement of the variety in question.

31 On the one hand, the purpose of Article 94(1) of the regulation is that financial compensation should be paid in respect of the benefit which has been gained by the person who committed the infringement, that benefit corresponding to the amount equivalent to the licence fee which that person has failed to pay (see, to that effect, judgment of 5 July 2012 in *Geistbeck*, C-509/10, EU:C:2012:416, paragraph 40). The Court has stated in that regard that Article 94(1) does not provide for reparation for damage other than damage connected to the failure to pay 'reasonable compensation' within the meaning of that provision (see judgment of 5 July 2012 in *Geistbeck*, C-509/10, EU:C:2012:416, paragraph 50).

32 On the other hand, Article 94(2) of Regulation No 2100/94 concerns the 'further damage' for which an infringer must compensate the holder of a Community plant variety right where the infringer has acted 'intentionally or negligently'.

33 It follows that Article 94 of that regulation establishes for the holder of a Community plant variety right an entitlement to compensation which not only is full but which also rests on an objective basis, that is to say, it covers solely the damage which he has sustained as a result of the infringement.

34 Article 94 of the regulation cannot therefore be interpreted as providing a legal basis, to the benefit of the rightholder, which permits an infringer to be required to pay punitive damages, established on a flat-rate basis.

35 Rather, the extent of the compensation payable under Article 94 of Regulation No 2100/94 must reflect, as accurately as possible, the actual and certain damage suffered by the holder of the plant variety right because of the infringement.

36 In the second place, such an interpretation is consistent with the objectives of Directive 2004/48, which lays down a minimum standard concerning the enforcement of intellectual property rights in general.

37 First of all, as stated in recital 17 of Directive 2004/48, remedies provided for in the directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case.

38 Next, recital 26 of that directive states that the aim of any compensation is not to introduce an obligation to provide for punitive damages.

39 Lastly, Article 13(1) of Directive 2004/48 specifies that Member States are to ensure that the competent judicial authorities, on application of the injured party, order the infringer to pay the holder of the right that has been infringed damages appropriate to the actual damage suffered by him as a result of the infringement.

40 In those circumstances, Article 94 of Regulation No 2100/94 does not permit an infringer to be ordered to pay a flat-rate 'infringer supplement', as described by the referring court, since such a supplement does not necessarily reflect the damage suffered by the holder of the variety infringed, although Directive 2004/48 does not prevent the Member States from laying down measures that are more protective.

41 Similarly, Article 94 does not permit the holder of a Community plant variety right to claim restitution of the gains and profits made by an infringer. In fact, both the 'reasonable compensation' and the amount of compensation payable under Article 94(2) of Regulation No 2100/94 must be set on the basis of the damage suffered by the injured party and not on the basis of the profit made by the person who committed the infringement.

42 Although paragraph 2 of Article 94 refers to the 'advantage derived … by the person who committed the infringement', it does not provide that that advantage has to be taken into account, as such, in the amount of the financial compensation actually awarded to the holder. The point should also be made that, so far as concerns an action for restitution as regards the advantage derived by the infringer, Article 97 of Regulation No 2100/94 refers expressly to the national law of the Member States.

43 It follows from those considerations that the answer to Questions 1, 5(b) and 6 is that Article 94 of Regulation No 2100/94 must be interpreted as meaning that the right to compensation which it establishes for the holder of a plant variety right that has been infringed encompasses all the damage sustained by that holder, although that article cannot serve as a basis either for the imposition of a flat-rate 'infringer supplement' or, specifically, for the restitution of the profits and gains made by the infringer.

Consideration of the questions relating to the methods for setting the compensation provided for by Article 94 of Regulation No 2100/94

The reasonable compensation provided for in Article 94(1) of Regulation No 2100/94

44 By Questions 2 and 3, the referring court asks, in essence, what factors must be taken into consideration in the determination of the reasonable compensation provided for in Article 94(1) of Regulation No 2100/94. In particular, it wishes to ascertain the extent to which certain specific circumstances should be taken into account for the purposes of that determination.

45 Article 94(1) of Regulation No 2100/94 is intended to offset the advantage gained by the person who committed the infringement, which corresponds to the amount equivalent to the licence fee that the infringer has failed to pay the holder (judgment of 5 July 2012 in *Geistbeck*, C-509/10, EU:C:2012:416, paragraph 40).

46 The Court has already held that that provision is intended to make good the loss suffered by the holder of a plant variety who is the victim of an infringement (judgment of 5 July 2012 in *Geistbeck*, C-509/10, EU:C:2012:416, paragraph 36).

47 Accordingly, in order to determine 'reasonable compensation' as provided for in Article 94(1) of Regulation No 2100/94, it is appropriate to take as the basis for that calculation an amount equivalent to the fee payable for licensed production (judgment of 5 July 2012 in *Geistbeck*, C-509/10, EU:C:2012:416, paragraph 37).

48 For that purpose, in order to determine the amount of reasonable compensation payable in a case of infringement, the amount of the fee which would be payable for licensed production of the plant variety, as referred to in Article 14(3) of Regulation No 2100/94, can be said to constitute an appropriate basis for calculation.

49 It is nevertheless the referring court which must verify whether the circumstances which it specifically mentions in the order for reference correspond to those of the fee that it is minded to use as a point of reference in order to determine what amount constitutes appropriate compensation.

50 It must be made clear in that regard that it also falls to the referring court to determine whether it is appropriate to increase the amount of that fee in the light of those circumstances, bearing in mind that each of them may be taken into account only once if the principle of objective and full compensation, as it results from Article 94 of Regulation No 2100/94, is to be observed.

51 In any event, the Court has stated that Article 94(1) of Regulation No 2100/94 must be interpreted as meaning that it does no more than provide for reasonable compensation in the event of unlawful use of a plant variety, but does not provide for reparation for damage other than damage connected to the failure to pay that compensation, thereby excluding from the amount of the compensation costs incurred for monitoring compliance with the rights of the plant variety holder (see judgment of 5 July 2012 in *Geistbeck*, C-509/10, EU:C:2012:416, paragraphs 50 and 51).

52 It follows from that interpretation that reasonable compensation, within the meaning of that provision, includes loss or damage that is closely connected to failure to pay that compensation.

53 Default interest may fall within that loss because of the late payment of the fee payable in the normal course of events, particularly if the contractual term is one which reasonable, informed contracting parties would have included, provided that the licence fee used as a reference does not include such interest.

54 Consequently, the answer to Questions 2 and 3 is that the concept of 'reasonable compensation', provided for in Article 94(1) of Regulation No 2100/94, must be interpreted as meaning that it covers, in addition to the fee that would normally be payable for licensed production, all damage that is closely connected to the failure to pay that fee, which may include, inter alia, payment of default interest. It is for the referring court to determine the circumstances which require that fee to be increased, bearing in mind that each of them may be taken into account only once for the purpose of determining the amount of reasonable compensation.

The compensation for damage provided for in Article 94(2) of Regulation No 2100/94

55 By Questions 4, 5(a) and (c), 7 and 8, the referring court seeks, in essence, to ascertain what factors should be taken into account in determining the compensation payable pursuant to Article 94(2) of Regulation No 2100/94 on account of damage suffered. In particular, it wishes to know whether the

amount of the fee payable for licensed production is to serve as a basis for determining the amount of compensation awarded under that provision and whether the legal costs incurred in interlocutory proceedings as well as any out-of-court expenses may be included as compensation for that damage.

56 As regards, first, the extent of that compensation for damage, it is apparent from paragraphs 33 to 43 of the present judgment that Article 94 of Regulation No 2100/94 seeks to secure full and objective compensation for the damage suffered by the holder of the infringed variety. In order to obtain such compensation, that person must produce evidence which establishes that his damage goes beyond the matters covered by the reasonable compensation provided for in Article 94(1).

57 In that respect, the fee normally payable for licensed production cannot in itself form the basis for determining that damage. In fact, such a fee enables the reasonable compensation provided for in Article 94(1) of Regulation No 2100/94 to be calculated and does not necessarily have any connection with the damage which has yet to be compensated.

58 In any event, it should be recalled that the circumstances which gave grounds, in the calculation of reasonable compensation, for increasing the fee normally payable for licensed production cannot be brought into account a second time in respect of the compensation provided for in Article 94(2) of Regulation No 2100/94.

59 It is the referring court which must determine the extent to which the damage pleaded by the holder of the variety infringed can be precisely established or whether it is necessary to set a lump sum which reflects the actual damage as accurately as possible. In that context, default interest at the usual rate may be applied to the amount of the compensation for damage if that appears justified.

60 Secondly, the Court notes that Article 94 of Regulation No 2100/94 gives no indication as to the substance of the damage for which compensation can be awarded. However, and in the absence of more detailed information about the national law in force in this area, the point should be made that Article 14 of Directive 2004/48 provides, in essence, that the costs incurred by the successful party are, in principle, to be borne by the unsuccessful party.

61 As regards the costs of the interlocutory application which preceded the main proceedings, the order for reference indicates that the applicant in the main action was ordered to pay the costs. Accordingly, nothing prevents national law from not making provision for those costs to be reimbursed when it comes to determining the damage for which compensation is to be paid under Article 94(2) of Regulation No 2100/94.

62 As regards out-of-court expenses, related inter alia to the time spent by the victim of the infringement in enforcing his rights, the Court has held that Article 14 of Directive 2004/48 aims to strengthen the level of protection of intellectual property, by avoiding the situation in which an injured party is deterred from bringing legal proceedings in order to protect his rights (see judgment of 16 July 2015 in *Diageo Brands*, C-681/13, EU:C:2015:471, paragraph 77).

63 That being so, the referring court must determine whether the foreseeable amount of the legal costs that may be awarded to the victim of the infringement is such, in view of the sums he has incurred in respect of out-of-court expenses and their utility in the main action for damages, as to deter him from bringing legal proceedings in order to enforce his rights.

64 The answer to questions 4, 5(a) and (c), 7 and 8 is that Article 94(2) of Regulation No 2100/94 must be interpreted as meaning that the amount of the damage referred to in that provision must be determined on the basis of the specific matters put forward in that regard by the holder of the variety infringed, if need be using a lump-sum method if those matters are not quantifiable. It is not contrary to that provision if the costs incurred in an unsuccessful interlocutory application are left out of account in the determination of that damage or if the out-of-court expenses incurred in connection

with the main action are not taken into consideration. However, a condition for not taking those expenses into account is that the amount of the legal costs that are likely to be awarded to the victim of the infringement is not such, in view of the sums he has incurred in respect of out-of-court expenses and their utility in the main action for damages, as to deter him from bringing legal proceedings in order to enforce his rights.

Costs

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

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

1. **Article 94 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights must be interpreted as meaning that the right to compensation which it establishes for the holder of a plant variety right that has been infringed encompasses all the damage sustained by that holder, although that article cannot serve as a basis either for the imposition of a flat-rate 'infringer supplement' or, specifically, for the restitution of the profits and gains made by the infringer.**

2. **The concept of 'reasonable compensation', provided for in Article 94(1) of Regulation No 2100/94, must be interpreted as meaning that it covers, in addition to the fee that would normally be payable for licensed production, all damage that is closely connected to the failure to pay that fee, which may include, inter alia, payment of default interest. It is for the referring court to determine the circumstances which require that fee to be increased, bearing in mind that each of them may be taken into account only once for the purpose of determining the amount of reasonable compensation.**

3. **Article 94(2) of Regulation No 2100/94 must be interpreted as meaning that the amount of the damage referred to in that provision must be determined on the basis of the specific matters put forward in that regard by the holder of the variety infringed, if need be using a lump-sum method if those matters are not quantifiable. It is not contrary to that provision if the costs incurred in an unsuccessful interlocutory application are left out of account in the determination of that damage or if the out-of-court expenses incurred in connection with the main action are not taken into consideration. However, a condition for not taking those expenses into account is that the amount of the legal costs that are likely to be awarded to the victim of the infringement is not such, in view of the sums he has incurred in respect of out-of-court expenses and their utility in the main action for damages, as to deter him from bringing legal proceedings in order to enforce his rights.**

[Signatures]