# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 7 November 2002 [1]

1. In order to answer the two questions referred by the Oberlandesgericht (Higher Regional Court) Düssseldorf, Germany, for a preliminary ruling under Article 234 EC, it is necessary to interpret Regulation (EC) No 2100/94 [2] on Community plant variety rights, and, in particular, Article 14(3), sixth indent, which requires those who benefit from the agricultural exemption to provide particular information, in conjunction with Article 8 of Regulation (EC) No 1768/95 [3] implementing rules on that exemption. It is also necessary to consider Article 3(2) of Regulation No 1768/95, which gives an organisation of holders the opportunity to invoke, collectively, the rights of its members.

## I — Facts

2. The appellant in the main proceedings is Saatgut-Treuhandverwaltung, a limited company established under German law whose object is to safeguard the commercial interests of natural and legal persons which directly or indirectly produce or market seeds or which are involved in those operations.

Its activities include the monitoring of the rights of holders of plant variety rights nationally and internationally, in particular the conduct of checks, in undertakings which propagate and distribute seeds, in respect of the rights of shareholders or third parties, the collection of licence fees in respect of plant variety rights, and the implementation of general measures which serve to promote production, guarantee sales, and supply faultless, top-quality seed to consumers. However, it does not purchase or sell seeds.

1 — Original language: Spanish.

2 — Council Regulation of 27 July 1994 (OJ 1994 L 227, p. 1), amended by Council Regulation of 25 October 1995 (OJ 1995 L 258, p. 3). The amendments do not affect the content of the provisions whose interpretation is requested in these preliminary reference proceedings.

3 — Commission Regulation of 24 July 1995 (OJ 1995 L 173, p. 14). The Commission has adopted implementing rules on two other occasions: in Regulation (EC) No 1238/95 of 31 May 1995 establishing implementing rules for the application of Regulation No 2100/94 as regards the fees payable to the Community Plant Variety Office (OJ 1995 L 121, p. 31) and in Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Regulation (EC) No 2100/94 as regards proceedings before that Office (OJ 1995 L 121, p. 37).

3. As the Oberlandesgericht Düsseldorf states in its order for reference, the appellant's shareholders include holders and exclusive licensees of plant variety rights under the Sortenschutzgesetz (German Law on the Protection of Plant Varieties), under Regulation No 2100/94 and under both provisions. The appellant's shareholders are also said to include the Bundesverband Deutscher Pflanzenschützer e. V., a civil association of which a large number of holders and exclusive licensees of plant variety rights, amongst others, are members. [4]

4. The appellant is invoking in its own name, by virtue of written mandates, the rights — in connection with the application of the farmer's privilege in respect of more than 500 protected varieties — of over 60 persons who are the holders or who enjoy the right of exploitation of plant variety rights, before the German courts and against hundreds of farmers, one of whom is Mr Jäger, the respondent in the main proceedings.

An initial group of persons whose rights it is invoking are shareholders in the appellant; a second group consists of members which belong to an association which is a shareholder in Saatgut-Treuhandverwaltung; and a third group is made up of persons who have merely mandated the appellant, for a consideration, to invoke their plant variety rights against the use by farmers for propagating purposes, on their own holding, of the product of the harvest which they have obtained by planting propagating material of a protected variety.

5. The purpose of the application is to ascertain to what extent, during the 1997/1998 growing season, Mr Jäger used for propagating purposes, on his own holding, the product of the harvest he had obtained by planting propagating material of over five hundred plant varieties — amongst which are specified potato, winter wheat, spring wheat, winter barley, spring barley, oats, winter rye, field pea, field bean, triticale and yellow lupin —, of which one third are protected varieties under Regulation No 2100/94 and the other two thirds are protected varieties under German law.

The appellant claims that the farmer must, by virtue of being a farmer, provide it with that information, but does not assume the obligation of showing that, in each case, the respondent has cultivated a specific variety or the extent to which he has done so. Mr Jäger opposes the claim because, amongst other reasons, the other party has adduced no evidence that he has used any of the protected plant varieties.

4 — In reply to the question I put to him during the hearing, the representative of the appellant company in the main proceedings informed the Court of Justice that its own shareholders and those of the Bundesverband Deutscher Pflanzenschützer are holders of a plant variety right.

## II — The questions referred for a preliminary ruling

6. The claim was dismissed at first instance. The Oberlandesgericht Düsseldorf, which is hearing the appeal, decided to stay proceedings and refer the following two questions to the Court of Justice for a preliminary ruling:

'1. Can

(a) a limited company (GmbH) established under German law be an "organisation of holders" within the meaning of Article 3(2) of ... Regulation ... No 1768/95 of 24 July 1995, and can

(b) such a company invoke, pursuant to Article 3(2), the rights deriving from Article 3(1) of the abovementioned regulation even in respect of holders who are not shareholders in it but members of an association which is a shareholder, and can

(c) such a company invoke, pursuant to Article 3(2), the rights deriving from Article 3(1) of the abovementioned regulation (for a consideration) even in respect of holders who are neither shareholders nor members of an association which is a shareholder?

2. Must the sixth indent of Article 14(3) of ... Regulation No 2100/94, read in conjunction with Article 8 of ... Regulation No 1768/95, be interpreted as meaning that the holder of a plant variety right protected under Regulation No 2100/94 can require the information referred to in the abovementioned provisions *from any farmer*, *irrespective* of whether or not there is any indication that he has carried out a specific act of use in respect of the variety in question under Article 13(2) of Regulation No 2100/94, or at least otherwise used the variety in question on his holding?'

## III — Community legislation

7. Article 1 of Regulation No 2100/94 states: '[a] system of Community plant variety rights is hereby established as the sole and exclusive form of Community industrial property rights for plant varieties.' Since it entered into force, Member States have been entitled to grant national property rights, although Article 92 prohibits the holding of two sets of rights, so that a variety which is the subject matter of a Community plant variety right cannot be the subject of a national plant variety right or any patent for that variety. Varieties of

all botanical genera and species, including, inter alia, hybrids between genera or species, may form the object of Community plant variety rights.

8. In order to be protectable, varieties must be distinct, uniform, stable, new and designated by a denomination. The person who bred, or discovered and developed the variety, or his successor in title, shall be entitled to the Community plant variety right.

9. Under Article 13 of Regulation No 2100/94, only the holder of a Community plant variety right shall be entitled to effect certain acts, which are set out in paragraph 2, namely: (a) production or reproduction (multiplication); (b) conditioning for the purpose of propagation; (c) offering for sale; (d) selling or other marketing; (e) exporting from the Community; (f) importing to the Community; and (g) stocking for any of the purposes mentioned in (a) to (f). The holder may give authorisation for those acts to be carried out. He may also make his authorisation subject to conditions and limitations.

10. Article 14(1) contains a derogation from the holder's rights, for the purposes of safeguarding agricultural production, since it authorises farmers to use for propagating purposes, on their own holding, the product of the harvest which they have obtained by planting propagating material of a variety other than a hybrid or synthetic variety, which is covered by a Community plant variety right. The farmers' privilege applies only to certain agricultural plant species listed in paragraph 2, classified in four groups: fodder plants, oil and fibre plants, cereals and potatoes.

The national court is interested in the interpretation of the sixth indent of 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, ... , in implementing rules, ... , on the basis of the following criteria:

...

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

11. In order to fulfil the obligation laid down in Article 14(3) of Regulation No 2100/94, the Commission adopted Regulation No 1768/95 which gives effect to the agricultural exemption. Farmers who take advantage of that opportunity must pay an equitable remuneration to the holder, which is to be sensibly lower than the amount charged for the licensed production of propagating material of the same variety in the same area. Small farmers, as defined in Regulation No 2100/94, are exempt from that obligation.

12. The Oberlandesgericht Düsseldorf is seeking an interpretation of Article 3(2) of Regulation No 1768/95, which enables an organisation of holders to invoke, collectively, the rights of its members, and of Article 8(2) of the regulation, which establishes detailed rules governing the farmer's duty to supply information, for the purpose of remunerating the holder.

Article 3(2) provides:

'Rights referred to in paragraph 1 may be invoked by individual holders, collectively by several holders or by an organisation of holders which is established in the Community at Community, national, regional or local level. An organisation of holders may act only for its members, and only for those thereof which have given the respective mandate in writing to the organisation. It shall act either through one or more of its representatives or through auditors accredited by it, within the limits of their respective mandates.'

In so far as it is relevant here, Article 8 establishes that, where a contract has not been concluded, the farmer shall be required to provide the holder, if he so requests, with a statement containing the following information: (a) the name of the farmer, the place of his domicile and the address of his holding; (b) the fact whether the farmer has made use, on his holding, of the product of the harvest belonging to one or more varieties of the holder; (c) if the farmer has made such use, the amount of the product he has used; (d) the name and address of the person who has supplied a service of processing the relevant product of the harvest for him for planting; and (e) if the information obtained under (b), (c) or (d) cannot be confirmed in accordance with the provisions of Article 14, the amount of licensed propagating material of the varieties used, as well as the name and address of the supplier thereof.

That information is to refer to the current marketing year, and to one or more of the three preceding marketing years for which the holder has not previously requested information.

## IV — The proceedings before the Court of Justice

13. Saatgut-Treuhandverwaltung, Mr Jäger, Italy and the Commission have submitted written observations in these proceedings within the period laid down for the purpose by Article 20 of the Statute of the Court of Justice.

At the hearing, which was held on 3 October 2002, the representative of Saatgut-Treuhandverwaltung, Mr Jäger's representative, and the agents of the United Kingdom and the Commission presented their oral submissions.

## V — The first question referred for a preliminary ruling

14. By this question, which it has set out in three paragraphs, the national court wishes to know whether a limited company, governed by German law, constitutes an 'organisation of holders' within the meaning of Article 3(2) of Regulation No 1768/95 and whether, as such, it may also invoke the rights conferred by Article 3 (1) on holders of plant variety rights who, although not shareholders, belong to an association which is a shareholder, or who, although neither shareholders nor members of an association which is a shareholder, entrust it with that task for a consideration.

### A — *The views of those who have presented observations*

15. Saatgut-Treuhandverwaltung points out that the Community legislature has not defined the term 'organisation of holders'. It proposes that it be given a broad meaning so that holders who, owing to the high number of farmers affected, cannot claim their rights individually have the opportunity to do so together with others; for that purpose, a holder or person who holds an exclusive right of exploitation need only grant a power of attorney to the organisation, thereby becoming a member. And there is all the more reason for the company to be authorised to act for holders who, as well as giving it their mandate, are members of an association which is a shareholder.

16. Mr Jäger considers that a limited company is not composed of members within the meaning of Article 3(2) of Regulation No 1768/95. In the light of the terminology used, the legislature had in mind a group with a common professional interest adopting the legal form of an association or similar structure, not an undertaking with independent legal status and organisation which is disassociated from the individual interests of the holders. In his view, the appellant is merely a fee-collecting undertaking motivated by purely financial interests.

17. The Italian Government considers that an organisation of holders should not adopt the form of a company with legal personality. If it did so, it would have third party status in relation to each holder of a plant variety right and therefore could not be the transferee of the benefits granted to holders by Article 14 of Regulation No 2100/94.

18. The Commission believes that the term at issue should be given a broad interpretation. The fact that a holder may invoke his rights either personally or collectively, either in a group or through an organisation, means that, for the purposes of capacity to bring an action, the organisation must be treated in the same way as an individual holder. A limited company, established under German law, would act as an 'organisation of holders' on behalf of its members and of those who are members of a body which is a shareholder in the company, but not of those who, although neither shareholders nor members of an association which is a shareholder, give it their mandate to invoke their rights for a consideration.

B — *Reply to the question referred for a preliminary ruling*

19. I agree with the view taken by the Commission with regard to the interpretation of Article 3(2) of Regulation No 1768/95. The meaning of organisation of holders within that provision is so broad that the Community legislature seems to have wanted it to encompass all the types of association existing in the Member States. However, irrespective of the legal form it adopts, it must comply with the conditions laid down by the provision for its operation.

20. Regulation No 1768/95 establishes the implementing rules of the conditions to give effect to the farmer's privilege. Under Article 3, the rights and obligations of the holder which derive from the provisions of Article 14 of Regulation No 2100/94, other than the right to an already quantifiable payment of the remuneration, may not be transferred to third parties.

Essentially, there are three rights which this provision confers on the holder: to receive the remuneration from the farmer who makes use of the privilege; to monitor compliance with the legislation governing this situation; and to obtain the relevant information from the farmer and from whomever has processed the product for subsequent use.

21. Article 3(2) of Regulation No 1768/95 provides that these rights may be invoked by individual holders, collectively by several

holders or by an organisation of holders which is situated in the Community, at Community, national, regional or local level.

I do not agree with the Italian Government's line of argument. Provided that all the company's members are holders of a plant variety right and that its company object is to invoke the rights arising under Article 14 of Regulation No 2100/94, the fact that it has its own legal personality does not infringe Article 3(2) of Regulation No 1768/95, since that provision, as I have pointed out, does not require the organisation to adopt a specific legal form.

I also disagree that the holder assigns his rights to the company. Acquiring the status of member of an organisation which adopts the form of a limited company does not involve transferring rights, particularly as Article 3(1) establishes that, other than the right on an already quantifiable payment, the other rights which the organisation may invoke may not be transferred to third parties, unless they are transferred together with a Community plant variety right.

22. Article 3(2) of Regulation No 1768/95 imposes various conditions on the organisations of holders. First, they are to act only for their members, who must be holders of a plant variety right. That condition precludes them acting for themselves or for third parties, as in the case of the appellant company in the main proceedings. Likewise, it prevents licencees, whether or not exclusive, of the exploitation of protected plant varieties from belonging to such organisations, since they are not holders and therefore do not have the rights which Article 14 of Regulation No 2100/94 confers on holders when laying down the provisions governing the agricultural exemption.

Second, it is a prerequisite that a holder be a member of the organisation or a shareholder; however, that is not enough, since an organisation may represent him only if he has given it his mandate in writing. The holder is required to comply with that formality in the deed of incorporation or subsequently.

23. Thus, if the German legislation governing the creation and operation of limited companies allows these requirements to be met — a matter which it is for the national court to decide — one of these companies may be an 'organisation of holders' of plant variety rights within the meaning of Article 3(2) of Regulation No 1768/95.

24. The situation in which an association of holders is a shareholder of a limited company which protects the rights arising for holders of plant variety rights from the farmer's privilege is treated in the same way. Indeed, provided that the association as such is composed of holders, the company may act in their name as well, on condition that they have given it an express mandate to do so. This is a formula likely to encourage an organisation of holders established in one Member State to invoke, in that country, the rights of holders situated in another Member State, who have formed an organisation in order to protect their rights collectively.

25. However, compliance with these requirements precludes an organisation of holders within the meaning of Article 3(2) of Regulation No 1768/95 from enforcing the rights of persons who are not members, as in the case of those who, although neither shareholders nor members of an association which is a shareholder of Saatgut-Treuhandverwaltung, have given it their mandate to assert, for a consideration, their rights in respect of the farmer's privilege.

I disagree with the view taken by Saatgut-Treuhandverwaltung that, merely by granting a mandate, a holder becomes a member. I do not dispute that it is the correct way to form a group to protect legitimate interests jointly, but, if an organisation of holders adopts the form of a commercial corporation, the only way to join it is by becoming a shareholder: if a holder asks the company to assert his rights for a consideration, that does not amount to acquiring the status of a shareholder.

26. For the reasons stated, I consider that a limited company governed by German law may constitute an 'organisation of holders' within the meaning of Article 3(2) of Regulation No 1768/95 and, as such, invoke, on behalf of holders of plant variety rights, the rights referred to in Article 3(1), on condition that they are shareholders, that they have given it their mandate in writing and that it acts on their behalf. The company is also authorised to invoke those rights on behalf of holders of plant variety rights who are members of an association which is a shareholder, provided that they have given it their mandate in writing. On the other hand, it does not represent persons who are neither shareholders nor members of an association which is a shareholder.

## VI — The second question referred for a preliminary ruling

27. By the question it has posed, the Oberlandesgericht Düsseldorf wishes to know whether the provisions it cites mean that the holder of a Community plant variety right may request relevant informa-

tion from any farmer for the purpose of claiming payment from him for having made use of the privilege, even if there is no evidence that the variety has been used for any of the operations provided for in Article 13(2) of Regulation No 2100/94, which include production, or for any other purpose.

28. This question is identical to that posed by the Oberlandesgericht Frankfurt am Main in August 2000, which gave rise to Case C-305/00 *Schulin*, in which I delivered my Opinion on 21 March 2002 and which is pending judgment. The facts of that case are very similar to those which have led to the proceedings against Mr Jäger; the difference lies in the fact that then Saatgut-Treuhandverwaltgung was the respondent, whereas it is now the appellant.

29. In July 2002, the European Seed Association wrote me a letter in which, after saying that, at the request of the Directorate-General for Agriculture of the Commission of the European Communities, it had assisted in defining the agricultural exemption contained in Regulation No 2100/94 and in Regulation No 1768/95, it explained to me the aim of the legislature in establishing rules to govern this situation, and asked me to reconsider the reply which I had proposed that the Court of Justice should give to the question referred for a preliminary ruling by the Oberlandesgericht Frankfurt am Main.

30. It appears that the representative of Saatgut-Treuhandverwaltung has tried to sidestep the rules governing the procedure of the Court of Justice, by violating the fact that they are mandatory.

Aware, from the decision in *Emesa Sugar*, [5] that the Advocate General participates publicly and personally in the process of preparing the judgment of the Court of Justice putting an end to the dispute between the parties, so that, in view of the judicial nature of his contribution, his acts are not subject to an adversarial procedure, the appellant in the main proceedings organised an ingenious ruse. Since in earlier proceedings, in which the same question had been referred for a preliminary ruling, [6] the reply proposed by this Advocate General did not take the direction sought by the company in its claims, nor were the circumstances those required by case-law [7] for declaring, pursuant to Article 61 of the Rules of Procedure, that the oral stage be reopened, it decided to discontinue the action it had brought in order to prevent the Court of Justice giving a ruling without

5 — Case C-17/98 *Emesa Sugar* [2000] ECR I-665.

6 — *Schulin*, cited above.

7 — See my Opinion in Case C-466/00 *Kaba*, delivered on 11 July 2002 (judgment of 6 March 2003, [2003] ECR I-2219, I-2222), points 108 and 109.

having dealt with its observations on the Advocate General's Opinion. It would therefore be able to reinforce its arguments in the following case, in which the same disagreement was raised.

To strengthen its position, it contacted the Secretariat of the Court of Justice and requested that the *Schulin* case be discontinued and, in the alternative, that judgment should not be given in that case before the hearing was held in the present case. Although the German court, the Oberlandesgericht Frankfurt am Main, did not agree to discontinue the action, and persisted with its reference for a preliminary ruling, the delay in the administration of justice, an inherent consequence of the high number of cases to be decided, ran in the company's favour, so that it has had the opportunity to submit its oral pleadings in this case before the Court of Justice has given a ruling on the merits in the earlier one. That is all very well if it helps to improve the quality of judicial protection, but we must remember the principle of the duty to act fairly in proceedings which the parties owe to judicial bodies, in this case not only to the Court of Justice but also to the German courts, and also the principle of solidarity with and respect for the other litigants which, owing to the complexity of and constant increase in legal proceedings on all fronts, requires that a person who brings an action must — subject always to its right to take all the steps necessary for protecting its rights — do so in a reasonable manner, so as not to affect the duration or depth of analysis of claims made by others. That is to say, the right to effective judicial protection also has its limits. In the circumstances in which the judicial function is currently exercised in the western world, those limits are reflected in the fact that, since the courts have a finite time in which to settle the claims brought before them, each person has to assert his claims with no loss of safeguards but without adversely affecting his fellow citizens' right of access to the courts, by avoiding bringing actions which are unnecessary or untimely, excessively complicated or confused in form, or too lengthy, and by not bringing multiple actions in order to give full rein to his exclusive interests. [8]

A — *The views of those who have submitted observations*

31. Saatgut-Treuhandverwaltung maintains that the sixth indent of Article 14(3) of Regulation No 2100/94, in conjunction with Article 8(2) of Regulation No 1768/95, allows the holder of a plant variety right to require any farmer to inform him whether he has exercised the privilege and to let him know the extent of the operation, even if the holder has no evidence that a protected variety has been used on his holding in the past. In support of this interpretation it cites no fewer than 10 recent judgments of German courts of first instance which have adopted the same position.

8 — In reply to the question I put to him during the hearing, the representative of Saatgut-Treuhandverwaltung admitted that bringing one action, subsequently attempting to discontinue it, and raising similar actions in other proceedings was part of a planned strategy to reply to the Advocate General's Opinion.

In the company's view, the holder is not in a position to adduce any evidence that the farmer has used, for propagating purposes, on his own holding, the product of the harvest which he has obtained by planting propagating material of a protected variety. In theory, the fact that a farmer may have made one purchase of new certified seed of a variety from a supplier would amount to evidence that he could use the product of the harvest for propagation purposes. However, in practice, the holder is not in a position to adduce that evidence since, as he does not maintain business relations with farmers, he does not know who has purchased at some point seed of his new plant variety. The holder delivers the base or pre-base seed of the variety to an establishment which multiplies plants, so that it may manufacture the product for marketing. After that, the seed is first sold to cooperatives or wholesalers, reaching users through retailers and resellers. The company points out that there is nothing to prevent a farmer who has bought certified seed from using the product of the harvest, in particular, in the case of cereals, for propagating purposes during several planting seasons.

32. At the hearing, the United Kingdom Government's agent advocated that Article 14(3), sixth indent, of Regulation No 2100/94 and Article 8 of Regulation No 1768/95 should be interpreted literally. Since those provisions do not distinguish between farmers in general and farmers who have already sown a protected plant variety on their holding, they cannot be taken to mean that only the latter are required to reply to a request for information made by a holder. Furthermore, if the aim of the legislation is to enable the holder to exercise his right to fair remuneration in consideration for the privilege enjoyed by the farmer, the simplest and most practical way of gaining access to the information is to request it directly from those who sow seeds.

33. Mr Jäger, the Italian Government and the Commission all point out that the application of Article 8(2)(b) and (c) requires that seed of a protected variety has been purchased or that there are indications that it has been used, and that the holder should specify, in his request for information, the evidence he has for reaching that conclusion.

The Commission adds that the exercise of the farmers' privilege presupposes, by any reckoning, the existence of a relationship with the holder since, before the product of the harvest of the protected variety is resown, they must have concluded some agreement for the first use, either directly, or indirectly by means of the purchase of seeds from a supplier. It submits that, as a general rule, the holder has access to the information relating to the transactions involving his protected varieties. Otherwise, the best thing to do would be to contact the seed wholesalers or other suppliers who market his products, before trying to impose on all farmers an enforceable obligation to supply information.

B — *Reply to the question referred for a preliminary ruling*

34. After studying closely the written and oral statements made before the Court of Justice in these proceedings, I have found no grounds for amending the view I expressed in the Opinion delivered in Case C-305/00, cited above.

35. As stated in the fifth recital, the aim of Regulation No 2100/94 was to provide improved protection compared with the situation in 1994 for all breeders, in order to stimulate the breeding and development of new varieties.

Article 13 specifically defines the commercial transactions requiring the holder's authorisation; these include transactions made with components of a variety and also with the material harvested (flowers and fruit, for example) from reproduction to storage.

36. The exercise of Community plant variety rights is subject to restrictions laid down in provisions adopted in the public interest. Since that includes safeguarding agricultural production, Article 14 of the Regulation authorised farmers, under certain conditions, to use the product of their harvest for reproduction. Of the 20 or so species listed in Article 14(2) as covered by the exemption, there are some which are very extensively and commonly grown, such as barley, wheat and potatoes.

Without any doubt, that opportunity restricts the holder's right to exploit the variety he has obtained or has discovered and developed by his own efforts. In order to protect the legitimate interests of the breeder and the farmer, Article 14 provided that it was necessary to adopt implementing rules on the basis of certain criteria, amongst them the obligation to pay an equitable remuneration to the holder.

37. As I have already pointed out in the Opinion I delivered in Case C-305/00 (*Schulin*) some farmers seem to feel that they are adversely affected by these regulations, because they consider that they limit the practice, carried on in the sector from time immemorial, of keeping part of the product of one harvest in order to make free use of it as propagating material in the next. However, the fact is that, as a result of the work of breeders, significant advances have been made in the development of new plant varieties which increase and improve agricultural production.

Since the obligation to remunerate the breeder for the use of the product of the harvest for propagating purposes affects only those who sow a protected variety on their holding, farmers who use uncertified seed are exempt from the obligation to supply information and pay remuneration.

Furthermore, as seen in the section devoted to the reply to the first question, Article 3(2) of Regulation No 1768/95 provides holders with the opportunity of forming an organisation in order to invoke, collectively, their rights arising as a result of the agricultural exemption.

38. Under Article 14 of Regulation No 2100/94, — the provision which lays down the agricultural exemption —, monitoring compliance with those provisions and the rules adopted to implement them, is the responsibility of the holders, without any assistance from official bodies. In that regard, relevant information may be provided by official bodies involved in the monitoring of agricultural production, if such information has been obtained through ordinary performance of their tasks, without additional burden or costs.

39. In the light of that legislation, it is a question of deciding which farmers are required to provide information: all farmers, simply because they are farmers, as Saatgut-Treuhandverwaltung and the United Kingdom Government maintain; or, as Mr Jäger, the Italian Government and the Commission suggest, farmers who, in the past, have sown or planted on their holding propagating material of the protected variety in question.

In my view the latter interpretation should prevail.

In order to facilitate monitoring, which would be practically impossible under those conditions, Article 14(3), sixth indent, of Regulation No 2100/94 and Article 8 of Regulation No 1768/95 require the farmer to provide the holder, under contract or on request, with the relevant information for him to determine whether it is appropriate to seek remuneration, and also the amount of any remuneration. That requirement to provide information at the request of the holder extends to processors.

40. I should like to highlight a point which, although it is obvious, seems to have escaped the attention of the representative of Saatgut-Treuhandverwaltung and the agent of the United Kingdom Government: the aim of Regulation No 2100/94 is not to regulate any agricultural production sector in the Community, but to establish Community plant variety rights. Consequently, when its provisions mention the 'farmer' they are not referring to any agricultural

operator who carries out his activity within the territory of the Union, but only to one who falls within the persons covered by the regulation, who are those who use protected plant varieties on their holdings.

41. From the wording of Article 14(1) and (2), it is clear that the exception applies only to farmers who fulfil certain conditions, such as having (a) planted, on their own holdings, propagating material of a protected variety; (b) had a harvest; and (c) cultivated a variety which corresponds to one of the agricultural plant species listed. If they use the product of that harvest, they are under a duty to pay remuneration to the holder and to supply him with the relevant information for calculating it. [9]

42. The sole objective of Regulation No 1768/95 is to implement Article 14(3) of Regulation No 2100/94, the provision which lays down the conditions for giving effect to the agricultural exemption, by protecting the legitimate interests of the farmer and those of the holder. Given the limited aim of that legislation, I have all the more reason to consider that the 'farmer' on whom it imposes certain obligations cannot be any farm worker within the European Union; it can only be an operator to whom the legislation applies, that is to say, someone who has acquired propagating material from one of the agricultural plant species listed in Article 14(2) of Regulation No 2100/94.

Accordingly, the farmers affected by the duty to supply information are limited to those who have in the past acquired propagating material from the protected variety in question. It seems to me fundamental that that burden should not be imposed on persons who have never bought such material, since they would not have been able to cultivate it or to gather a harvest suitable for being re-used, for propagating purposes, on their holdings.

43. Article 8 of Regulation No 1768/95 lays down detailed rules relating to the content of the information which must be supplied by a farmer who is in a position to use the product harvested with propagating material of a protected variety. Under Article 8(1), the farmer and the holder may specify, in a contract, the details to be supplied by the former to the latter. That contract is additional to the main contract, in which the holder or his representative authorises the farmer to carry out one of the acts listed in Article 13(2) of Regulation

9 — In the circumstances, if the legislature had wished to refer to all the farmers in the Community it should have said so specifically, indicating that they were all affected by the duty to provide information to the holders, irrespective of whether they had planted on their holdings certified seed of one of the agricultural plant species listed in Article 14(2) of Regulation No 2100/94. In any event, there are more all-encompassing expressions than 'farmers' which the legislature could have used, like, for example, 'todos los agricultores', 'cualquier agricultor', 'tous les agriculteurs', 'l'ensemble des agriculteurs', 'chaque agriculteur', 'all farmers', 'every farmer', 'alle Landwirte' or 'jeder Landwirt'.

No 2100/94, normally agricultural production.

44. In the absence of an additional contract concerning the details of the information which has to be provided, a legal relationship exists between, on the one hand, the holder, his representative or the traders authorised to sell the propagating material of his protected variety and, on the other, the farmer who purchases it.

Since it is for the holder to monitor compliance with his rights by farmers and other economic operators, he is the person with the greatest interest in there being a record of the transactions relating to the propagating material of his protected plant varieties and, more particularly, of the species in respect of which farmers may exercise their privilege of using the product of the harvest for a subsequent sowing or planting.

45. The United Kingdom and, in particular, the appellant company maintain that it is practically impossible for holders to know which farmers have purchased seed of their protected varieties, since they grant licences for multiplication and are not concerned with subsequent transactions. Saatgut-Treuhandverwaltung added during the hearing that the holders' attempt to impose binding contracts on the economic agents who participate in the distribution and marketing of the seed would be contrary to Article 81 EC.

46. I do not agree with this view. Admittedly, under Article 27 of Regulation No 2100/94, Community plant variety rights may form, in full or in part, the subject of contractually granted exploitation rights, exclusive or non-exclusive. However, when a holder grants a licence, there is nothing to prevent him imposing any conditions and limitations appropriate to his right. In any event, the provision allows him to invoke the rights conferred by the Community plant variety right against a licensee who contravenes the clauses of the contract.

47. It should be added that it is impossible to assess in the abstract whether the conditions which holders are able to impose on licensees, in order to ensure compliance with their rights in respect of the agricultural exemption, may be contrary to Article 81 EC. It is necessary to consider, in each case, whether it is a question of agreements, decisions or prohibited practices and, subsequently, to ascertain whether the exceptions provided in Article 81(3) EC are applicable.

48. Article 8(2)(a) to (f) of Regulation No 1768/95 gives the relevant details which the farmer must supply to the holder if there is no contract; amongst these are, first, the

name of the farmer, the place of his domicile and the address of his holding.

In my view, there is no reason why it should be superfluous or unnecessary to request that information, even though if the holder, either directly or through the organisation to which he belongs, contacts the farmer, that means that he already has part of it. The farmer's obligation to include that information in his statement may be explained partly by its use for identification purposes and partly by the fact that it may be useful to the recipient to check or complete it.

49. Second, the farmer must indicate whether he has exercised the privilege in respect of a variety belonging to the holder. I consider that that provision confirms that, when the holder asks for the information, he knows that the farmer is in a position to have used that product, that is to say, that he has previously purchased propagating material of the holder's protected variety.

50. Third, if the farmer has used the product on his holding, he has to specify, in his statement, the amount he has used, so that the remuneration payable to the holder may be calculated. In that case, he is also required to supply the particulars of the persons who have processed the product for his subsequent use, if he has used the services of third parties.

51. Fourth, if the circumstances relating to the use of the product of the harvest and the amount cannot be confirmed, the farmer has to indicate the amount he has used of licensed propagating material of the holder's variety and the particulars of the supplier.

During the hearing, Saatgut-Treuhandverwaltung's representative stated that the fact that the farmer has, in that event, to provide the supplier's particulars, confirms its argument that the holder does not have that information. However, I disagree with this interpretation. In my view, if a farmer acquires propagating material from a protected variety but does not make use of the privilege, it may also be of interest to the holder to find out the amount used in relation to the quantity purchased and, for the purposes of checking, to know who has supplied it to him.

52. As regards monitoring by the holders, Article 14 of Regulation No 1768/95 requires farmers to keep invoices and labels from at least the three marketing years preceding the current marketing year, which is as far back as the holder's request for information regarding the use of the product of the harvest may go.

53. Under Article 8(5) and (6) of Regulation No 1768/95, the holder is permitted,

instead of contacting the farmer, to approach cooperatives, processors or suppliers of licensed propagating material of the holder's protected varieties, who have been authorised by the farmers concerned to supply that information, in which case, the specification of individual farmers is not required.

Those provisions also confirm, first, that for a holder validly to exercise his right to information in respect of a variety, the farmer must have cultivated propagating material of that variety beforehand and, second, that the holder knows who are, and have been during several marketing years, the suppliers of propagating material to specific farmers.

54. The second subparagraph of Article 8 (3) of Regulation No 1768/95, which specifies the marketing years with respect to which the farmer is required to give the information relating to the use of the privilege, confirms the decisive role which the holder plays or is called upon to play in the marketing chain of his protected plant variety. Under that provision, the first marketing year must be the one in which the first request for information was made in respect of the variety and the farmer concerned, *provided that the holder has made sure that, when the farmer purchased the propagating material of the protected variety or previously, he was informed at least about the filing of the application for the grant of a Community plant variety right or about the grant of such a right as well as about conditions relating to the use of that propagating material.*

55. It is clear from this provision that information may be requested from the farmer only after he has knowingly purchased a protected plant variety and also that there are obligations which the holder has to meet with regard to the farmer at the time the seed is purchased. There is therefore no basis for Saatgut-Treuhandverwaltung's claim that all farmers are required to give information to holders, irrespective of whether they have ever purchased seeds of protected varieties, and that it is impossible for the holder to know who has acquired them.

56. It is therefore to be concluded, from the wording of the provisions whose interpretation is requested by the German court, as well as from their context and the objectives which they pursue, [10] that the obligation to supply the relevant information to the holder of a protected plant variety, in respect of the use of the privilege, affects all farmers who have acquired licensed

10 — Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21. See also Case 292/82 *Merck* [1983] ECR 3781, paragraph 12, and Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23.

propagating material of that variety, and those are the only circumstances in which the holder is entitled to ask for that information.

Consequently, the obligation to provide information, non-fulfilment of which may lead to court proceedings, as this case demonstrates, cannot be extended, as Saatgut-Treuhandverwaltung claims, to farmers who have never purchased propagating material of the holder's variety, because it is therefore technically impossible for the farmer to have used the product of the harvest.

57. It is true that the holder cannot check, in each individual case, whether farmers use, on their holdings, for propagation purposes, the product they have harvested after growing his protected variety. [11] However, in view of the fact that any use of the constituents of that variety requires his authorisation, that he may impose conditions or restrictions when he grants that authorisation and that he has exclusive responsibility for monitoring the observance of his rights, it is reasonable that he would arrange — if he has not already done so — to be permanently informed, through the intermediaries and seed suppliers, about who purchases the propagating material. With that information, he may more accurately send his requests for information to farmers who are required to give it to him.

The claim made by Saatgut-Treuhandverwaltung that it may indiscriminately contact *all the farmers in a country* and ask them to fill in a form concerning the use of the *product of the harvest which they have obtained by planting a protected variety* seems to me disproportionate. Furthermore, it is unnecessary for the purpose of protecting the legitimate interests of holders who, as I have already pointed out, have other more accurate means of obtaining the relevant information to which they are doubtless entitled.

58. For the reasons stated, I consider that Article 14(3), sixth indent, of Regulation No 2100/94, in conjunction with Article 8 of Regulation No 1768/95, must be construed as meaning that the obligation to give the holder of a protected plant variety right information concerning the planting on their holdings of the product of the harvest obtained using propagating material of that variety, applies only to farmers who have purchased that material in the past and who are therefore in a position to have planted it, irrespective of whether they have done so or not.

11 — Kiewiet, B.P., who is the President of the Community Plant Variety Office, in the report presented in Einbeck on 26 January 2001 on *Modern Plant Breeding and Intellectual Property Rights*, p. 2, states: 'Taking action against farmers who are not prepared to pay involves considerable expense (not least legal costs) and is made even more difficult by the lack of adequate information about the extent of the use of seed from protected varieties at individual farm level.' Published on www.cpvo.fr/e/articles ocvv/speech bk.pdf.

## VII — Conclusion

59. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the questions submitted by the Oberlandesgericht Düsseldorf:

(1) A limited company governed by German law may constitute an 'organisation of holders' within the meaning of Article 3(2) of Regulation No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation (EC) No 2100/94 on Community plant variety rights and, as such, invoke, on behalf of holders of plant variety rights, the rights provided for in Article 3(1), on condition that they are shareholders, that they have given it their mandate in writing and that it acts on their behalf. The company is also authorised to invoke those rights on behalf of the holders of plant variety rights who are members of an association which is a shareholder, provided that they have given it their mandate in writing. On the other hand, it does not represent persons who are neither shareholders nor members of an association which is a shareholder.

(2) Article 14(3), sixth indent, of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, read in conjunction with Article 8 of Regulation (EC) No 1768/95, must be construed as meaning that the obligation to give the holder of a protected plant variety right information concerning the planting on their holdings of the product of the harvest obtained using propagating material of that variety, applies only to farmers who have purchased that material in the past and who are therefore in a position to have planted it, irrespective of whether they have done so or not.