

Anonymised version

Translation

C-522/21 – 1

Case C-522/21

Request for a preliminary ruling

Date lodged:

24 August 2021

Referring court:

Pfälzisches Oberlandesgericht Zweibrücken (Germany)

Date of the decision to refer:

18 August 2021

Defendant and appellant:

MS

Applicant and respondent:

Saatgut Treuhandverwaltungs GmbH

[...]

**Pfälzisches Oberlandesgericht
Zweibrücken
(Palatine Higher Regional Court,
Zweibrücken, Germany)**

Order

In the case of

MS, [...] Thür

– defendant and appellant –

[...]

v

Saatgut Treuhandverwaltungs GmbH, [...] Bonn

– applicant and respondent –

[...]

concerning compensation due to infringement of a plant variety right

the 4th Civil Chamber of the Palatine Higher Regional Court, Zweibrücken [...] [composition of the panel of judges] made, on 18 August 2021, the following

order:

- I. The proceedings are stayed.
- II. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the first paragraph, point (b), and the second paragraph of Article 267 of the Treaty on the Functioning of the European Union:

Is Article 18(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 Council Regulation (EC) No 2100/94 on Community plant variety rights, in so far as a minimum level of compensation of quadruple the licence fee can be claimed under the conditions laid down therein, compatible with Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights ('the Basic Regulation'), in particular with the first sentence of Article 94(2) of that regulation?

Grounds:

I.

The parties to the proceedings are in dispute, in so far as remains relevant at second instance, regarding compensation under Community law on plant varieties for unauthorised subsequent planting of harvested material.

The applicant, an organisation, in the form of a limited liability company, of holders of plant variety rights, has been tasked by those holders with safeguarding their property rights, and in particular with enforcing entitlements to information and payment, in its own name.

The defendant is a farmer against whom the applicant brought an action at first instance seeking, inter alia, information on the planting of harvested material carried out by him in respect of the winter barley variety 'KWS Meridian', which is protected under Community law. In those proceedings, the defendant provided,

for the first time, information on the extent of the processing of the abovementioned seeds in the previous years as follows:

- 2012/2013 marketing year 24.50 decitonnes (dt = 100 kg)
- 2013/2014 marketing year 26.00 dt
- 2014/2015 marketing year 34.00 dt
- 2015/2016 marketing year 45.40 dt

After the defendant subsequently paid, in respect of the 2015/2016 marketing year in accordance with Article 94(1) of the Basic Regulation (Council Regulation (EC) No 2100/94 of 27 July 1994), as compensation (reasonable compensation) the customary simple licence fee ('*Z-Lizenzgebühr*' [licence fee for certified seed] = EUR 11.95 per dt) in the amount of EUR 537.75 (EUR 11.95 x 45 dt), which would have been payable in the case of licensed production (see CJEU, judgment of 9 June 2016, C-481/14, *Hansson*, [...] [reference in national literature], [EU:C:2016:419]) the applicant sought, by letter from its lawyer of 26 November 2019, payment of further compensation in the amount of EUR 2 151.00 (lump sum of quadruple the licence fee for the 2013/2014 and 2014/2015 marketing years, offsetting in each case the subsequently paid simple licence fee of EUR 310.70 and EUR 406.30, respectively = EUR 932.10 and EUR 1 218.90) and in the amount of EUR 1 613.25 (lump sum of quadruple the licence fee for the 2015/2016 marketing year, offsetting the simple licence fee) in accordance with Article 94(2) of the Basic Regulation (Council Regulation (EC) No 2100/94 of 27 July 1994), read in conjunction with Article 18(2) of Commission (Implementing) Regulation (EC) No 1768/95 of 24 July 1995.

At first instance, the defendant contested the entitlement to that further claim for payment.

He took the view that, by paying the normally payable licence fee instead of the fee for the planting of harvested material (Article 5(5) of Commission (Implementing) Regulation (EC) No 1768/95 of 24 July 1995, read in conjunction with Commission (Implementing) Regulation (EC) No 2605/98 of 3 December 1998), the damage caused to the holder of the plant variety right by his unlawful conduct has been sufficiently compensated. Additional 'punitive damages' established on a lump-sum basis are not compatible with the case-law of the Court of Justice.

By judgment concluding the proceedings (*Schlussurteil*) of 4 December 2020 [...] [composition of the panel of judges], [the Landgericht (Regional Court) Kaiserslautern upheld the forms of order sought most recently, with the exception of an amount of EUR 0.25. As grounds for the award of further compensation, the judgment cites the clear wording of Article 18(2) of Commission Regulation (EC) No 1768/95 of 24 July 1995.

The defendant's appeal, to which there can be no objection from a procedural point of view, is directed against that judgment and, by that appeal, he pursues his objective of seeking the rejection of the lump-sum compensation, together with interest, in respect of which the action had been brought.

The defendant takes the view that Article 18(2) of Commission (Implementing) Regulation (EC) No 1768/95 of 24 July 1995 is incompatible with the requirements of Article 94(2) of the Basic Regulation (Council Regulation (EC) No 2100/94 of 27 July 1994) and must therefore be annulled by the Court of Justice of the European Union. According to the defendant, this is because Article 94(2) of the Basic Regulation (Council Regulation (EC) No 2100/94 of 27 July 1994) is not to be understood as permitting the establishment of punitive damages on a lump-sum basis –in the case in the main proceedings, in the form of quadruple the licence fee – for the benefit of the holder of the plant variety right. Rather, the extent of the compensation payable under the first sentence of Article 94(2) of the Basic Regulation (Council Regulation (EC) No 2100/94 of 27 July 1994) must correspond as closely as possible to the damage actually and certainly suffered by the holder of the plant variety right as a result of the infringement.

By contrast, the applicant defends the Regional Court's decision, which it considers to be correct.

According to its legal appraisal, Article 18(2) of Commission (Implementing) Regulation (EC) No 1768/95 of 24 July 1995 does not infringe the requirements of Article 94(2) of the Basic Regulation (Council Regulation (EC) No 2100/94 of 27 July 1994), and the provision is also in line with the case-law of the Court of Justice of the European Union. The establishment of a minimum level of compensation on a lump-sum basis in the amount of quadruple the licence fee for the production of propagating material of the protected variety constitutes a necessary and reasonable balance of interests in view of the repeated and intentional unlawful infringement of the rights of the holder of the plant variety right, as is required for such compensation.

II.

The present Chamber stays the appeal proceedings pending before it and asks the Court of Justice of the European Union to deliver a preliminary ruling pursuant to the first paragraph, point (b), and the second paragraph of Article 267 TFEU on the question set out in paragraph II. of the operative part of the present order.

According to the appellate court's legal assessment, the decision on the defendant's appeal hinges exclusively on whether or not Article 18(2) of Commission (Implementing) Regulation (EC) No 1768/95 of 24 July 1995 is valid.

A minimum level of compensation established on a lump-sum basis in the amount of quadruple the licence fee, as provided for by the Commission in that rule, could

be in breach of the main principles of the first sentence of Article 94(2) of the Basic Regulation (Council Regulation (EC) No 2100/94 of 27 July 1994) and could therefore be invalid.

It could be argued in that respect that Article 94(1) of the Basic Regulation (Council Regulation (EC) No 2100/94 of 27 July 1994) already serves to compensate the advantage derived by the infringer (farmer who is not privileged as provided for in Article 14 of that regulation), in an amount corresponding to the simple licence fee normally payable (reasonable compensation). In that context, the first sentence of Article 94(2) of the Basic Regulation (Council Regulation (EC) No 2100/94 of 27 July 1994) could be understood to mean that, in the event of an intentional or negligent infringement, the holder of a plant variety right should be entitled to compensation for further damage (only) if he or she can demonstrate it in concrete terms.

The referring court takes the view that the case-law of the Court of Justice of the European Union to date indicates that the legislative establishment of a minimum level of compensation on a lump-sum basis – in line with the provision made in Article 18(2) of Commission (Implementing) Regulation (EC) No 1768/95 of 24 July 1995 – is not compatible with the first sentence of Article 94(2) of the Basic Regulation (Council Regulation (EC) No 2100/94 of 27 July 1994) (see CJEU, judgment of 9 June 2016 – C-481/14, *Hansson v Jun[g]pflanzen Grünwald GmbH* [...] [source in the national legal literature] [EU:C:2016:419], paragraphs 32-34; CJEU, judgment of 5 July 2012, C-509/10, *Saatgut v Geistbeck*, [...] [source in the national legal literature] [EU:C:2012:416,] paragraph 39).

Therefore, the question set out in paragraph II. of the operative part of the present order arises, the answer to which is a matter reserved for the Court of Justice of the European Union. This is because an implementing regulation adopted under an enabling provision in a basic regulation may not derogate from the provisions of that regulation and, in the event of such a contradiction, must be annulled (see judgment of the Court of Justice of the European Union of 2 March 1999, C-179/97, *Kingdom of Spain v Commission of the European Communities* [EU:C:1999:109]).

[...]

[signatures and certification]