OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 21 March 2002 [1]

1. The Oberlandesgericht (Higher Regional Court) Frankfurt am Main, Germany, has referred a question for a preliminary ruling under Article 234 EC. It asks the Court 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.

I — Facts

2. The applicant in the main proceedings is the firm Saatgut-Treuhandverwaltungsgesellschaft mbH ('Saatgut-Treuhandverwaltung'), a seed company engaged in trust management, which has been authorised by a large number of holders of Community plant variety protection rights to enforce, in its own name, those persons' rights to remuneration from farmers who make use of the agricultural exemption, also referred to in academic writings as the 'farmers' privilege' or [4] 'farmers' exemption'. [5] This exemption allows them to plant, on their holdings, the product of the harvest which they have obtained using propagating material of a protected variety, without having to obtain the permission of the holder (hereinafter 'the agricultural exemption'). The power of attorney relates to both plant varieties protected under Regulation No 2100/94 and varieties protected under the Sortenschutzgesetz (German Law on the protection of plant varieties).

The defendant in the main proceedings is Mr Schulin, who is a farmer.

1 — Original language: Spanish.

2 — Council Regulation of 27 July 1994 (OJ 1994 L 227, p. 1), amended by Council Regulation No 2506/95 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 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 No 2100/94 as regards proceedings before that Office (OJ 1995 L 121, p. 37).

4 — Quintana Carlo, I., 'El Reglamento CE número 2100/94, relativo a la protección comunitaria de las obtenciones vegetales', in *Actas de Derecho Industrial y Derecho de Autor*, Volume XVI, 1994-95, Marcial Pons, Madrid, 1996, p. 96.

5 — Elena Roselló, J.M., 'Situación actual de la normativa legal en Europa y en América', in the book edited and coordinated by Nuez, F., Llácer, G. and Cuartero, J., *Los derechos de propiedad de las obtenciones vegetales*, Ministerio de Agricultura, Pesca y Alimentación, Madrid, 1998, p. 88.

3. The main proceedings arise out of the request for information sent by Saatgut-Treuhandverwaltung to Mr Schulin, asking whether he had exercised the agricultural exemption during the 1997/98 cropping season in respect of any of the 525 protected plant varieties which it listed, [6] and what amount of the product he had used.

4. Mr Schulin challenged those claims, arguing that the company had not established either the substance of the right to the protection of plant varieties or its entitlement to enforce remuneration claims on behalf of the holders of those rights.

5. At first instance, the German court allowed the claim and ordered Mr Schulin to provide the information requested. The judgment was based on the view that the obligation to provide information under Article 14(3), sixth indent, of Regulation No 2100/94 is not conditional on a reasoned submission that the farmer has used the product of the harvest of a protected plant variety.

6 — Of these, 180 were plant varieties protected under Regulation No 2100/94.

II — The question referred for a preliminary ruling

6. In order to decide the appeal brought by Mr Schulin, the Oberlandesgericht Frankfurt am Main has asked the Court to reply to the following question:

'Are the provisions of Article 14(3), sixth indent, of Regulation No 2100/94..., in conjunction with Article 8 of Regulation No 1768/95, to be construed as meaning that the owner of a plant variety which is protected under Regulation No 2100/94 can require any farmer to provide the information specified in the above provisions irrespective of whether there is anything to suggest that the farmer has carried out any act, within the meaning of Article 13(2) of Regulation No 2100/94, using the variety in question or has at least — otherwise — used that variety on his holding?'

III — History of the legal protection of plant varieties

7. Since ancient times human creativity has extended to the plant world. Very varied

procedures have been used — ranging from traditional techniques (crossbreeding and selection) to recent biotechnology — to achieve outstanding advances in agriculture, with the fundamental objective of finding new plant varieties which, owing to their particular characteristics, may facilitate an increase in the productive and nutritional potential of agricultural species.

8. Until a few decades ago, however, that task was afforded no legal protection at all. The industrialisation of agriculture, which took place in the developed countries from the 1950s onwards, represented a turning point in that sphere as a result of the advances and improvements in new techniques, in particular, those relating to the cultivation of hybrids (especially maize). Innovative work in the plant world became particularly significant in agricultural development and, in addition, took on a financial relevance which was hitherto unknown. For that reason, it became especially important to acknowledge the persons responsible for carrying out that work (breeders) [7] and to grant them certain exclusive rights. In those times — as Advocate General Rozès pointed out in the Opinion she delivered in the *Nungesser* case [8] — a protection system devised for live organisms (agricultural products), which are subject to change, raised very different problems from those relating to a technical invention (industrial products). [9]

9. The idea of introducing a specific industrial property right for that kind of invention crystallised, as a result of various national initiatives, in the adoption of the International Convention for the Protection of New Varieties of Plants, which was signed on 2 December 1961 and has been in force since 10 August 1968. [10] The States which were party to the Convention, which originally numbered 10, constituted the International Union for the Protection of New Varieties of Plants (hereinafter 'UPOV'), an intergovernmental organisation based in Geneva which, since that time, has ensured that the Convention has been implemented properly. Although some amendments had been made to it in 1972 and 1978, it became clear in the mid-1980s that the Convention needed to be reformed in order to adapt the legal position to meet the challenges of the so-called 'biotechnological revolution'.

7 — As Pollaud-Dulian, F. rightly points out in *Droit de la propriété industrielle*, Montchrestien, Paris, 1999, p. 333, Professor Calculus, the well-known character in Hergé's *Adventures of Tintin*, may be regarded as a forerunner in the work of developing new plant varieties, since he creates a new strain of rose, the 'Castafiore bianca' in *The Castafiore Emerald*, and blue oranges in the film *Tintin and the blue oranges*.

8 — Opinion in Case 258/78 *Nungesser* v *Commission* [1982] ECR 2015, 2081 et seq., especially 2112.

9 — Díaz Rodríguez, G., 'El punto de vista del sector empresarial', and in the book edited and coordinated by Nuez, F. and others, cited above, pp. 168 and 169 and 176 and 177: A new plant variety is obtained after many years of research (between 9 and 10). If the breeder is to benefit from the investment he has made, which is usually considerable, he must be assured of a monopoly over the use of that plant variety for a long period of time. By encouraging the work of breeders, it is sought to make available to farmers better quality seeds giving better harvests for a lower investment.

10 — See the text of the original Convention and the amendments made in 1972 and 1991 on www.upov.org (Texts of the UPOV Conventions. Acts of 1961, 1978 and 1991).

10. The advances made in these technologies, whose considerable advantages [11] were beginning to be noticed, involved, as well as considerable cost, a high risk which the undertakings dedicated to innovation in that sector could not assume unless they were able to rely on strong legal protection which would ensure that they recovered their investment.

11. From the outset, the plant variety protection right has been framed as a right which is less powerful than a patent or has less scope as an exclusive right. In order to avoid a possible clash between legislations, the Munich Convention on European Patents (hereinafter 'the Munich Convention'), which was signed in 1973 and has been in force since 1978, [12] expressly states, in paragraph 53(b) that European patents shall not be granted in respect of plant or animal varieties or essentially biological processes for the production of plants. [13] By that provision, the Munich Convention joined the UPOV Convention of 1961 in precluding dual protection, that is to say protection by means of both a plant variety protection right and a patent, when the subject-matter of the right related specifically to a plant variety.

12. In 1991 the UPOV Convention underwent a third revision in which significant changes were made to the system, expanding the scope of protection afforded to breeders.

13. In recent years, the number of States party to the UPOV Convention has grown considerably. It has increased from 20 member States in 1992 to 50 in 2001, and another 19 States or organisations are negotiating entry. This development has been aided by the appearance, in connection with the World Trade Organisation (hereinafter 'WTO'), of the Agreement on Trade-related Aspects of Intellectual Property Rights (hereinafter 'the TRIPS Agreement'). [14] Under that agreement, all Member States which belong to the WTO are required to grant protection for plant varieties either by means of patents, or by means of an effective system *sui generis*, or

11 — Castro, E., 'La protección de las obtenciones de plantas mediante biotecnología', in the book edited and coordinated by Nuez, F. and others, cited above, p. 254, refers to the Bulletin of the European Federation of Biotechnology No 2 of 2 January 1994: 'Las técnicas de modificación genética están siendo empleadas para lograr muchos de los mismos propósitos que el cultivo, la cría y los métodos de selección tradicionales, pero tienen dos ventajas principales. Primero, proporcionan los medios para controlar la producción de genes con mucha mayor predicción y precisión que la que se obtiene con los métodos tradicionales. Segundo, hacen posible introducir copias de material genético en especies no relacionadas, lo que era imposible conseguir por técnicas tradicionales'. ('Genetic modification techniques are being used to achieve many of the same objectives as traditional cultivation, breeding and selection methods, but they have two main advantages. Firstly, they provide the means of monitoring gene production with better forecasting and greater accuracy than with traditional methods. Secondly, they make it possible to introduce copies of genetic material into unrelated species, which was impossible to achieve using traditional techniques').

12 — Convention on the Grant of the European Patent, in *La propriété industrielle*, Volume 90, Organisation Mondiale de la Propriété Intellectuelle, 1974, p. 51 et seq.

13 — Ruiz, J.J. and Nuez, F., 'La propuesta de directiva del Parlamento Europeo y del Consejo relativa a la protección jurídica de las invenciones biotecnológicas', in the book edited and coordinated by Nuez, F. and others, cited above, p. 277, point out that previously the Strasbourg Convention of 1963 on the Unification of Certain Elements of Substantive Law on Patents for Invention had given Member States the option of not affording protection to plant varieties, and that the Munich Convention took that option.

14 — The TRIPS Agreement is included as an annex to the Marrakesh Agreement of 15 April 1994 establishing the World Trade Organisation (WTO). It has been signed by the European Community (OJ 1994 L 336, p. 213).

by means of a combination of the two schemes. At the same time, it allows States to refuse patents to plants and animals, except micro-organisms, and to non-biological or microbiological procedures.

IV — The Community system of legal protection for new plant varieties

14. At the beginning of the 1990s, in spite of the existence of the UPOV Convention system, the industrial property rules applicable, within the European Community, to plant varieties lacked harmonisation. [15] Added to the fact that Greece, Portugal and Luxembourg [16] did not have a specific law for the protection of plant varieties, there were two factors which made it particularly difficult to harmonise the laws within the Community: the fact that several versions of the Convention were in force simultaneously in the Community, [17] and the extensive latitude afforded to the Member States. [18]

15. In order to improve that situation, which was not conducive to bringing about the internal market in the agricultural sector, the Commission had proposed, in its 1985 White Paper, some measures of a legislative nature. Faced with the problems inherent in proceeding by consensus, which were brought to light in the negotiations to introduce the Community patent, [19] the Community authorities opted for a change in strategy with regard to plant varieties and used legislation to ensure the establishment of a system of protection which was uniform throughout the Community. Several years of interinstitutional collaboration culminated in the adoption of Regulation No 2100/94.

16. In the Commission's proposal of 6 September 1990, reference was made to Article 43 of the EC Treaty (now, after amendment, Article 37 EC) relating to the common agricultural policy, as the legal basis of the Regulation and, in line with that, the first recital of the proposal stated that the continued breeding of improved plant varieties was an essential part of the

15 — That lack of harmonisation is mentioned by Quintana Marco, I., op. cit., p. 82, and by Mayr, C.E., 'Notizie e novità legislative comunitarie ed internazionali', *Rivista di Diritto Industriale*, A. Giuffrè Editore, Milan, 1995, Part Three, p. 5 et seq.

16 — Of those three States, only Portugal is currently a member of UPOV (since October 1995).

17 — Even today, the laws of Belgium and Spain are governed by the 1961 version, as amended in 1972. Of the eleven remaining Member States, five form part of the Act of 1978 and six of the Act of 1991 (according to information provided on 7 December 2001 by UPOV).

18 — Elena Roselló, J.M., in the book edited and coordinated by Nuez, F. and others, cited above, p. 85.

19 — These difficulties are mentioned by Massaguer Fuentes, J., in *Los Derechos de propiedad industrial e intelectual ante el Derecho comunitario: libre circulación de mercancías y defensa de la competencia*, IDEI, Madrid, 1995, p. 93 et seq.

technical progress necessary to increase agricultural productivity. It was later considered that no specific provision of the Treaty authorised the Community to legislate on that matter and, consequently, it used the provisions contained in Article 235 of the EC Treaty (now Article 308 EC), concerning implied powers, in order to adopt the regulation.

17. Although the regulation is in some respects innovative, it is not noted for its originality, since to a large extent it follows the framework established by the UPOV Convention in the Act of 1991. Its preamble acknowledges that plant varieties pose specific problems as regards the industrial property regime which may be applicable, and the regulation therefore seeks to overcome some of the ambiguities inherent in the rules governing plant improvements without openly contravening those rules. It is also pointed out that the regulation takes into account existing international conventions,[20] amongst them — apart from the UPOV Convention mentioned above — the Munich Convention and the TRIPS Agreement. Consequently, it implements the ban on patenting plant varieties only to the extent to which the Munich Convention so requires, namely plant varieties as such may not be patented; in that respect, Regulation No 2100/94 is more consistent with the Munich Convention, which excludes patents for plant varieties, than with the 1991 Act of the UPOV Convention, which leaves the way open for that possibility.[21]

18. The implementation of that scheme is the responsibility of the Community Plant Variety Office, which has its headquarters in Angers.[22] This is a Community organisation with legal personality which has been in operation since 27 April 1995.[23] As a result of its work, a breeder is able — with one application, one fee and one procedure — to obtain protection in all 15 States of the Union.

V — The applicable legislation

19. 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

20 — The first and 29th recitals.

21 — Holtmann, M., 'La protección jurídica de las innovaciones vegetales ¿patente y/o título de obtención vegetal?', in the book edited and coordinated by Nuez, F. and others, cited above, p. 351.

22 — The location of the headquarters was decided at the Intergovernmental Conference on 6 December 1996.

23 — The organisation was established by Regulation No 2100/94 and given responsibility for considering applications for Community protection, granting Community plant variety protection rights and approving denominations of variety. Appeal lies from its decisions, depending on the circumstances, either directly before the Court of First Instance or before the Office itself, which may take the claim to the Board of Appeal, whose decisions are, in turn, open to appeal before the Court of First Instance.

industrial property rights for plant varieties'. Since it came 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-matter 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.

20. 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, is to be entitled to the Community plant variety right.

21. 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.

22. 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.[24] The

24 — Van der Kooij, P.A.C.E., *Introduction to the EC Regulation on plant variety protection*, Kluwer Law International, 1997, p. 36: 'It only applies in relation to farmers who *use* the product of their *own* harvest for propagating purposes on their *own* holding'.

agricultural exemption applies only to certain agricultural plant species listed in paragraph 2, classified in four groups: fodder plants, oil and fibre plants, cereals and potatoes. [25]

The national court is interested in the interpretation of Article 14(3), sixth indent, 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;...'

23. 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 are to be required to 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.

24. The Oberlandesgericht Frankfurt am Main is seeking an interpretation of Article 8(2) of Regulation No 1768/95, which lays down detailed rules governing the farmer's duty to provide information, for the purpose of remunerating the holder. In so far as it has relevance here, the provision 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 of the product of the harvest belonging to one or more varieties of the holder for planting on his holding; (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 concerned used, as well as the name and address of the supplier thereof.

25 — Kiewiet, B.P., who is the President of the Community Plant Variety Office, in the report presented at Einbeck on 26 January 2001, *Modern plant breeding and intellectual property rights*, states in that regard: 'In a nutshell, what the regime amounts to is that a "farmers' privilege" has been created for varieties of the most important agricultural crops protected by Community plant variety rights'; published on www.cpvo.fr/e/articles ocvv/speech bk.pdf.

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

VI — The proceedings before the Court

25. Mr Schulin, Saatgut-Treuhandverwaltung 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.

At the hearing on 21 February 2002, Mr Schulin's representative, the representative of Saatgut-Treuhandverwaltung and the Commission's agent presented their oral submissions.

VII — The views expressed by those who have submitted observations

26. Mr Schulin submits that Regulation No 1768/95, which gives effect to the agricultural exemption, cannot apply to farmers who, instead of exercising that privilege, prefer to obtain new seed for each marketing year. The holder cannot avail himself of his right under Regulation No 2100/94 to obtain information from farmers against a person who has not used the product of the harvest obtained from planting propagating material of a variety belonging to the holder and, even less, against a person who has not used on his holding any of the plant varieties in respect of which the holder has rights. Otherwise, any farmer at all, merely by virtue of being a farmer, would be at risk of receiving numerous requests for information which, because he would have to respond to them properly, would involve, as well as expense, a considerable strain on his time.

He adds that the first acquisition of propagating material is an act — of which there is evidence — which creates legal effects for the holder and for the farmer. Therefore, the remuneration for exercising the privilege may be paid at the time of purchase, so that the farmer chooses between planting the protected variety once or reusing the product of the harvest, the price being fixed accordingly.

27. According to Saatgut-Treuhandverwaltung, the Community legislation allows the holder of a plant variety protected under Regulation No 2100/94 to require any farmer to inform him whether he has exercised the privilege and to let him know the extent of the operation.

In its view, the holder is not, in principle, in a position to adduce any evidence that the farmer has used the seed of the protected variety on his holding. In theory, the fact that a farmer may have made one purchase of new certified seed of a variety from a supplier is an indication 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 made one purchase of certified seed of his 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 a farmer who has bought certified seed may use the product of the harvest, in particular in the case of cereals, for propagating purposes over several planting seasons. [26]

28. The Commission maintains that the exercise of the agricultural exemption presupposes, by any reckoning, the existence of a relationship with the holder since, before the product of the harvest of the protected variety is replanted, they must have concluded some agreement for the first use, either directly, or indirectly by means of the purchase of seeds from a supplier. The Commission considers 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.

VIII — Consideration of the question referred for a preliminary ruling

29. By the question which it has raised, the Oberlandesgericht Frankfurt am Main

26 — It points out that almost all German farmers use the product of the harvest of protected varieties, since 70% of those who have provided it with information had done so with at least one of the varieties mentioned in the request. It is of the opinion that the percentage is still higher, because it assumes that those who have not supplied information have taken greater advantage of the opportunity.

wishes to know whether the provisions to which it refers mean that the holder of a Community plant variety protection right may request relevant information from any farmer for the purpose of seeking remuneration from him for having made use of the exemption, even if there is no indication that the variety has been used for one of the acts listed in Article 13(2) of Regulation No 2100/94, including production, or for any other purpose.

30. I should like to point out, first of all, that this case is the first in which the Court has had to interpret the provisions of Regulation No 2100/94, which establishes a system of Community plant variety rights which coexists with national regimes and whose aim is the grant of industrial property rights valid throughout the Community. [27] However, it is not the only case pending on this matter; the Oberlandesgericht Düsseldorf has subsequently referred a question for a preliminary ruling in very similar terms. [28]

31. In order to stimulate the breeding and development of new varieties, Regulation No 2100/94 was intended to provide improved protection for all breeders as compared with the situation in 1994. [29]

Thus, Article 13 specifically defines the commercial transactions requiring the authorisation of the holder; these include transactions made with components of a variety and also with the material harvested (flowers and fruit, for example), covering the period from reproduction to storage. However, 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. [30] Of the 20 or so species listed in Article 14(2) as covered by

27 — However, the Court is not unfamiliar with the concept of the plant variety protection right. In its judgments in *Nungesser* v *Commission*, cited above, and Case 27/87 *Erauw-Jacquery* [1988] ECR 1919, it considered that industrial property right in connection with the competition rules. In Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079, both the judgment and the Opinion delivered by Advocate General Jacobs distinguished, for the purposes of the grant of patents, between plant varieties and inventions whose technical feasibility was not confined to any particular plant. See paragraphs 43 and 44 of the judgment and points 135 to 139 of the Opinion.

28 — Case C-182/01, in which the written procedure ended in the middle of September 2001. The Oberlandesgericht Dusseldorf states in its order that Saatgut-Treuhandverwaltung has lodged hundreds of claims throughout Germany against farmers whom it asks whether they have made use of the privilege.

29 — The fifth recital.

30 — Millett, T., 'The Community system of plant variety rights', *European Law Review*, Volume 24, June 1999, p. 240: 'The farmer may use the product of his harvest only on his own holding, and may not sell it on e.g. for propagation to another farmer. Furthermore this authorisation is limited to certain fodder plants, cereals, potatoes and oil and fibre plants so that the so-called farmers' privilege should not be extended to sectors of agriculture or horticulture where it was not previously common practice.'

the privilege, there are some which are very extensively and commonly grown, such as barley, wheat and potatoes.

32. 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.

The farmers seem to feel that they are adversely affected by these rules, 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 provide information and pay remuneration. Consequently, it is not possible to state, as Mr Schulin's representative stated at the hearing, that Regulation No 2100/94 has removed the privilege previously enjoyed by farmers.

33. Monitoring compliance with those provisions 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, only if such information has been obtained in the course of the ordinary performance of their tasks, without additional burden or costs.

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.

34. In the light of that legislation, it is a question of deciding which farmers are required to provide information: those who, with the knowledge of the holder, have exercised the privilege, as Mr Schulin maintains; all farmers, simply because they are farmers, as Saatgut-Treuhandverwaltung maintains; or, as the Commission suggests, farmers who, in the past, have sown or planted on their holding propagat-

ing material of the protected variety in question.

To my mind, the Commission's interpretation must prevail, for the reasons I shall go on to explain.

35. It is clear from the wording of Article 14(1) and (3), sixth indent, of Regulation No 2100/94 that, in order to exercise the privilege, the farmer must have sown or planted, on at least one occasion, propagating material of a protected variety and, under Article 13, this could only have been done under licence.

Consequently, the only farmers under an obligation to provide information are those who, in the past, have acquired propagating material of the protected variety in question. It seems to me fundamental that that obligation cannot be imposed on farmers who have never purchased that material, since they could not have cultivated it or obtained a harvest which might be used again on their holdings for propagating purposes.

36. At the hearing, Mr Schulin's representative and the representative of Saatgut-Treuhandverwaltung disagreed on the definition of a farmer required to provide the holder with information about a plant variety. Although it is true that Article 4(2) of Regulation No 1768/95 refers to the *farmer who exploits for plant growing*, it must be borne in mind that that rule laid down by the Commission gives effect to the agricultural exception provided in Article 14 of Regulation No 2100/94, the aim of which is to provide *Community plant variety rights*. Therefore, those provisions are not intended to apply to all farmers, or even to all those who exploit for plant growing, but only to those who obtain propagating material of a protected variety.

37. The content of the information which the holder is entitled to receive may be specified in a contract concluded with the farmer concerned. I agree with the Commission that 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 No 2100/94, normally agricultural production, including the purchase of propagating material.

38. I also agree that, in the absence of an additional contract concerning the details of the information which has to be pro-

vided, 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 for the first time.

As I have already pointed out, it is for the holder to monitor observance of his rights by farmers and other economic operators, so 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.

39. In the absence of a contract specifying the information to be provided to the holder, Article 8(2)(a) to (f) of Regulation No 1768/95 gives the relevant details, amongst which are, first, the name of the farmer, the place of his domicile and the address of his holding. The fact that the holder may ask for that information has been used by Saatgut-Treuhandverwaltung to show that the holder does not know, and has no means of knowing, who has planted or sown propagating material of one of his protected plant varieties. In my view, that argument is not persuasive because if the holder, either directly or through a representative, contacts the farmer, that means that he has part of that information; the farmer's obligation to include it in his statement may be for identification purposes and because it is useful to check or complete it.

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.

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.

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. As regards the monitoring which may be carried out by holders, Article 14 of Regulation No 1768/95 provides that farmers shall keep invoices and labels for

at least three years prior to the current marketing year, which is the period which may be covered by the holder's request for information concerning the use of the product of the harvest.

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 that, for the holder validly to exercise his right to information in respect of a variety, the farmer must previously have cultivated propagating material of that variety.

40. 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, [31] 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 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 protected variety, because it is therefore technically impossible for the farmer to have used the product of the harvest.

41. 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. [32] 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.

31 — 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.

32 — Kiewiet, B.P., op. cit., p. 2: '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.'

The claim made by Saatgut-Treuhandverwaltung that the holder 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.

42. 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.

IX — Conclusion

43. In the light of the foregoing considerations, I propose that the Court give the following reply to the question submitted by the Oberlandesgericht Frankfurt am Main:

Article 14(3), sixth indent, of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, in conjunction with Article 8 of Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14(3) of Regulation No 2100/94, 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.