



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

12 July 2012*

(Agriculture — Directives 98/95/EC, 2002/53/EC, 2002/55/EC and 2009/145/EC — Validity — Vegetables — Sale on the national seed market of vegetable seed not included in the official common catalogue of varieties of vegetable species — Non-compliance with system of prior authorisation for marketing — International Treaty on Plant Genetic Resources for Food and Agriculture — Principle of proportionality — Freedom to conduct a business — Free movement of goods — Equal treatment)

In Case C-59/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the cour d'appel de Nancy (France), made by decision of 4 February 2011, received at the Court on 9 February 2011, in the proceedings

Association Kokopelli

v

Graines Baumaux SAS,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, G. Arestis (Rapporteur) and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

- Association Kokopelli, by B. Magarinos Rey, avocat,
- Graines Baumaux SAS, by P. de Jong, C. Ronse and S. Lens, avocats,
- the French Government, by G. de Bergues, B. Cabouat and R. Loosli-Surrans, acting as Agents,
- the Spanish Government, by A. Rubio González, acting as Agent,
- the Council of the European Union, by P. Mahnič Bruni and É. Sitbon Bercain, acting as Agents,
- the European Commission, by D. Bianchi and Z. Malůšková, acting as Agents,

* Language of the case: French.

after hearing the Opinion of the Advocate General at the sitting on 19 January 2012,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the validity of the following directives:
 - Council Directive 98/95/EC of 14 December 1998 amending, in respect of the consolidation of the internal market, genetically modified plant varieties and plant genetic resources, Directives 66/400/EEC, 66/401/EEC, 66/402/EEC, 66/403/EEC, 69/208/EEC, 70/457/EEC and 70/458/EEC on the marketing of beet seed, fodder plant seed, cereal seed, seed potatoes, seed of oil and fibre plants and vegetable seed and on the common catalogue of varieties of agricultural plant species (OJ 1999 L 25, p. 1);
 - Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species (OJ 2002 L 193, p. 1);
 - Council Directive 2002/55/EC of 13 June 2002 on the marketing of vegetable seed (OJ 2002 L 193, p. 33); and
 - Commission Directive 2009/145/EC of 26 November 2009 providing for certain derogations, for acceptance of vegetable landraces and varieties which have been traditionally grown in particular localities and regions and are threatened by genetic erosion and of vegetable varieties with no intrinsic value for commercial crop production but developed for growing under particular conditions and for marketing of seed of those landraces and varieties (OJ 2009 L 312, p. 44).
- 2 The reference has been made in proceedings between Association Kokopelli ('Kokopelli') and Graines Baumaux SAS ('Baumaux') concerning the marketing of vegetable seed.

Legal context

The International Treaty on Plant Genetic Resources for Food and Agriculture

- 3 The conclusion, on behalf of the European Community, of the International Treaty on Plant Genetic Resources for Food and Agriculture was approved by Council Decision 2004/869/EC of 24 February 2004 (OJ 2004 L 378, p. 1; 'the ITPGRFA').
- 4 According to Article 1 of the ITPGRFA, the objectives of the Treaty are 'the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security'.
- 5 Article 5 of the ITPGRFA provides:

'5.1. Each Contracting Party shall, subject to national legislation, and in cooperation with other Contracting Parties where appropriate, promote an integrated approach to the exploration, conservation and sustainable use of plant genetic resources for food and agriculture and shall in particular, as appropriate:

...

(c) promote or support, as appropriate, farmers and local communities' efforts to manage and conserve on-farm their plant genetic resources for food and agriculture;
...'

6 Article 6 of the ITPGRFA states:

'6.1. The Contracting Parties shall develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture.'

7 In accordance with paragraph 7.1 of Article 7 of the ITPGRFA, '[e]ach Contracting Party shall, as appropriate, integrate into its agriculture and rural development policies and programmes, activities referred to in Articles 5 and 6, and cooperate with other Contracting Parties, directly or through [the Food and Agriculture Organisation of the United Nations (FAO)] and other relevant international organisations, in the conservation and sustainable use of plant genetic resources for food and agriculture'.

8 Article 9 of the ITPGRFA provides:

'9.1. The Contracting Parties recognise the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.

...

9.3. Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.'

European Union ('EU') law

Directive 2002/55

9 Directive 2002/55 establishes a common catalogue of varieties of vegetable species.

10 Recitals 2 to 4 and 12 in the preamble to that directive are worded as follows:

'(2) The production of vegetable seed occupies an important place in the agriculture of the Community.

(3) Satisfactory results in vegetable cultivation depend to a large extent on the use of appropriate seed.

(4) Greater productivity will be achieved in Community vegetable cultivation if for the choice of varieties accepted for marketing the Member States apply uniform rules which are as strict as possible.

...

(12) Seed of varieties listed in the common catalogue of varieties should not be subject within the Community to any marketing restrictions relating to variety.'

11 According to Article 1 of Directive 2002/55, the directive 'shall apply to the production with a view to marketing, and to the marketing, of vegetable seed within the Community'.

12 Article 3(1) of Directive 2002/55 provides:

‘Member States shall provide that vegetable seed may not be certified, verified as standard seed and marketed unless the variety is officially accepted in one or more Member States.’

13 With regard to the acceptance of varieties for inclusion in the official catalogues, Article 4(1) and (4) of Directive 2002/55 provides:

‘1. Member States shall ensure that a variety is accepted only if it is distinct, stable and sufficiently uniform.

...

4. In the interest of conserving plant genetic resources as specified in Article 44(2), the Member States may depart from the acceptance criteria set out in the first subparagraph of paragraph 1 in so far as specific conditions are established in accordance with the procedure referred to in Article 46 considering the requirements of Article 44(3).’

14 Article 5 of Directive 2002/55 is worded as follows:

‘1. A variety shall be regarded as distinct if, whatever the origin, artificial or natural, of the initial variation from which it has resulted, it is clearly distinguishable in one or more important characteristics from any other variety known in the Community.

The characteristics must be capable of precise recognition and of precise definition.

...

2. A variety shall be regarded as stable if, after successive propagation or multiplications or at the end of each cycle (where the breeder has defined a particular cycle of propagation or multiplications) it remains true to the description of its essential characteristics.

3. A variety shall be regarded as sufficiently uniform if, apart from a very few aberrations, the plants of which it is composed are, account being taken of the distinctive features of the reproductive systems of the plants, similar or genetically identical as regards the characteristics, taken as a whole, which are considered for this purpose.’

15 Article 44(2) and (3) of Directive 2002/55 provides:

‘2. Specific conditions shall be established in accordance with the procedure referred to in Article 46(2) to take account of developments in relation to the conservation in situ and the sustainable use of plant genetic resources through growing and marketing of seed of:

- (a) landraces and varieties which have been traditionally grown in particular localities and regions and threatened by genetic erosion without prejudice to the provisions of Council Regulation (EC) No 1467/94 of 20 June 1994 on the conservation, characterisation, collection and utilisation of genetic resources in agriculture [O] 1994 L 159, p. 1];
- (b) varieties with no intrinsic value for commercial crop production but developed for growing under particular conditions.

3. The specific conditions referred to in paragraph 2 shall include in particular the following points:

- (a) in the case of paragraph 2, point (a), the landraces and varieties shall be accepted in accordance with the provisions of this Directive. In particular the results of unofficial tests and knowledge gained from practical experience during cultivation, reproduction and use and the detailed descriptions of the varieties and their relevant denominations, as notified to the Member State concerned, shall be taken into account and, if sufficient, shall result in exemption from the requirement of official examination. Upon acceptance of such a landrace or variety, it shall be indicated as a “conservation variety” in the common catalogue;
- (b) in the case of paragraph 2, points (a) and (b), appropriate quantitative restrictions.’

16 According to Article 48 of Directive 2002/55:

‘1. Specific conditions may be established in accordance with the procedure referred to in Article 46(2) to take account of developments in the areas of:

...

- (b) conditions under which seed may be marketed in relation to the conservation in situ and the sustainable use of plant genetic resources, including seed mixtures of species which also include species listed in Article 1 of [Directive 2002/53], and are associated with specific natural and semi-natural habitats and are threatened by genetic erosion;

...

2. The specific conditions referred to in paragraph 1(b) shall include in particular the following points:

- (a) the seed of these species shall be of a known provenance approved by the appropriate authority in each Member State for marketing the seed in defined areas;
- (b) appropriate quantitative restrictions.’

Directive 2009/145

17 Directive 2009/145 implements Articles 4(4), 44(2) and 48(l)(b) of Directive 2002/55 with the aim of conserving plant genetic resources.

18 According to recitals 1 to 3 and 14 in the preamble to Directive 2009/145:

‘(1) The questions of biodiversity and the conservation of plant genetic resources have grown in importance in recent years, as shown by different developments at international and Community level. Examples include Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity [OJ 1993 L 309, p. 1], [Decision 2004/869], Council Regulation (EC) No 870/2004 of 24 April 2004 establishing a Community programme on the conservation, characterisation, collection and utilisation of genetic resources in agriculture and repealing Regulation (EC) No 1467/94 [OJ 2004 L 162, p. 18] and Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [OJ 2005 L 277, p. 1]. Specific conditions should be established under Directive [2002/55] in order to take account of these issues as regards the marketing of vegetable seed.

- (2) In order to ensure in situ conservation and the sustainable use of plant genetic resources, landraces and varieties which have been traditionally grown in particular localities and regions and are threatened by genetic erosion (conservation varieties) should be grown and marketed even where they do not comply with the general requirements as regards the acceptance of varieties and the marketing of seed. In addition to the general aim of protecting plant genetic resources, the particular interest of preserving these varieties lies in the fact that they are especially well adapted to particular local conditions.
- (3) In order to ensure the sustainable use of plant genetic resources, varieties with no intrinsic value for commercial crop production but developed for growing under particular conditions (varieties developed for growing under particular conditions) should be grown and marketed even where they do not comply with the general requirements as regards the acceptance of varieties and the marketing of seed. In addition to the general aim of protecting plant genetic resources, the particular interest of preserving these varieties lies in the fact that they are apt to be grown under particular climatic, pedological or agro-technical conditions (such as manual care, repeated harvesting).

...

- (14) After 3 years the Commission should assess whether the measures provided for in this Directive, in particular the provisions concerning quantitative restrictions for the marketing of seed of conservation varieties and of varieties developed for growing under particular conditions, are effective.'

19 Article 1 of Directive 2009/145 provides:

'1. As regards the vegetable species covered by Directive [2002/55], this Directive lays down certain derogations, in relation to the conservation in situ and the sustainable use of plant genetic resources through growing and marketing:

- (a) for acceptance for inclusion in the national catalogues of varieties of vegetable species, as provided for in Directive [2002/55], of landraces and varieties which have been traditionally grown in particular localities and regions and threatened by genetic erosion, hereinafter "conservation varieties"; and
- (b) for acceptance for inclusion in the catalogues referred to in point (a) of varieties with no intrinsic value for commercial crop production but developed for growing under particular conditions, hereinafter "varieties developed for growing under particular conditions"; and
- (c) for the marketing of seed of such conservation varieties and varieties developed for growing under particular conditions.

2. Unless otherwise provided in this Directive, Directive [2002/55] shall apply.'

20 Article 35 of Directive 2009/145 provides:

'By 31 December 2013 the Commission shall evaluate the implementation of this Directive.'

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

21 Kokopelli is a non-profit-making association which sells seed of old vegetable and flower varieties originating from organic agriculture and supplies to its members varieties of vegetables which are not widely cultivated in France.

- 22 Baumaux is engaged in the business of producing and marketing flower and vegetable seed. In 2005 it brought unfair competition proceedings against Kokopelli, seeking, in particular, lump-sum damages of EUR 50 000, together with the cessation of all advertising in relation to the varieties marketed by Kokopelli.
- 23 By judgment of 14 January 2008, the tribunal de grande instance de Nancy (Nancy Regional Court) ordered Kokopelli to pay damages to Baumaux for unfair competition. That court found that Kokopelli and Baumaux were operating in the sector of old seed or collectors' seed, that, of the products which they were marketing, 233 were identical or similar, and that they were supplying the same customers (amateur gardeners) and were therefore competitors. It therefore considered that Kokopelli was engaging in acts of unfair competition by offering for sale vegetable seed which was neither in the French catalogue nor in the common catalogue of varieties of vegetable species.
- 24 Kokopelli appealed against that judgment to the cour d'appel de Nancy (Nancy Court of Appeal).
- 25 In those circumstances, the cour d'appel de Nancy decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are Council Directives 98/95/EC, 2002/53/EC and 2002/55/EC and Commission Directive 2009/145 valid in the light of the following fundamental rights and principles of the European Union, namely, freedom to pursue an economic activity, proportionality, equal treatment or non-discrimination and the free movement of goods, and also in the light of the commitments arising from the [ITPGRFA], particularly in so far as they impose restrictions on the production and marketing of old seed and plants?'

The question referred for a preliminary ruling

Admissibility

- 26 According to Baumaux the reference for a preliminary ruling is inadmissible in so far as Kokopelli cannot invoke the invalidity of the directives at issue, which do not entail any right or any obligation for individuals. Kokopelli can challenge only the validity of the national legislation transposing those directives.
- 27 In addition, Baumaux takes the view that the reference to Directive 98/95 is irrelevant for the purposes of the outcome of the main proceedings. Directive 2002/53 is also irrelevant since it relates exclusively to the trade in varieties of agricultural plant species, yet it is apparent from the facts at issue in this dispute that Kokopelli claims to market only vegetable seed. Baumaux adds that Directive 2009/145 was adopted long after Baumaux initiated proceedings against Kokopelli, and the validity of that directive is therefore of no relevance to the outcome of that dispute.
- 28 It must be borne in mind in that regard that when a question on the validity of a measure adopted by the European Union institutions is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and consequently whether it should request the Court to rule on that question. Accordingly, where the national court's questions relate to the validity of a provision of EU law, the Court is obliged in principle to give a ruling (Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 13 and the case-law cited).
- 29 It is possible for the Court to refuse to give a preliminary ruling on a question submitted by a national court only where, inter alia, it is quite obvious that the ruling sought by that court on the interpretation or validity of EU law bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (*Afton Chemical*, paragraph 14).

- 30 In that regard it must be observed that Directive 2002/53 relates to the common catalogue of varieties of agricultural plant species. Since it is apparent from the order for reference that the main proceedings concern the marketing, by Kokopelli, of vegetable seed, it is not necessary to examine the validity of that directive.
- 31 It must also be pointed out that Directive 98/95 is an amending act in respect of Council Directive 66/400/EEC of 14 June 1966 on the marketing of beet seed (OJ, English Special Edition 1965-1966, p. 124); Council Directive 66/401/EEC of 14 June 1966 on the marketing of fodder plant seed (OJ, English Special Edition 1965-1966, p. 132); Council Directive 66/402/EEC of 14 June 1966 on the marketing of cereal seed (OJ, English Special Edition 1965-1966, p. 143); Council Directive 66/403/EEC of 14 June 1966 on the marketing of seed potatoes (OJ, English Special Edition 1965-1966, p. 154); Council Directive 69/208/EEC of 30 June 1969 on the marketing of seed of oil and fibre plants (OJ, English Special Edition 1969 (II) p. 315); Council Directive 70/457/EEC of 29 September 1970 on the common catalogue of varieties of agricultural plant species (OJ, English Special Edition, Third Series, 1966-1972, p. 36); and Council Directive 70/458/EEC of 29 September 1970 on the marketing of vegetable seed (OJ, English Special Edition 1970 (III) p. 674); and that the provisions of the latter directives have been codified by Directives 2002/53 and 2002/55. That being the case, it is not necessary to examine the validity of Directive 98/95 either.
- 32 As regards Directive 2009/145, it is common ground that it was adopted in 2009, that is after the unfair competition action initiated by Baumaux against Kokopelli. Nevertheless, as the Advocate General pointed out at point 48 of her Opinion, examination of the validity of that directive may be relevant for the national court in determining the dispute in the main proceedings.
- 33 Accordingly, it is not obvious that the assessment of the validity of Directives 2002/55 and 2009/145 bears no relation to the actual facts of the main action or its purpose, or concerns a problem that is hypothetical.
- 34 Furthermore, it should be borne in mind that in the complete system of legal remedies and procedures established by the FEU Treaty with a view to ensuring judicial review of the legality of acts of the institutions, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 263 TFEU, directly challenge acts of the European Union of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the EU judicature under Article 277 TFEU or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity (*Afton Chemical*, paragraph 18).
- 35 It is sufficient to find that Kokopelli undoubtedly did not have standing to bring an action for annulment of Directives 2002/55 and 2009/145 on the basis of Articles 230 EC and 263 TFEU. Consequently, it is entitled, in an action brought in accordance with national law, to plead the invalidity of those directives even though it did not bring an action for their annulment before the EU judicature within the period laid down in those articles (see, to that effect, *Afton Chemical*, paragraphs 19 to 25).
- 36 It follows from all of the foregoing considerations that the question raised by the national court is admissible in so far as it concerns the validity of Directives 2002/55 and 2009/145.

Substance

- 37 By its question, the national court queries, in essence, the validity of Directives 2002/55 and 2009/145 in the light of the principles of freedom to pursue an economic activity, proportionality, equal treatment and the free movement of goods, and in the light of the commitments entered into by the European Union under the terms of the ITPGRFA.

Breach of the principle of proportionality

- 38 According to settled case-law, the principle of proportionality — the alleged breach of which should be examined first of all — is one of the general principles of EU law and requires that measures implemented through provisions of EU law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 68; Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 41; and Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraph 51).
- 39 With regard to the judicial review of the conditions mentioned in the preceding paragraph of the present judgment, it should be noted that in matters concerning the common agricultural policy the EU legislature has a broad discretion which corresponds to the political responsibilities given to it by Articles 40 TFEU and 43 TFEU and that the Court has, on several occasions, held that the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate, having regard to the objective which the competent institution is seeking to pursue (see Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraphs 89 and 90; Case C-306/93 *SMW Winzersekt* [1994] ECR I-5555, paragraph 21; and Case C-343/07 *Bavaria and Bavaria Italia* [2009] ECR I-5491, paragraph 81).
- 40 However, while the importance of the objectives pursued may justify restrictions which have adverse consequences, and even substantial adverse consequences, for certain traders (Case C-183/95 *Affish* [1997] ECR I-4315, paragraph 42), it is appropriate to ascertain, when examining the constraints relating to the various possible measures, whether the EU legislature fully took into account all the interests involved, apart from the main objective pursued (Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 37).
- 41 In the present case, it is necessary to examine whether the system of acceptance of seed of vegetable varieties that is laid down by Directives 2002/55 and 2009/145 breaches the principle of proportionality. Article 3(1) of Directive 2002/55 limits the certification, verification as standard seed, and marketing of vegetable seed to seed of a variety that is officially accepted in one or more Member States. In order to be accepted for inclusion in the official catalogues, a variety must be distinct, stable and sufficiently uniform, according to Article 4(1) of that directive.
- 42 Kokopelli submits that it is impossible for it to market seed of ‘old’ vegetable varieties, given that, in view of its particular characteristics, such seed cannot satisfy the criteria of distinctness, stability and uniformity, and is thus unjustifiably excluded from the official catalogues.
- 43 In that regard, it follows from recitals 2 to 4 in the preamble to Directive 2002/55 that the primary objective of the rules relating to the acceptance of seed of vegetable varieties is to improve productivity in vegetable cultivation in the European Union. That objective explicitly forms part of the objectives of the common agricultural policy, as laid down in Article 39(1)(a) TFEU.
- 44 As a means of guaranteeing increased productivity in vegetable cultivation, the establishment — under uniform rules which are as strict as possible as regards the choice of varieties accepted for marketing — of a common catalogue of varieties of vegetable species on the basis of national catalogues is capable of ensuring that that objective is attained.
- 45 Such an acceptance regime, which requires the seed of vegetable varieties to be distinct, stable and uniform, allows appropriate seed to be used and, consequently, agricultural productivity to be increased, on the basis of the reliability of the characteristics of the seed.

46 Furthermore, in accordance with Article 1 of Directive 2002/55, that directive is to apply to the production with a view to marketing, and to the marketing, of vegetable seed within the European Union. Recital 12 states that seed of varieties listed in the common catalogue should not be subject within the European Union to any marketing restrictions relating to variety.

47 Thus, Directive 2002/55 is also intended to establish the internal market for vegetable seed by ensuring its free movement within the European Union. In the present case, the acceptance regime laid down by that directive contributes to the attainment of that objective, since such a regime ensures that seed marketed in the various Member States will satisfy the same requirements.

48 It is also apparent from Article 4(4) of Directive 2002/55 that the directive is aimed at conserving plant genetic resources. The Member States may thus depart from the acceptance criteria set out in Article 4(1) in accordance with the procedures referred to in Articles 44(3) and 46(2).

49 In that regard, the derogating acceptance regime implemented by Directive 2009/145, which applies to seed of landraces and varieties which have been traditionally grown in particular localities and regions and which are threatened by genetic erosion (conservation varieties) and also to seed of varieties with no intrinsic value for commercial crop production but developed for growing under particular conditions, is capable of guaranteeing the conservation of plant genetic resources.

50 It follows from this that the acceptance regime laid down by Directives 2002/55 and 2009/145 is likely to enable the intended objectives of those directives to be achieved.

51 As to whether that regime goes beyond what is necessary to achieve those objectives, Kokopelli submits that that regime is the most restrictive means of regulating the conduct of an economic activity.

52 The Council of the European Union observes that Kokopelli did not state why it regards that acceptance regime as manifestly disproportionate in the light of the objectives pursued. The Council takes the view, in any event, that other, less restrictive measures, such as labelling, would not be as effective a means of ensuring that the productivity objective referred to in Directive 2002/55 is achieved, since it would allow the sale and sowing of seed that is potentially harmful or that is not conducive to optimum agricultural production.

53 It must be noted in that regard that in order to guarantee increased agricultural productivity, seed that is marketed in the internal market must provide the guarantees required for the optimum utilisation of agricultural resources.

54 In that context, it must be held that the EU legislature was entitled to take the view that the acceptance regime laid down by Directive 2002/55 was necessary in order for agricultural producers to achieve productivity which is reliable and of good quality in terms of yield.

55 First of all, Article 5(1) of Directive 2002/55 requires that a vegetable variety is distinct, in the sense that whatever the origin, artificial or natural, of the initial variation from which it has resulted, it is clearly distinguishable in one or more important characteristics from any other variety known in the European Union. That distinctness thus provides agricultural producers with the necessary information regarding the particular characteristics of the various types of seed and allows them to make a choice securing an optimum yield.

56 Next, Article 5(2) of that directive states that a variety is to be regarded as stable if, after successive propagation or multiplications or at the end of each cycle (where the breeder has defined a particular cycle of propagation or multiplications) it remains true to the description of its essential characteristics. The criterion relating to stability thus ensures that the particular qualitative characteristics of accepted seed remain consistent over time.

- 57 Lastly, according to Article 5(3) of that directive, the requirement of uniformity relates to the situation in which the plants of which a variety is composed are, account being taken of the distinctive features of the reproductive systems of the plants, similar or genetically identical as regards the characteristics, taken as a whole, which are considered for this purpose. By ensuring that all seed sold under a particular name has the same genetic characteristics, the criterion relating to uniformity encourages an optimum yield.
- 58 Consequently, the requirement of listing in the official catalogues and the related acceptance criteria allow the variety to be defined and its stability and uniformity to be verified, for the purposes of ensuring that seed of a given variety has the qualities necessary to ensure a high level of agricultural production that is of good quality, reliable and maintained over time.
- 59 In those circumstances, and particularly in the light of the broad discretion which the EU legislature has in the area of the common agricultural policy, which involves choices to be made of an economic nature, requiring complex assessments and evaluations, the EU legislature could legitimately take the view that other measures, such as labelling, would not enable the same result to be achieved as that resulting from legislation, such as that at issue, which establishes a prior acceptance scheme in respect of seed of vegetable varieties, and that that legislation was, therefore, appropriate in the light of the objectives which the EU legislature is seeking to pursue.
- 60 A less restrictive measure, such as labelling, would not be as effective, since it would allow the sale and, therefore, the sowing of seed that is potentially harmful or not conducive to optimum agricultural production. It follows from this that the legislation at issue cannot be regarded as being manifestly inappropriate in the light of the aforementioned objectives.
- 61 The EU legislature did not thereby breach the principle of proportionality since, notwithstanding the fact that that legislation may have adverse consequences, and even substantial adverse consequences, for certain traders, it must be held that, having regard to the objectives pursued by the acceptance regime laid down by Directives 2002/55 and 2009/145, which seeks, in particular, to ensure increased agricultural productivity and to ensure the free movement of accepted seed, that regime simultaneously promotes the economic interests of agricultural producers and those of traders who market the accepted vegetable seed.
- 62 With regard to traders, such as Kokopelli, who offer for sale ‘old varieties’ which do not satisfy the conditions laid down in Articles 4(1) and 5 of Directive 2002/55, it must be borne in mind that that directive envisages, in Articles 44(2) and 48(1)(b), the establishment of specific acceptance and marketing conditions in regard to conservation varieties and varieties developed for growing under particular conditions.
- 63 In particular, Article 44(3)(a) of Directive 2002/55 provides that seed of conservation varieties may be accepted in the European Union catalogue without an official examination on the basis, *inter alia*, of results of unofficial tests and of experience gained during their cultivation. In addition, Article 44(3)(b) of that directive provides that appropriate quantitative restrictions must be applied to conservation varieties and to varieties developed for growing under particular conditions. Directive 2009/145 was adopted in application of those articles of Directive 2002/55.
- 64 Directives 2002/55 and 2009/145 take into account the economic interests of traders such as Kokopelli, in that they do not rule out the marketing of ‘old varieties’. Admittedly, Directive 2009/145 imposes geographical, quantitative and packaging restrictions in respect of seed of conservation varieties and of varieties developed for growing under particular conditions, but those restrictions fall within the scope of the conservation of plant genetic resources.

- 65 Furthermore, as the institutions which lodged written observations contend, the EU legislature was not pursuing the liberalisation of the market for seed of conservation varieties and of varieties developed for growing under particular conditions, but was seeking to ease the rules of acceptance while preventing the emergence of a parallel market for such seed, which was likely to constitute an impediment to the internal market for seed of vegetable varieties.
- 66 It must be borne in mind, moreover, that Article 35 of Directive 2009/145 requires the Commission to evaluate the implementation of that directive by 31 December 2013. Recital 14 confirms that, after three years, the Commission is to assess whether, in particular, the provisions concerning quantitative restrictions for the marketing of seed of conservation varieties and of varieties developed for growing under particular conditions are effective. That directive is, therefore, capable of being amended on the basis of the results of checks carried out.
- 67 Thus, the EU legislature was fully entitled to take the view that the appropriate means of reconciling the objectives referred to by Directives 2002/55 and 2009/145 — recalled in paragraphs 43 to 49 of the present judgment — and the interests of all the traders concerned was to lay down a general acceptance regime for the marketing of standard seed as well as specific cultivation and marketing conditions for seed of conservation varieties and of varieties developed for growing under particular conditions.
- 68 It should also be noted that, in view of the importance of the productivity objective under Article 39 TFEU, measures allowing the rational development of agricultural production and optimum utilisation of the factors of production, such as those at issue here, notwithstanding the fact that they may involve adverse economic consequences for some traders, do not appear, in the light of the economic interests of those traders, to be manifestly disproportionate in relation to the aim pursued.
- 69 It follows from the foregoing considerations that Directives 2002/55 and 2009/145 do not breach the principle of proportionality.

Breach of the principle of equal treatment

- 70 According to settled case-law, compliance with the principle of equal treatment, or of non-discrimination, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 46; Case C-304/01 *Spain v Commission* [2004] ECR I-7655, paragraph 31; Case C-141/05 *Spain v Council* [2007] ECR I-9485, paragraph 40; and Case C-442/04 *Spain v Council* [2008] ECR I-3517, paragraph 35).
- 71 Kokopelli submits that the acceptance regime imposed by Directives 2002/55 and 2009/145 establishes an unjustified difference in treatment between seed of conservation varieties and standard seed that may be accepted for inclusion in the official catalogues. In the light of that regime, it is impossible for Kokopelli to market seed of conservation varieties.
- 72 It must be held that, in view of their particular characteristics, standard seed and seed of conservation varieties are in different situations. Seed of conservation varieties does not, in principle, satisfy the requirements laid down in Articles 4(1) and 5 of Directive 2002/55. It has been traditionally grown in particular localities and regions and threatened by genetic erosion.
- 73 By taking account of the particular characteristics of the different varieties of seed, the acceptance regime established by Directives 2002/55 and 2009/145 lays down, on the one hand, general rules with regard to the marketing of standard seed and, on the other, specific cultivation and marketing conditions for seed of conservation varieties.

- 74 Those specific conditions fall within the scope of conservation in situ and the sustainable use of plant genetic resources.
- 75 In that regard, recitals 2 and 3 to Directive 2009/145 state that, in addition to the general aim of protecting plant genetic resources, the particular interest of preserving conservation varieties lies in the fact that they are especially well adapted to particular local conditions and that they are apt to be grown under particular climatic conditions.
- 76 It follows from this that, in laying down, by Directive 2002/55 as well as by the directive adopted to implement it — Directive 2009/145 — particular cultivation and marketing conditions with regard to seed of conservation varieties, the EU legislature treated different situations differently. Consequently, those directives do not breach the principle of equal treatment.

Non-observance of the principle of the freedom to pursue an economic activity

- 77 It is clear from settled case-law that the freedom to pursue an economic activity forms part of the general principles of EU law. Those principles are, however, not absolute, but must be viewed in relation to their social function. Consequently, the exercise of the freedom to pursue an economic activity may be restricted, provided that any restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (see, in particular, Case 265/87 *Schröder HS Kraftfutter* [1989] ECR 2237, paragraph 15, and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 126).
- 78 In the present case, it is true that the acceptance regime for vegetable seed laid down by Directives 2002/55 and 2009/145 is capable of restricting the freedom of traders in old seed, such as Kokopelli, to pursue their professional activity.
- 79 However, the rules set out in Articles 3 to 5 of Directive 2002/55 are intended to secure improved productivity in vegetable cultivation in the European Union, the establishment of the internal market for vegetable seed by ensuring its free movement within the European Union, and the conservation of plant genetic resources, which are objectives of general interest. As is apparent from the grounds of the present judgment relating to the alleged breach of the principle of proportionality, those rules and the measures laid down by them are not inappropriate to the attainment of those objectives, and the obstacle to the freedom to pursue an economic activity which such measures represent cannot, in the light of the aims pursued, be regarded as disproportionately impairing the right to exercise that freedom.

Non-observance of the principle of the free movement of goods

- 80 It should be borne in mind that, according to settled case-law, the prohibition of quantitative restrictions and of measures having equivalent effect laid down in Article 34 TFEU applies not only to national measures but also to measures adopted by the institutions of the European Union (see Case 15/83 *Denkavit Nederland* [1984] ECR I-2171, paragraph 15, and *Alliance for Natural Health and Others*, paragraph 47).
- 81 In that regard, it should be observed that, as paragraphs 43 to 47 of the present judgment show, the acceptance regime laid down by Directives 2002/55 and 2009/145 contributes to improved productivity in vegetable cultivation in the European Union and to the establishment of the internal market for vegetable seed by ensuring the free movement of such seed within the European Union. Accordingly, the regime promotes, rather than restricts, the free movement of goods.

Non-compliance with the ITPGRFA

- 82 According to Article 1 of the ITPGRFA, the main objective of the Treaty is the conservation and sustainable use of plant genetic resources for food and agriculture.
- 83 Kokopelli takes the view that the acceptance regime laid down by Directive 2002/55 does not comply with the provisions of the ITPGRFA.
- 84 It has consistently been held that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union (Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 50).
- 85 The validity of the act of the European Union concerned in the light of the rules of international law may be assessed where the European Union is bound by those rules and where the nature and the broad logic of the international treaty at issue do not preclude this and its provisions appear, as regards their content, to be unconditional and sufficiently precise (see, to that effect, *Air Transport Association of America and Others*, paragraphs 51 to 54).
- 86 In that regard, it must be noted that, as a Contracting Party, the European Union is bound by the ITPGRFA. However, as the Advocate General noted at point 53 of her Opinion, that treaty does not include any provision which, as regards its content, is unconditional and sufficiently precise to challenge the validity of Directives 2002/55 and 2009/145.
- 87 Paragraph 5.1 of Article 5 of the ITPGRFA, in particular, provides that each Contracting Party is, subject to national legislation, and in cooperation with other Contracting Parties where appropriate, to promote an integrated approach to the exploration, conservation and sustainable use of plant genetic resources for food and agriculture and is in particular, as appropriate, to adopt a certain number of measures.
- 88 In addition, in accordance with Article 6 of the ITPGRFA, the Contracting Parties are to develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture.
- 89 Thus, under those provisions, the measures to be adopted in any given case are left to the discretion of the Member States.
- 90 Furthermore, Article 9 of the ITPGRFA, on which Kokopelli relies, states that the Contracting Parties recognise the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.
- 91 Paragraph 9.3 of Article 9 of the ITPGRFA provides that nothing in that article is to be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.
- 92 Accordingly, that article does not contain an obligation that is sufficiently unconditional and precise to challenge the validity of Directives 2002/55 and 2009/145 either.
- 93 It follows from all of the foregoing considerations that consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Directives 2002/55 and 2009/145.

Costs

- ⁹⁴ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Council Directive 2002/55/EC of 13 June 2002 on the marketing of vegetable seed, and of Commission Directive 2009/145/EC of 26 November 2009 providing for certain derogations, for acceptance of vegetable landraces and varieties which have been traditionally grown in particular localities and regions and are threatened by genetic erosion and of vegetable varieties with no intrinsic value for commercial crop production but developed for growing under particular conditions and for marketing of seed of those landraces and varieties.

[Signatures]