



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 January 2012¹

Case C-59/11

Association Kokopelli
v
Graines Baumaux SAS

(Reference for a preliminary ruling from the cour d'appel de Nancy (France))

(Agriculture — Validity — Directive 2002/55/EC — Vegetables — Seed trade — Prohibition against marketing seed of varieties that are not officially accepted and registered in a catalogue of varieties — International Treaty on Plant Genetic Resources for Food and Agriculture — Principle of proportionality — Freedom to conduct a business — Movement of goods — Equal treatment)

I – Introduction

1. It is well known that the number of plant varieties grown in European agriculture is on the decrease. Many traditional varieties are disappearing or are simply preserved in seed banks for future generations. Instead, the fields are dominated by a handful of varieties individual specimens of which, moreover, seem very similar to each other.
2. For that reason, biodiversity in agriculture is in significant decline. It is possible that, as a result, certain varieties which could, for example, adapt more successfully to climate change or to new diseases than the varieties that currently predominate will, in the future, no longer exist. Today, the end-consumer's choice of agricultural products is already restricted.
3. One would imagine that this development is primarily driven by the economic interests of farmers who, where possible, grow the most productive varieties.
4. However, the present case demonstrates that the restriction of biodiversity in European agriculture results, at least in part, from rules of European Union ('EU') law. In fact, seed for most of the plant varieties used in agriculture may only be marketed if the variety is officially accepted. Acceptance presupposes that the variety is distinct, stable and sufficiently uniform. In certain cases, productivity, that is that the variety is of 'satisfactory value for cultivation and use', must also be proved. Such proof cannot be adduced in relation to many 'old varieties'. Consequently, the question arises whether this restriction on trade in seed is justified.

¹ — Original language: German.

II – Legal framework

A – *The International Treaty on Plant Genetic Resources for Food and Agriculture*

5. By decision of 24 February 2004,² the Council of the European Union approved the conclusion of the International Treaty on Plant Genetic Resources for Food and Agriculture³ ('the International Treaty').

6. Article 5.1 of the International Treaty sets out the most important measures:

'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;

...'

7. Article 6 of the International Treaty sets out further measures:

'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.

6.2. The sustainable use of plant genetic resources for food and agriculture may include such measures as:

- (a) pursuing fair agricultural policies that promote, as appropriate, the development and maintenance of diverse farming systems that enhance the sustainable use of agricultural biological diversity and other natural resources;

...

- (d) broadening the genetic base of crops and increasing the range of genetic diversity available to farmers;

- (e) promoting, as appropriate, the expanded use of local and locally adapted crops, varieties and underutilised species;

...

- (g) reviewing, and, as appropriate, adjusting breeding strategies and regulations concerning variety release and seed distribution.'

² — Decision 2004/860/EC (OJ 2004 L 378, p. 1).

³ — OJ 2004 L 378, p. 3.

8. Article 9 of the International Treaty addresses farmers' rights and in Article 9.2 establishes specific measures:

'The Contracting Parties agree that the responsibility for realising farmers' rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote farmers' rights, including:

- (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
- (b) the right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources for food and agriculture; and
- (c) the right to participate in making decisions, at national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.'

B – EU law

9. Matters relating to seed are governed by various directives. Such rules were first adopted in relation to vegetable seed in 1970⁴ and for other varieties used in agriculture as early as 1966.⁵ However, the provisions which apply today — and on which the European Commission is currently consulting with a view to reform⁶ — are set out below.

1. Directive 2002/55/EC

10. The varieties at issue in the main proceedings are governed largely or possibly exclusively by Council Directive 2002/55/EC of 13 June 2002 on the marketing of vegetable seed⁷ ('the Vegetable Seed Directive').

11. Article 3(1) of the Vegetable Seed Directive prohibits the marketing of seed of a variety that is not officially accepted:

'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.'

12. Article 4(1) of the Vegetable Seed Directive governs acceptance:

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

In the case of industrial chicory, the variety must be of satisfactory value for cultivation and use.'

4 — Articles 3 and 4 of Council Directive 70/458/EEC of 29 September 1970 on the marketing of vegetable seed (OJ, English Special Edition 1970 (III), p. 674).

5 — See 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) and Council Directive 66/402/EEC of 14 June 1966 on the marketing of cereal seed (OJ, English Special Edition 1965-1966, p. 143).

6 — Relevant documents and submissions of various authorities and interest groups can be found on the Commission's website at http://ec.europa.eu/food/plant/propagation/evaluation/index_en.htm (last visited on 16 January 2012).

7 — OJ 2002 L 193, p. 33.

13. Article 4(3) of the Vegetable Seed Directive contains provisions for the protection of consumers of food produced from such varieties:

‘However, where material derived from a plant variety is intended to be used as a food or food ingredient falling within the scope of Regulation (EC) No 258/97, these foods or food ingredients must not:

- present a danger for the consumer,
- mislead the consumer,
- differ from foods or food ingredients which they are intended to replace to such an extent that their normal consumption would be nutritionally disadvantageous for the consumer.’

14. Article 4(4) of the Vegetable Seed Directive provides for less onerous acceptance criteria in the interest of conserving plant genetic resources. The relevant conditions are to be determined by the Commission in accordance with Article 44(2) and Article 46(2).

15. Article 5 of the Vegetable Seed Directive defines the characteristics of distinctness, stability and uniformity:

‘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.

...

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.’

16. Pursuant to Article 52, the Vegetable Seed Directive entered into force on the 20th day following that of its publication in the *Official Journal of the European Communities*, that is on 9 August 2002. As it consolidated provisions of earlier directives, the deadlines for transposition of which had already expired, no further deadline for transposition was laid down.

2. Directive 2009/145/EC

17. 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 varieties⁸ was adopted on the basis of Article 4(4), Article 44(2) and Article 46(2) of the Vegetable Seed Directive.

⁸ — OJ 2009 L 312, p. 44.

18. Article 1(1) of Directive 2009/145 establishes the varieties for which derogations are to be laid down:

‘As regards the vegetable species covered by Directive 2002/55/EC, 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/EC, 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.’

19. The principal criteria for acceptance as a conservation variety result from Article 4 of Directive 2009/145:

‘1. In order to be accepted as a conservation variety, a landrace or variety referred to in Article 1(1)(a) shall present an interest for the conservation of plant genetic resources.

2. By way of derogation from Article 1(2) of Directive 2003/91/EC, Member States may adopt their own provisions as regards distinctness, stability and uniformity of conservation varieties.

...’

20. Articles 13 and 14 of Directive 2009/145 provide that seed from conservation varieties may only exceptionally be produced and marketed outside its region of origin.

21. Pursuant to Article 15 of Directive 2009/145, conservation varieties may only be marketed in very limited quantities:

‘Each Member State shall ensure that, for each conservation variety, the quantity of seed marketed per year does not exceed the quantity necessary for producing vegetables on the number of hectares set out in Annex I for the respective species.’

22. Depending on the species concerned, the figure set out in Annex I is 10, 20 or 40 hectares.

23. Article 22 of Directive 2009/145 sets out the requirements for acceptance as a variety developed for growing under particular conditions:

‘1. In order to be accepted as a variety developed for growing under particular conditions, as referred to in Article 1(1)(b), a variety shall be with no intrinsic value for commercial crop production but developed for growing under particular conditions.

A variety shall be considered as having been developed for growing under particular conditions if it has been developed for growing under particular agro-technical, climatic or pedological conditions.

2. By way of derogation from Article 1(2) of Directive 2003/91/EC, Member States may adopt their own provisions as regards distinctness, stability and uniformity of varieties developed for growing under particular conditions.’

24. Pursuant to Article 36(1) of Directive 2009/145, that directive was to be transposed by 31 December 2010.

3. Directive 2003/91/EC

25. Commission Directive 2003/91/EC of 6 October 2003 setting out implementing measures for the purposes of Article 7 of Council Directive 2002/55/EC as regards the characteristics to be covered as a minimum by the examination and the minimum conditions for examining certain varieties of vegetable species,⁹ mentioned in Directive 2009/145, specifies in Article 1(2) the requirements with regard to distinctness, stability and uniformity of varieties by reference to certain documents of the Community Plant Variety Office and the International Union for the Protection of New Varieties of Plants. Both organisations are concerned with the protection of intellectual property in plant varieties.

4. Directive 2002/53/EC

26. Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species¹⁰ (‘the Varieties Catalogue Directive’) establishes common rules on the acceptance of varieties for agricultural crop plants covered by various directives other than the Vegetable Seed Directive. Of interest in the present case are sugar beet and fodder beet under Council Directive 2002/54/EC of 13 June 2002 on the marketing of beet seed¹¹ (‘the Beet Directive’).

27. Article 1(1) of the Varieties Catalogue Directive defines the scope of the directive:

‘This Directive concerns the acceptance for inclusion in a common catalogue of varieties of agricultural plant species of those varieties of beet ... the seed of which may be marketed under provisions of the Directives concerning ... the marketing of beet seed (2002/54/EC) ... ’

28. Article 1(2) of the Varieties Catalogue Directive establishes the basis for the common catalogue of varieties:

‘The common catalogue of varieties shall be compiled on the basis of the national catalogues of the Member States.’

29. Article 3(1) of the Varieties Catalogue Directive provides for the establishment of national catalogues of varieties:

‘Each Member State shall establish one or more catalogues of the varieties officially accepted for certification and marketing in its territory. ...’

30. The conditions for the acceptance of a variety are laid down in Article 4(1) of the Varieties Catalogue Directive:

‘Member States shall ensure that a variety is accepted only if it is distinct, stable and sufficiently uniform. The variety must be of satisfactory value for cultivation and use.’

9 — OJ 2003 L 254, p. 11.

10 — OJ 2002 L 193, p. 1.

11 — OJ 2002 L 193, p. 12.

31. Article 5 of the Varieties Catalogue Directive defines the criteria for acceptance in the same terms as Article 5 of the Vegetable Seed Directive. However, in addition, in Article 5(4) it clarifies the meaning of ‘satisfactory value of a variety for cultivation [or] use’:

‘The value of a variety for cultivation or use shall be regarded as satisfactory if, compared to other varieties accepted in the catalogue of the Member State in question, its qualities, taken as a whole, offer, at least as far as production in any given region is concerned, a clear improvement either for cultivation or as regards the uses which can be made of the crops or the products derived therefrom. Where other, superior characteristics are present, individual inferior characteristics may be disregarded.’

5. Directive 98/95/EC

32. 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 species¹² (‘the amending Directive’) introduced a legal basis to permit, within the framework of legislation on the seed trade, the conservation, by use in situ, of varieties threatened with genetic erosion (recital 17 in the preamble). The Commission could have adopted provisions to the same effect using the comitology procedure. Those provisions are now included in the Vegetable Seed Directive, the Beet Directive and the Varieties Catalogue Directive, and were therefore repealed on the adoption of those directives.

III – Facts and reference for a preliminary ruling

33. Association Kokopelli (‘Kokopelli’) is a non-governmental organisation which sells seed of old varieties, some of which are not accepted within the meaning of the Vegetable Seed Directive. Graines Baumaux SAS (‘Graines Baumaux’), a seed trader, identified among the varieties being offered for sale by Kokopelli 461 varieties that were not accepted, and, consequently, commenced proceedings in 2005 on grounds of unfair competition. Graines Baumaux claims, inter alia, lump-sum damages of EUR 50 000 and seeks the removal of all advertising for those varieties. At first instance, the tribunal de grande instance Nancy (Regional Court, Nancy) (France) awarded Graines Baumaux damages of EUR 10 000 and dismissed the remainder of the action.

34. Kokopelli appealed to the cour d’appel de Nancy (Court of Appeal, Nancy) (France). In those proceedings, a reference has been made to the Court of Justice for a ruling on the following question:

‘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 International Treaty on Plant Genetic Resources for Food and Agriculture, particularly in so far as they impose restrictions on the production and marketing of old seed and plants?’

35. Graines Baumaux, Kokopelli, the French Republic, the Kingdom of Spain, the Council of the European Union and the European Commission submitted written observations. There was no oral procedure.

¹² — OJ 1999 L 25, p. 1.

IV – Legal appraisal

A – Admissibility of the reference for a preliminary ruling

36. Graines Baumaux questions the admissibility of the reference for a preliminary ruling. In its view, the validity of the directives specified is irrelevant to the outcome of the dispute in the main proceedings, as those proceedings concern compliance with provisions of French law by which the directives are implemented. As the Court does not answer hypothetical questions,¹³ Graines Baumaux submits that the reference for a preliminary ruling in the present case is inadmissible.

37. In response to that argument, it must be conceded that an infringement by Kokopelli of the French implementing legislation would not necessarily be ruled out by the invalidity of the provisions of the directives in question. However, as long as those provisions are presumed to be valid,¹⁴ national courts are hardly in a position to question the validity of the implementing legislation.¹⁵ By contrast, if the directives are invalid, the implementing legislation is also open to question. For example, if the seed at issue in the main proceedings also included products from other Member States, the legislation might breach the principle of the free movement of goods established in Article 34 TFEU. For that reason, the Court does answer questions of this kind.¹⁶

B – The subject-matter of the reference for a preliminary ruling

38. The cour d'appel de Nancy seeks to ascertain the validity of four directives containing numerous rules on the marketing of seed. They establish, in particular, the conditions under which varieties are accepted and included in national catalogues of varieties or in the common catalogue of varieties, prohibit the sale of seed that is not accepted and, in addition, govern the control and quality of seed and the packaging in which it may be sold. In all those areas there are 'restrictions on the production and marketing of old seed and plants', the validity of which, according to the wording of the question referred, needs to be examined.

39. However, the matter in dispute in the main proceedings is more narrowly defined. It is limited to the complaint that Kokopelli sold seed for plant varieties that are not accepted. Kokopelli does not seek to have its varieties included in a catalogue and expressly states that it does not question the rules on seed quality.¹⁷ Although Kokopelli contests the rules on sales packaging,¹⁸ it is not evident that those rules are at issue in the main proceedings.

40. Consequently, it is necessary to examine only the prohibition against the marketing of seed of varieties that are not accepted.

41. According to the application submitted by Graines Baumaux at first instance, Kokopelli marketed 461 vegetable varieties that are not accepted. It is clear that those varieties fall mainly, perhaps even entirely, within the scope of the third directive mentioned by the cour d'appel, that is the Vegetable Seed Directive. I shall therefore concentrate on that directive in the following analysis.

13 — See, for example, Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-8263, paragraph 40.

14 — Case 101/78 *Granaria* [1979] ECR 623, paragraph 4; Case C-475/01 *Commission v Greece* [2004] ECR I-8923, paragraph 18; and Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 59.

15 — See, on the review of implementing legislation in the light of national constitutional law, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 56.

16 — See the facts of Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 20; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 21; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraphs 17, 22 et seq. and 34; and Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* [2011] ECR I-773, paragraph 12.

17 — Paragraph 146 of its written observations.

18 — *Ibid*, paragraph 147 et seq.

42. In that regard, I shall examine the obligation on Member States, established in Article 3(1) of the Vegetable Seed Directive, to provide that vegetable seed may not be marketed unless the variety is officially accepted in one or more Member States.

43. The rules governing acceptance are set out primarily in Articles 4 and 5 of the Vegetable Seed Directive. According to those provisions, seed may be marketed only if it is established that the variety is distinct, stable and sufficiently uniform. In the case of industrial chicory, the variety must also be of satisfactory value for cultivation and use.

44. According to Kokopelli and the Commission,¹⁹ those requirements pose a problem for the use of the old seed mentioned in the reference for a preliminary ruling, in so far as many of the varieties that are not accepted are unable to satisfy them. Directive 2009/145 establishing certain derogations for vegetable seed confirms that point as, according to recital 2 in the preamble thereto, it was adopted to ensure that certain varieties may be grown and marketed even where they do not comply with the general requirements.

45. According to Kokopelli, the genetic composition of the old varieties it markets is less uniform than the genetic composition of accepted varieties. For that reason, depending on environmental conditions, old varieties may develop differently; in other words, they are not stable. In addition, the individual specimens in the populations concerned differ more markedly. Thus, the varieties are not as uniform as accepted varieties.²⁰

46. Consequently, it must be examined whether the prohibition against the marketing of seed of varieties which are not demonstrably distinct, stable and sufficiently uniform and, where applicable, of satisfactory value for cultivation and use, established in Article 3(1) of the Vegetable Seed Directive, is compatible with the higher-ranking rules specified in the reference for a preliminary ruling from the national court.

47. In that regard, I shall examine, first, the International Treaty (see C.1 below), then the principle of proportionality (C.2), followed by the freedom to pursue an economy activity (C.3) and the free movement of goods (C.4) and, finally, the principle of equal treatment (C.5).

48. Directive 2009/145 on derogations for vegetable seed, the last of the directives mentioned by the cour d'appel, was not adopted by the Commission until 2009, and the period prescribed for its implementation expired on 31 December 2010. As proceedings were commenced before the national court in 2005, this directive is unlikely to be relevant in relation to the damages claimed. However, it may be relevant in determining whether Kokopelli must refrain in future from advertising seed that is not accepted. Consequently, it must be examined whether Directive 2009/145 alters the conclusion reached on Article 3(1) of the Vegetable Seed Directive (see the final part of C.2(c)).

49. The second directive specified by the cour d'appel is the Varieties Catalogue Directive. It is relevant only if the nine beet varieties mentioned by Graines Baumaux in its list of contested vegetable varieties²¹ include sugar beets or fodder beets which fall within the scope of the Beet Directive, not specified in the reference for a preliminary ruling. Admittedly, there is nothing in the case-file to suggest this, and the arguments of Graines Baumaux and Kokopelli would suggest otherwise. However, it is not absolutely certain that the outcome in the main proceedings does not depend also

19 — Paragraph 95 of the written observations of the Commission.

20 — See Food Chain Evaluation Consortium, 'Evaluation of the Community *acquis* on the marketing of seed and plant propagating material (S&PM)', available online at http://ec.europa.eu/food/plant/propagation/evaluation/s_pm_evaluation_finalreport_en.pdf, 2008, pp. 78 and 168 et seq.

21 — The first-instance application of Graines Baumaux mentions five varieties of 'betteraves' and four varieties of 'navets' (see pp. 25 and 26 of the annexes thereto).

on the validity of the Varieties Catalogue Directive. In order to avoid the need for a further reference for a preliminary ruling from the cour d'appel in the present case,²² I shall examine, finally, whether my conclusions on the Vegetable Seed Directive can be applied to the Varieties Catalogue Directive (see D below).

50. Following the adoption of the Vegetable Seed Directive and the Varieties Catalogue Directive, the first directive mentioned by the cour d'appel, the amending Directive, is no longer in force. In addition, it merely establishes legal bases for derogations which were never invoked while the directive was in force. For that reason, examination of that directive is unnecessary.

C – Article 3(1) of the Vegetable Seed Directive

1. The International Treaty

51. Pursuant to Article 1, the International Treaty aims, inter alia, to ensure the conservation and sustainable use of plant genetic resources for food and agriculture. In Kokopelli's view, it precludes the rules on the acceptance of varieties.

52. The Court of Justice reviews the validity of secondary law in the light of all the rules of international law, subject to two conditions. First, the European Union must be bound by those rules and, second, the Court can examine the validity of legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise.²³

53. Whether the European Union is bound by the International Treaty is not at issue, as it is a Contracting Party. The question whether its nature and broad logic preclude a review of secondary law²⁴ does not need to be determined by the Court in the present case. That is because the Treaty does not include any provisions which, as regards their content, are unconditional and sufficiently precise as to challenge the validity of EU legislation on the marketing of seed.

54. Article 5 of the International Treaty provides that measures should be taken 'subject to national legislation' and 'as appropriate'. Pursuant to Article 6, 'appropriate measures' are to be developed and maintained. This is followed by an illustrative list of such measures. Consequently, both provisions leave it to the discretion of States to determine the measures to be adopted. Therefore, the freedom of the European Union to regulate the marketing of seeds is not restricted as a result.

55. Article 9 of the International Treaty concerns farmers' rights. In accordance with their needs and priorities, each Contracting Party should adopt measures as appropriate and subject to its national legislation. This also does not constitute a sufficiently unconditional and precise obligation.

56. No other provisions of the International Treaty appear relevant.

57. Consequently, consideration of the International Treaty has disclosed no factor of such a kind as to affect the validity of Article 3(1) of the Vegetable Seed Directive.

22 — Case C-461/03 *Gaston Schul Douane-expéditeur* [2005] ECR I-10513, paragraph 19 et seq.

23 — Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 43 et seq., and Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 51 et seq.

24 — On that issue, see my Opinion in *Air Transport Association of America and Others*, cited in footnote 23, point 68 et seq.

2. The principle of proportionality

58. The prohibition against the marketing of seed of varieties that are not accepted might, however, be disproportionate.

59. The principle of proportionality, which is one of the general principles of EU law, requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question and, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.²⁵

60. With regard to judicial review of the conditions referred to in the previous point, the EU legislature must be allowed a broad discretion in an area which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The legality 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.²⁶

61. This standard formulation of the Court should not be understood to mean that only the appropriateness of the measure must be reviewed or that the yardstick of a manifest defect applies only to that criterion. Instead, that wording indicates that the purpose of the review is to establish whether the measure is manifestly disproportionate.²⁷ In that connection, regard must be had to all three stages of the proportionality test.²⁸

62. Moreover, even though it has such a (broad) power, the EU legislature must base its choice on objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators.²⁹

a) The objectives pursued by the prohibition and its appropriateness for attaining those objectives

63. According to recitals 2 to 4 in the preamble to the Vegetable Seed Directive, the scheme for the acceptance of varieties aims to increase agricultural productivity. As the Commission correctly emphasises, this is an objective of the common agricultural policy, as laid down in Article 39(1)(a) TFEU.

64. In addition, the sales prohibition protects users against the purchase of seed of varieties which are not distinct, stable and sufficiently uniform and which may not be of satisfactory value for cultivation and use, that is are not sufficiently productive.

65. There cannot be any doubt that the prohibition against the sale of seed that is not accepted is appropriate to the furtherance of both of those aims. In essence, it ensures that users, that is farmers in particular, obtain only seed having the characteristics established on acceptance.

25 — Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81; Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 41; and Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 45 and the case-law cited.

26 — See *S.P.C.M. and Others*, paragraph 42, and *Afton Chemical*, paragraph 46, both cited in footnote 25.

27 — *S.P.C.M. and Others*, cited in footnote 25, paragraph 71.

28 — See the review carried out in *S.P.C.M. and Others*, cited in footnote 25, on the objectives and appropriateness of the measure (paragraph 44 et seq.), its necessity (paragraph 59 et seq.), and weighing the disadvantages against the aims (paragraph 64 et seq.).

29 — Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 58; Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraph 53; and Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECR I-3727, paragraph 63.

66. If a variety is *distinct, stable* and sufficiently *uniform*, users of the seed can rely, in particular, on the fact that it will produce the crop desired. Such reliability is an essential requirement for the optimal use of agricultural resources. If, as is the case in relation to industrial chicory, a variety is shown to be of satisfactory value for cultivation and use,³⁰ users can, moreover, expect a certain crop yield.

67. If, however, the specified seed characteristics have not been established, users are to a certain extent buying ‘a pig in a poke’. They have to rely on the information provided by the vendor as to the crop variety that will develop from the seed. Whether that information is correct is something that they will generally discover, at the earliest, several months later when plants develop from the seed, and possibly not until the crops are ripe. If it is then apparent that the plants do not correspond to expectations, it is too late to adjust the relevant crop cycle. Productivity would suffer as a result.

68. Moreover, it is possible that a sufficiently professional seed industry with high yield standards did not exist when the prohibition against the marketing of seed of varieties that are not accepted was introduced. Strict regulation may conceivably have been necessary at the time in order to eradicate competition from ‘low-cost operators’ and to encourage the development of reputable structures.

69. High levels of agricultural productivity may contribute indirectly to food security and allow areas that are no longer required to be left fallow or to be farmed in a more environmentally friendly manner, which, in the view of the French Republic, the Council and the Commission, may be regarded as further objectives of the marketing rules at issue. However, both of those objectives are connected only very remotely to the prohibition against the sale of seed that has not been accepted.

70. In addition, recital 12 in the preamble to the Vegetable Seed Directive indicates that the common catalogue of varieties is intended to ensure the free movement of seed. That objective falls within the ambit of Article 3(3) TEU, which provides for the establishment of the internal market. The law governing the acceptance of varieties is appropriate to contributing to the attainment of that objective inasmuch as Member States can assume that seed lawfully marketed in other Member States also satisfies domestic requirements.

71. Article 4(3) of the Vegetable Seed Directive can be understood to mean that the acceptance of varieties aims also to protect end-users of the food produced, that is to protect them from health risks and from being misled. Taking those objectives into account in the acceptance of varieties may contribute to the attainment of those objectives.

72. Finally, the Commission contends that the health status of seed — as mentioned in the 12th recital in the preamble to Directive 66/402, a precursor to a parallel directive on cereal seed — may be regarded as an objective of the marketing rules. It may well be the case that the directives specified in the order for reference include rules which serve that purpose. However, it is not clear how the scheme for the acceptance of varieties is supposed to contribute to that. The conditions for acceptance are unrelated to plant health. For that reason, that objective cannot be taken into account for the purpose of justifying those rules.

30 — See the definition of that value in Article 5(4) of the Varieties Catalogue Directive.

b) Necessity

73. At first glance, one might doubt the necessity of a prohibition against the marketing of seed of varieties that are not accepted. The stated objectives can be attained, for the most part, by means of less intrusive labelling requirements.³¹ If a consumer of seed knows that a variety does not satisfy the requirements of the catalogue of varieties, he can choose not to purchase it or to use it. This solution would avoid the disadvantages in relation to productivity and, at the same time, ensure consumer protection.

74. However, the fact that objectives are largely attained does not suffice to preclude the necessity of a measure. A measure must be regarded as necessary if the less onerous measure is also less effective. That is the situation here.

75. Labelling and warning obligations would not ensure to the same extent that users obtain only seed that satisfies the acceptance criteria. The possibility cannot be precluded that users would nevertheless be mistaken as to the quality of the seed or — on other grounds, for example, on account of price, advertising or conviction — would use seed that does not satisfy the acceptance criteria. Whether or not the — marginally — greater attainment of regulatory objectives as a result of the prohibition at issue suffices to justify it is not a question of necessity but a matter which must be examined when weighing the disadvantages against the aims.

76. However, it is not necessary, for the purpose of ensuring free movement of seed in the internal market, for the acceptance of varieties to be linked to a prohibition against the marketing of varieties that are not accepted.³² Even if the protection of agriculture against seed of varieties that are not accepted were to justify national restrictions on trade,³³ this would be no reason for the *European Union* to adopt a prohibition. Instead, Article 16(1) of the Vegetable Seed Directive suffices to ensure the free movement within the European Union of varieties that satisfy the acceptance criteria.

77. In addition, the rules on acceptance are unnecessary for the purposes of protecting end-consumers against the food produced from certain varieties. That objective is achieved through food law, for example, Regulation (EC) No 178/2002,³⁴ which includes much more specific rules on that point.

c) Balancing the advantages and disadvantages (appropriateness)

78. Thus, it must be examined whether, in the light of the objectives of promoting agricultural productivity and protecting seed users, the disadvantages resulting from the sales prohibition are manifestly inappropriate. In this connection, it is necessary to ascertain whether, in exercising its discretion, the EU legislature attempted to achieve a balance between, on the one hand, those objectives and, on the other hand, the economic interests of traders.³⁵

31 — See also the fourth of five scenarios put forward by the Commission for discussion in its consultation document ‘Options and Analysis of Possible Scenarios for the Review of the EU Legislation on the Marketing of Seed and Plant Propagating Material’ at http://ec.europa.eu/food/plant/propagation/evaluation/docs/15042011_options_analysis_paper_en.pdf, pp. 12 and 13.

32 — See point 70 above.

33 — This is questionable in the light of my conclusions below on appropriateness (point 88 et seq.) and on the free movement of goods (point 112 et seq.).

34 — Regulation of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

35 — *Afton Chemical*, cited in footnote 25, paragraph 56. See also *S.P.C.M. and Others*, cited in footnote 25, paragraph 64 et seq., and Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063, paragraphs 77 and 81, and the case-law cited in footnote 29.

79. In the following section, I shall demonstrate, first, that until the adoption of Directive 2009/145 on derogations for vegetables the legislature did not undertake any efforts to balance opposing interests and, subsequently, that the disadvantages of the rule are also manifestly disproportionate to its benefits. Finally, I shall examine whether consideration of Directive 2009/145 results in a different conclusion.

i) The legislature's efforts to balance the interests concerned

80. According to the recitals in the preamble to the directive under review and the arguments advanced in most of the submissions made in the present proceedings, the prohibition against the marketing of seed of varieties that are not accepted is based on the notion that the objectives pursued are in the interests of economic operators. High levels of productivity and protection against seed of varieties not satisfying the criteria for acceptance are matters that correspond to the economic interests of many farmers.

81. However, the rules also concern the interests of economic operators and consumers who are not primarily interested in high productivity levels and standard products. In addition, they also touch upon the public interest in the genetic diversity of agricultural varieties.

82. *Economic operators* whose interests are not primarily focused on productivity are considerably restricted as a result of the existing system. Seed producers, seed merchants, farmers and consumers of agricultural products cannot use varieties with characteristics which differ from those of accepted varieties. If, for example, a variety that is not accepted has a different taste to that of accepted varieties or produces a better yield under certain growing conditions, it may — all the same — not be marketed. In addition, efforts to develop varieties that are not accepted into varieties satisfying the acceptance criteria are rendered more difficult.

83. At the same time, *consumer* choice is restricted. Consumers do not have access to food or other products made from varieties not satisfying the acceptance criteria, nor may they grow those varieties themselves, for example in their own gardens.

84. Restricting farmers to the use of accepted varieties ultimately reduces *genetic diversity* on European farmland as fewer varieties are grown and there is less genetic variation between the various individual plants of those varieties.³⁶

85. Although biodiversity is not expressly referred to in the Treaties as an objective of European policy, the European Union has committed itself — in particular by the Convention on Biological Diversity³⁷ — to the protection thereof and the Court of Justice, too, has recognised it as an objective worthy of protection.³⁸ In relation to agriculture, specifically, that objective is recognised by the International Treaty.

86. Although seed banks and cultivation in limited areas can contribute to the conservation of varieties that are not accepted, such measures typically depend on public funding. By contrast, commercial use of varieties that are not accepted would be a much more robust means of ensuring their conservation and, in practical terms also, would result in greater biodiversity.

³⁶ — See point 45 above.

³⁷ — OJ 1993 L 309, p. 3.

³⁸ — Case C-67/97 *Bluhme* [1998] ECR I-8033, paragraph 33.

87. In the light of the recitals and the arguments advanced in the observations submitted to the Court, in particular, by the Council and the Commission, it is not evident that the legislature took account of those interests prior to the adoption of Directive 2009/145. For that reason alone, the provision at issue appears manifestly disproportionate.

ii) Balancing the disadvantages and aims

88. If, none the less, the legislature engaged in an (undocumented) exercise to weigh up those interests, it clearly failed to achieve the objective of securing an appropriate balance between disadvantages and aims.

89. The advantages of a sales prohibition over less onerous measures, such as labelling requirements, are — as set out above³⁹ — in essence limited to preventing the mistaken use of seed that has not been accepted. However, that risk would be minimal, if sufficiently clear warnings were prescribed.

90. By contrast, there is no reason to fear that European farmers will lose access to high-quality seed. Even in the absence of a prohibition against the marketing of varieties that are not accepted, farmers can make use of varieties that are listed in the catalogue of varieties and thus satisfy the acceptance criteria. In the light of the yield qualities of accepted varieties, there is also no reason to anticipate any appreciable predatory competition from varieties that are not accepted.

91. Moreover, plant variety rights have now been established,⁴⁰ which provides an additional incentive for the development of high-performing varieties. Plant variety rights are subject to criteria similar to those for the acceptance of varieties in the seed catalogue. For that reason, the professional seed industry hardly needs protection from competition from varieties that are not accepted.

92. According to the Council, a further advantage of the marketing prohibition is the fact that this prevents even the use of seed that is not accepted. Such seed may be harmful or incapable of ensuring optimal agricultural production. I understand this argument to mean that farmers — if necessary, even against their will — are, in practice, to be compelled to use productive varieties. However, that constitutes only a very limited advantage as, in principle, it is for farmers to decide which varieties to grow. They could also choose not to cultivate their fields at all.

93. By contrast, the disadvantages of the prohibition against the marketing of seed of varieties that are not accepted are considerable. They impact — as I set out above — on the freedom to conduct a business, on consumers of agricultural products and on biodiversity in agriculture.

94. Consequently, it must be concluded that the disadvantages of the prohibition against the marketing of seed of varieties that are not accepted manifestly outweigh its advantages.

iii) Directive 2009/145

95. However, my conclusion thus far would be called into question, at least with regard to the period since 31 December 2010, if Directive 2009/145 concerning derogations for vegetables attenuated sufficiently the disadvantages of the previous scheme.

39 — See point 75 above.

40 — In the European Union this matter is governed by Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

96. The amending Directive from the year 1998 indicates that the legislature had already recognised the need for a balancing of interests with regard to biodiversity. That directive introduced a legal basis for limited derogations from the strict acceptance criteria later incorporated in the Vegetable Seed Directive. However, until the Commission finally utilised them in 2009 in adopting Directive 2009/145 on derogations for vegetable seed, those powers had no effect on the prohibition and, as a result, the balance of interests remained unchanged.

97. Directive 2009/145 introduces the possibility, however, of marketing seed of varieties which could not be accepted hitherto. Although that directive does not expressly require Member States to accept certain varieties, Member States must exercise the discretion afforded to them by the directive in line with the fundamental rights recognised in EU law.⁴¹ As a result, they are required to accept varieties satisfying the requirements of Directive 2009/145 if the scheme for the acceptance of varieties would otherwise be rendered disproportionate.⁴²

98. Consequently, it must be examined whether Directive 2009/145 allows sufficient scope for the use of old varieties. The directive includes rules governing two kinds of variety: conservation varieties and ‘varieties developed for growing under particular conditions’.

99. Pursuant to Article 4(2) of Directive 2009/145, the acceptance of conservation varieties nevertheless presupposes proof of a certain minimum quality as regards distinctness, stability and uniformity. In addition, there are considerable restrictions on the use of those varieties. Pursuant to Articles 13 and 14, seed may only be grown and marketed in its region of origin or similar regions. In conjunction with Annex I, Articles 15 and 16 also place restrictions on seed quantities. For each variety, depending on the species concerned, seed may be marketed per year only for crop production on 10 to 40 hectares of land.

100. Kokopelli is doubtful whether those rules achieve a reasonable balance between, on the one hand, the objectives of productivity and the protection of farmers and, on the other hand, the conservation of genetic diversity in agriculture. However, it can no longer be concluded that the advantages of the scheme for the acceptance of varieties are *manifestly* disproportionate to the resulting threat to genetic diversity. To a limited extent, varieties may now be grown which are of interest for the conservation of plant genetic resources but which do not satisfy the general criteria for acceptance. And if the specific requirements concerning the distinctness, stability and uniformity of those varieties are understood and interpreted broadly, in accordance with the principle of proportionality, the acceptance of old varieties must, in principle, be possible.

101. However, having regard to the limitations inherent in those rules, it is not the objective of those rules to allow for the commercial use of the varieties involved. Consequently, insufficient consideration is given to the interests of economic operators and consumers.

102. The use of varieties developed for growing under particular conditions is subject to fewer restrictions, but stricter criteria for their acceptance apply. Pursuant to Article 22 of Directive 2009/145, a variety of that kind must have no intrinsic value for commercial crop production and have been developed for growing under particular agro-technical, climatic or pedological conditions. Only very few old varieties are likely to satisfy that latter condition. Therefore, although this rule allows the use of certain old varieties, it is too narrowly formulated to ensure that, when viewed as a whole, the scheme for the acceptance of varieties is proportionate.

41 — Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 105; and Case C-35/09 *Speranza* [2010] ECR I-6581, paragraph 28.

42 — See Case 137/85 *Maizena and Others* [1987] ECR 4587, paragraph 15, and *Speranza*, cited in footnote 41, paragraph 29.

103. In summary, it must be stated that even following the adoption of Directive 2009/145 on derogations for vegetables, disadvantages remain for economic operators and consumers whose access to old varieties that are not accepted is impeded. Those disadvantages — irrespective of any disadvantages for biodiversity — are manifestly disproportionate to the advantages of the prohibition, without any attempt having been made by the legislature to attain a balance.

d) Interim conclusion

104. For that reason, it must be concluded that the disadvantages of the prohibition against the sale of seed of varieties that are not demonstrably distinct, stable and sufficiently uniform and, where appropriate, of satisfactory value for cultivation and use, established in Article 3(1) of the Vegetable Seed Directive, are disproportionate to its aims. Consequently, that provision is invalid.

3. Freedom to pursue an economic activity

105. In addition, it must be clarified whether the prohibition at issue is compatible with the fundamental right to pursue an economic activity.

106. The freedom to pursue an economic activity is protected as the freedom to conduct a business as laid down in Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights' or 'the Charter'), which, since the Treaty of Lisbon, has the same legal value as the Treaties, pursuant to the first subparagraph of Article 6(1) TEU.⁴³ The Court had already recognised that fundamental right as part of the freedom to pursue a trade or profession.⁴⁴

107. It is clear that the rules on the marketing of seed restrict that freedom. Unless a variety has been accepted, its seed may not be marketed, nor can it be purchased for growing.

108. According to Article 52 of the Charter of Fundamental Rights, any limitation on the exercise of the rights and freedoms recognised by that charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.⁴⁵

109. Consequently, justification for interference with the freedom to conduct a business must satisfy the requirements of the principle of proportionality.⁴⁶ As it has already been established that the sales prohibition is disproportionate, in principle, it also infringes the fundamental right to pursue an economic activity.

110. However, in applying the principle of proportionality to justify a limitation on the right to pursue an economic activity, consideration must be given to the fact that not all the disadvantages resulting from the sales prohibition are to be balanced against its aims but only the interference with the fundamental right at issue, that is, above all, the restrictions for seed producers, seed merchants and farmers identified in point 82. However, on this limited assessment also, I conclude that the sales prohibition is manifestly disproportionate.

43 — Case C-555/07 *Küçükdeveci* [2010] ECR I-365, paragraph 22, and Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 30.

44 — Case 4/73 *Nold v Commission* [1974] ECR 491, paragraph 14; Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 78; and Case C-548/09 P *Bank Melli Iran v Council* [2011] ECR I-11381, paragraph 114.

45 — See, in a similar vein, the case-law cited in footnote 44. On the assessment of such justification, see *Volker und Markus Schecke and Eifert*, cited in footnote 35, paragraph 65 et seq.

46 — *Alliance for Natural Health and Others*, cited in footnote 16, paragraph 129; *ABNA and Others*, cited in footnote 16, paragraph 87 et seq.; and, in relation to data protection, *Volker und Markus Schecke and Eifert*, cited in footnote 35, paragraph 74.

111. For that reason, the restriction on the freedom to conduct a business, within the meaning of Article 16 of the Charter, which results from Article 3(1) of the Vegetable Seed Directive is not justified for the purposes of Article 52(1) of the Charter. Consequently, the provision at issue is invalid also by reason of its infringement of that fundamental right.

4. Free movement of goods

112. In addition, the prohibition against the marketing of seed of varieties that are not accepted might be contrary to the free movement of goods.

113. The prohibition of quantitative restrictions and of all measures having equivalent effect established in Article 34 TFEU applies not only to national measures but also to measures adopted by EU institutions.⁴⁷

114. The prohibition at issue necessarily results in a restriction of trade. As that restriction, too, is justified only if it satisfies the principle of proportionality,⁴⁸ to that extent, my reasoning above⁴⁹ also applies here.

5. Equal treatment or non-discrimination

115. Finally, the prohibition at issue must be assessed for compatibility with the principle of equal treatment or non-discrimination. That principle, now also enshrined in Article 20 of the Charter of Fundamental Rights, 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.⁵⁰ A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.⁵¹ The provision concerned must therefore be proportionate to the differences and similarities of the particular situation.⁵²

116. The difference in treatment in the present case arises from the circumstance that seed of accepted varieties may be sold, whereas seed of varieties that are not accepted may not. The sales prohibition is based on the fact that the criteria for acceptance have not been established. The absence of such proof constitutes a difference between the varieties which, in principle, would also justify a difference in treatment; for example, a special labelling requirement for the seed of varieties that are not accepted.

117. However, as I have already set out, the disadvantages of a sales prohibition are disproportionate to the aims of the scheme. Consequently, the difference in treatment is not justified and the prohibition at issue must be regarded as invalid also on the ground of breach of the principle of equal treatment.

47 — Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 15, and *Alliance for Natural Health and Others*, cited in footnote 16, paragraph 47.

48 — On reviewing the validity of secondary law, see Case 240/83 *ADBHU* [1985] ECR 531, paragraph 15; Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, paragraph 31; and, more generally, Case 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 11, and, in relation to appropriateness, paragraph 21; and also Case C-320/03 *Commission v Austria* [2005] ECR I-9871, paragraphs 85 and 90.

49 — See point 110 above.

50 — Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; *S.P.C.M. and Others*, cited in footnote 25, paragraph 74; and Case C-550/07 *P Akzo Nobel Chemicals and Akros Chemicals v Commission and Others* [2010] ECR I-8301, paragraph 55.

51 — *Arcelor Atlantique et Lorraine and Others*, cited in footnote 29, paragraph 47.

52 — See the Opinion of Advocate General Póras Maduro in Case C-524/06 *Huber* [2008] ECR I-9705, point 7, and my Opinion in Case C-540/03 *Parliament v Council* [2006] ECR I-5769, point 107 and the case-law cited, and in *S.P.C.M. and Others*, cited in footnote 25, point 134.

6. Conclusion

118. As an interim conclusion, it must be stated that the prohibition against the sale of seed of varieties that are not demonstrably distinct, stable and sufficiently uniform and, where appropriate, of satisfactory value for cultivation and use, established in Article 3(1) of the Vegetable Seed Directive, is invalid as it breaches the principle of proportionality, the freedom to conduct a business within the meaning of Article 16 of the Charter of Fundamental Rights, the free movement of goods established in Article 34 TFEU and the principle of equal treatment within the meaning of Article 20 of the Charter.

D – *Varieties Catalogue Directive*

119. Finally, it must be examined whether the outcome of the review of Article 3(1) of the Vegetable Seed Directive must be applied to the Varieties Catalogue Directive.

120. Unlike Article 3(1) of the Vegetable Seed Directive, the Varieties Catalogue Directive does not expressly provide that seed may be marketed only if its variety is officially accepted.

121. According to Article 1(1), the Varieties Catalogue Directive governs the acceptance of varieties the seed of which may be marketed. In connection with the criteria for acceptance, Article 3(1) also refers to ‘varieties officially accepted for ... marketing’.

122. Those provisions of the Varieties Catalogue Directive could be read as permitting only the seed of accepted varieties to be marketed. A prohibition of that kind would be invalid for the same reasons as apply in the case of Article 3(1) of the Vegetable Seed Directive. However, that interpretation is not mandatory.

123. Instead, one could interpret acceptance simply as a condition for the inclusion of a variety in the catalogue and as proof that the acceptance criteria are satisfied. This approach is preferable as, according to a general principle of interpretation, an act of the European Union must be interpreted, as far as possible, in such a way as not to affect its validity.⁵³

124. As such an interpretation in conformity with fundamental rights is possible, the validity of the Varieties Catalogue Directive is not called into question.

V – Conclusion

125. In the light of the foregoing, I propose that the Court should rule as follows:

- (1) The prohibition against the sale of seed of varieties that are not demonstrably distinct, stable and sufficiently uniform and, where appropriate, of satisfactory value for cultivation and use, established in Article 3(1) of Council Directive 2002/55/EC of 13 June 2002 on the marketing of vegetable seed, is invalid as it breaches the principle of proportionality, the freedom to conduct a business within the meaning of Article 16 of the Charter of Fundamental Rights of the European Union, the free movement of goods established in Article 34 TFEU and the principle of equal treatment within the meaning of Article 20 of the Charter of Fundamental Rights.

⁵³ — Case C-403/99 *Italy v Commission* [2001] ECR I-6883, paragraph 37; Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, paragraph 47; and Case C-149/10 *Chatzi* [2010] ECR I-8489, paragraph 43.

- (2) By contrast, consideration of the reference for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of the remaining provisions of Directive 2002/55 or the validity of 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, Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species 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.