Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

19 December 2019*

(Reference for a preliminary ruling — Community plant variety rights — Regulation (EC) No 2100/94 — Article 13(2) and (3) — Effects of community plant variety rights — Cumulative protection scheme — Planting of variety constituents and harvesting the fruit — Distinction between acts effected in respect of variety constituents and those concerning harvested material — Concept of 'unauthorised use of variety constituents' — Article 95 — Provisional protection)

In Case C-176/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decision of 6 March 2018, received at the Court on 7 March 2018, in the proceedings

Club de Variedades Vegetales Protegidas

v

Adolfo Juan Martínez Sanchís,

THE COURT (Seventh Chamber),

composed of P.G. Xuereb, President of the Chamber, T. von Danwitz (Rapporteur) and A. Kumin, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: L. Carrasco Marco, administrator,

having regard to the written procedure and further to the hearing on 16 May 2019,

after considering the observations submitted on behalf of

– Club de Variedades Vegetales Protegidas, by P. Tent Alonso, abogado, and V. Gigante Pérez, G. Navarro Pérez, and I. Pérez-Cabrero Ferrández, abogadas,

– Martínez Sanchís, by C. Kraus Frutos, abogada, and M.L. Maestre Gómez, procuradora,

– the Greek Government, by G. Kanellopoulos and E. Leftheriotou and A. Vasilopoulou, acting as Agents,

* Language of the case: Spanish.

– the European Commission, by B. Eggers, I. Galindo Martín, G. Koleva and F. Castilla Contreras and F. Castillo de la Torre, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 13 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

2 The request has been made in proceedings between Club de Variedades Vegetales Protegidas ('CVVP'), which represents the interests of the holder of Community plant variety rights in respect of the mandarin tree variety 'Nadorcott', and Mr Adolfo Juan Martínez Sanchís concerning the latter's exploitation of plants of that variety.

Legal context

The UPOV Convention

3 The International Convention for the Protection of New Varieties of Plants of 2 December 1961, as revised on 19 March 1991 ('the UPOV Convention'), was approved on behalf of the European Community by the Council Decision of 30 May 2005 (OJ 2005 L 192, p. 63).

4 Article 14 of that convention states:

'1. [*Acts in respect of the propagating material*] *(a)* Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorisation of the breeder:

(i) production or reproduction (multiplication),

(ii) conditioning for the purpose of propagation,

(iii) offering for sale,

(iv) selling or other marketing,

(v) exporting,

(vi) importing,

(vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorisation subject to conditions and limitations.

2. [*Acts in respect of the harvested material*] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)*(a)* in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorised use of propagating material of the protected variety shall require the authorisation of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

…’

Regulation No 2100/94

5 Pursuant to the 14th, 17th, 18th, 20th and 29th recitals of Regulation No 2100/94:

‘Whereas, since the effect of a Community plant variety right should be uniform throughout the Community, commercial transactions subject to the holder’s agreement must be precisely delimited; whereas the scope of protection should be extended, compared with most national systems, to certain material of the variety to take account of trade via countries outside the Community without protection; whereas, however, the introduction of the principle of exhaustion of rights must ensure that the protection is not excessive;

…

Whereas, the exercise of Community plant variety rights must be subjected to restrictions laid down in provisions adopted in the public interest;

Whereas this includes safeguarding agricultural production; whereas that purpose requires an authorisation for farmers to use the product of the harvest for propagation under certain conditions;

…

Whereas compulsory licensing should also be provided for under certain circumstances in the public interest, which may include the need to supply the market with material offering specified features, or to maintain the incentive for continued breeding of improved varieties;

…

Whereas this Regulation takes into account existing international conventions such as the [UPOV Convention] …’

6 Article 5(3) of Regulation No 2100/94, entitled ‘Object of Community plant variety rights’, provides as follows:

‘A plant grouping consists of entire plants or parts of plants as far as such parts are capable of producing entire plants, both referred to hereinafter as “variety constituents”.’

7 Article 13 of that regulation, entitled ‘Rights of the holder of a Community plant variety right and prohibited acts’, provides:

‘1. A Community plant variety right shall have the effect that the holder or holders of the Community plant variety right, hereinafter referred to as “the holder”, shall be entitled to effect the acts set out in paragraph 2.

2. Without prejudice to the provisions of Articles 15 and 16, the following acts in respect of variety constituents, or harvested material of the protected variety, both referred to hereinafter as “material”, shall require the authorisation of the holder:

(a) production or reproduction (multiplication);

(b) conditioning for the purpose of propagation;

(c) offering for sale;

(d) selling or other marketing;

(e) exporting from the Community;

(f) importing to the Community;

(g) stocking for any of the purposes mentioned in (a) to (f).

The holder may make his authorisation subject to conditions and limitations.

3. The provisions of paragraph 2 shall apply in respect of harvested material only if this was obtained through the unauthorised use of variety constituents of the protected variety, and unless the holder has had reasonable opportunity to exercise his right in relation to the said variety constituents.

…'

8 Article 16 of that regulation, entitled 'Exhaustion of Community plant variety rights', states:

'The Community plant variety right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 13(5), which has been disposed of to others by the holder or with his consent, in any part of the Community, or any material derived from the said material, unless such acts:

(a) involve further propagation of the variety in question, except where such propagation was intended when the material was disposed of; or

(b) involve an export of variety constituents into a third country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.'

9 Under Article 94 of Regulation No 2100/94, entitled 'Infringement':

'1. Whosoever:

(a) effects one of the acts set out in Article 13(2) without being entitled to do so, in respect of a variety for which a Community plant variety right has been granted; or

(b) omits the correct usage of a variety denomination as referred to in Article 17(1) or omits the relevant information as referred to in Article 17(2); or

(c) contrary to Article 18(3) uses the variety denomination of a variety for which a Community plant variety right has been granted or a designation that may be confused with it;

may be sued by the holder to enjoin such infringement or to pay reasonable compensation or both.

2. Whosoever acts intentionally or negligently shall moreover be liable to compensate the holder for any further damage resulting from the act in question. In cases of slight negligence, such claims may be reduced according to the degree of such slight negligence, but not however to the extent that they are less than the advantage derived therefrom by the person who committed the infringement.'

10 Article 95 of that regulation is worded as follows:

'The holder may require reasonable compensation from any person who has, in the time between publication of the application for a Community plant variety right and grant thereof, effected an act that he would be prohibited from performing subsequent thereto.'

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

11 Following an application lodged by Nadorcott Protection SARL, on 22 August 1995, with the Community Plant Variety Office ('CPVO'), the latter granted it a Community plant variety right in respect of the mandarin tree variety 'Nadorcott' on 4 October 2004. An appeal with suspensive effect was brought against that decision but was dismissed on 8 November 2005 by a decision published in the Official Gazette of the CPVO on 15 February 2006.

12 Between 22 August 1995 and 15 February 2006, Mr Martínez Sanchís purchased, from a nursery that was open to the public, plants of the Nadorcott variety, some of which were planted in the spring of 2005 and others in the spring of 2006. After 15 February 2006, he replaced a number of plants of that variety with new plants that he purchased, as stated in the order for reference, from that same nursery.

13 CVVP, which was appointed to bring infringement proceedings concerning the Nadorcott variety, brought a claim against Mr Martínez Sanchís on the ground that he had infringed the rights of the holder of the Community plant variety right relating to that plant variety. CVVP has thus brought, on the one hand, proceedings for 'provisional protection' in respect of the acts undertaken by Mr Martínez Sanchís prior to the granting of that protection, namely on 15 February 2006, and, on the other hand, infringement proceedings in respect of acts undertaken after that date. CVVP seeks cessation of all those acts, including marketing of the fruit obtained from the trees of that variety, and compensation for the damage allegedly suffered as a result of the acts undertaken by Mr Martínez Sanchís both during and after the provisional protection period.

14 The court at first instance dismissed the application on the ground that the CVVP's infringement proceedings were time-barred under Article 96 of Regulation No 2100/94.

15 The Audiencia Provincial (Provincial Court, Spain), before which an appeal against that decision had been brought, held that the action was not time-barred, but dismissed it as unfounded. That court found, first, that Mr Martínez Sanchís had purchased the plants of the Nadorcott variety in good faith from a nursery open to the public and, secondly, that that purchase had taken place on a date prior to that of the grant of the Community plant variety right relating to that plant variety, namely 15 February 2006. In those circumstances, the court found that CVVP's claims were unfounded.

16 CVVP brought an appeal on a point of law against that judgment before the Tribunal Supremo (Supreme Court, Spain).

17 That court seeks to ascertain whether the planting of plant constituents of a protected variety and the harvesting of fruits from those constituents must be regarded as an act in respect of 'variety constituents' requiring, pursuant to Article 13(2)(a) of Regulation No 2100/94, the prior authorisation of the holder of the Community plant variety right relating to that plant variety, failing which it constitutes an act of infringement, or must rather be regarded as an act in respect of 'harvested material', which, in the view of that court, is subject to the requirement of prior authorisation only under the conditions laid down in Article 13(3) of that regulation.

18 If Article 13(3) of Regulation No 2100/94 is applicable to the case before it, the referring court also seeks to ascertain whether the condition relating to 'unauthorised use of variety constituents of the protected variety', within the meaning of that provision, may be regarded as fulfilled where the variety

at issue has only 'provisional protection' under Article 95 of that regulation and plants belonging to that variety were purchased in the period between the publication of the application for protection and the actual grant of that protection.

19 In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) When a farmer has purchased some plants belonging to a plant variety from a nursery (establishment owned by a third party) and planted them before the grant of the variety right has come into effect, in order for the subsequent activity of that farmer of collecting the successive harvests to be covered by the "ius prohibendi" in Article 13(2) of Regulation [No 2100/94], must the requirements under Article 13(3) be satisfied for Article 13(2) to be interpreted as relating to "harvested material"? Or must Article 13(2) be interpreted as meaning that the activity of harvesting is an act of production or reproduction of the variety which results in "harvested material", whose prohibition by the holder of the plant variety does not require the conditions in Article 13(3) to be satisfied?

(2) Is an interpretation to the effect that the cumulative protection scheme covers all of the acts listed in Article 13(2) [of Regulation No 2100/94] that refer to "harvested material" and also the harvest itself, or that it covers only acts subsequent to the collection of that harvested material, whether the storage or marketing of that material, compatible with Article 13(3) of [that regulation]?

(3) In applying the scheme for extending the cumulative protection to "harvested material", provided for in Article 13(3) of Regulation [No 2100/94], in order for the first condition to be satisfied, is it necessary for the purchase of the plants to have taken place after the holder obtained Community protection for the plant variety, or is it sufficient that at that time the plant variety enjoyed provisional protection, as the purchase took place in the period between publication of the application and the grant of the plant variety right coming into effect?'

Consideration of the questions referred

The first and second questions

20 As a preliminary remark, it should be noted that even though CVVP asserted before the national court that Mr Martínez Sanchís had planted, grafted or commercially exploited the plant variety at issue in the main proceedings, that court, in its presentation of the relevant facts, states only that he planted the plants he had purchased in a nursery. It is thus apparent that he himself did not undertake multiplication of the constituents of the protected variety, which is a matter for the referring court to ascertain. In addition, it should be observed that, as is consistently apparent from the written observations submitted to the Court, the fruit harvested from the mandarin trees of the Nadorcott variety, at issue in the main proceedings, is not liable to be used as plant propagating material for that plant variety.

21 In those circumstances, it must be understood that, by its first and second questions, which it is appropriate to examine together, the national court is essentially asking whether Article 13(2)(a) and (3) of Regulation No 2100/94 must be interpreted as meaning that the activity of planting a protected variety and harvesting fruit thereof, which is not liable to be used as propagating material, requires the authorisation of the holder of that plant variety right where the conditions laid down in paragraph 3 of that article are fulfilled.

22 In that regard, it should be recalled that, in accordance with Article 13(2)(a) of Regulation No 2100/94, the authorisation of the holder of the plant variety right is required for 'acts of production or reproduction (multiplication)' relating to the 'variety constituents' or 'harvested material' of a protected variety.

23 Even though that provision refers to both variety constituents and harvested material of the protected variety, which it refers to together as 'material', the protection afforded to those two categories is nevertheless different. Article 13(3) of that regulation specifies that, as regards the acts referred to in Article 13(2) relating to harvested material, such authorisation is required only if that material was obtained through the unauthorised use of variety constituents of the protected variety and where the holder of the plant variety right has not had reasonable opportunity to exercise his or her right in relation to the constituents of the protected variety. Therefore, the authorisation required under Article 13(2)(a) of that regulation from the holder of a Community plant variety right is required, in the case of acts relating to harvested equipment, only where the conditions laid down in paragraph 3 of that article are fulfilled.

24 Accordingly, Regulation No 2100/94 provides for 'primary' protection covering the production or reproduction of variety constituents, in accordance with Article 13(2)(a) of that regulation. Harvested material is subject to 'secondary' protection, which, although also mentioned in that provision, is severely limited by the additional conditions laid down in paragraph 3 of that article (see, to that effect, judgment of 20 October 2011, *Greenstar-Kanzi Europe*, C-140/10, EU:C:2011:677, paragraph 26).

25 Thus, for the purposes of determining whether and under what conditions Article 13(2)(a) of Regulation No 2100/94 applies to the activity of planting a protected plant variety and harvesting fruit thereof, which is not liable to be used as propagating material, it is necessary to examine whether that activity is liable to result in the production or reproduction of variety constituents or harvested material of the protected variety.

26 In that respect, it must be held that, having regard to the usual meaning of the words 'production' and 'reproduction' used in that provision, it applies to acts by which new variety constituents or harvested material are generated.

27 In addition, it should be recalled that Article 5(3) of Regulation No 2100/94 defines the concept of 'variety constituents' as referring to entire plants or parts of plants as far as such parts are capable of producing entire plants.

28 In the present case, the fruit harvested from the trees of the variety at issue in the main proceedings is not, as is apparent from paragraph 20 above, liable to be used as propagating material for plants of that variety.

29 Consequently, the planting of such a protected variety and the harvesting of the fruits from plants of that variety may not be regarded as an 'act of production or reproduction (multiplication)' of variety constituents within the meaning of Article 13(2)(a) of Regulation No 2100/94, but must rather be regarded as the production of harvested material which, pursuant to that provision read in conjunction with Article 13(3) of that regulation, requires the authorisation of the holder of a Community plant variety right only where that harvested material was obtained through the unauthorised use of variety constituents of the protected variety, unless that holder had reasonable opportunity to exercise his or her right in relation to those variety constituents.

30 The importance of propagation capacity for the application of Article 13(2)(a) of that regulation to acts of production or reproduction, except in cases where the conditions of Article 13(3) are fulfilled with regard to harvested material, is borne out by the context in which Article 13 arises.

31 In particular, it is clear from the provisions of Article 16 of Regulation No 2100/94 relating to the exhaustion of the protection afforded by the Community plant variety right, that such protection extends to acts concerning material of the protected variety that has been disposed of to third parties by the right holder or with his or her consent only where those acts involve, inter alia, further propagation of the variety in question that was not authorised by the right holder.

32 As regards the objectives of Regulation No 2100/94, it is apparent, inter alia, from the 5th, 14th and 20th recitals of that regulation that even though the scheme introduced by the European Union is intended to grant protection to breeders who develop new varieties in order to encourage, in the public interest, the breeding and development of new varieties, such protection must not go beyond what is necessary to encourage such activity, otherwise the protection of public interests such as safeguarding agricultural production and the need to supply the market with material offering specified features, or the main aim of maintaining the incentive for continued breeding of improved varieties may be jeopardised. In particular, according to a combined reading of the 17th and 18th recitals of that regulation, agricultural production constitutes a public interest that justifies restricting the exercise of Community plant variety rights. In order to achieve that objective, Article 13(3) of Regulation No 2100/94 provides that the protection conferred by Article 13(2) on the holder of a Community plant variety right apply to 'harvested material' only under certain conditions.

33 Conversely, the interpretation that Article 13(2) of Regulation No 2100/94 also concerns, irrespective of the conditions laid down in Article 13(3), the activity of harvesting fruits from a protected variety, where that fruit is not likely to be used for the purpose of propagating that variety, would be incompatible with that objective since it would render Article 13(3) otiose and thus compromise the cumulative protection scheme established under Article 13(2) and (3) of that regulation.

34 In addition, the public interest in safeguarding agricultural production, referred to in the 17th and 18th recitals of Regulation No 2100/94, would potentially be compromised if the rights of the holder of a Community plant variety right under Article 13(2)(a) of Regulation No 2100/94 extended, regardless of the conditions laid down in Article 13(3), to harvested material of the protected variety that is not liable to be used for propagation purposes.

35 The interpretation that 'primary' protection under Article 13(2)(a) of that regulation is limited, except in cases where the conditions provided for in Article 13(3) are satisfied in relation to the harvested material, to variety constituents in so far as they constitute propagating material is borne out by Article 14(1)(a) of the UPOV Convention, which should be taken into account when interpreting that regulation, in accordance with the 29th recital thereof.

36 Under Article 14(1)(a) of that convention, the breeder's authorisation is required for acts of 'production' or 'reproduction' in respect of the 'propagating material of the protected variety'.

37 In addition, as noted by the Advocate General in points 32 to 35 of his Opinion, it is apparent from the *travaux préparatoires* relating to Article 14(1)(a) of the UPOV Convention that the use of propagating material for the purpose of producing a harvest was explicitly excluded from the scope of that provision which establishes the conditions for the application of primary protection, which corresponds to that of Article 13(2) of Regulation No 2100/94.

38 Therefore, under Article 14(1)(a) of the UPOV Convention, the breeder may not prohibit the use of variety constituents for the sole purpose of producing an agricultural harvest, but merely acts leading to the reproduction and propagation of the protected variety.

39 In the light of all of the foregoing, the answer to the first and second questions is that Article 13(2)(a) and (3) of Regulation No 2100/94 must be interpreted as meaning that the activity of planting a protected variety and harvesting the fruit thereof, which is not liable to be used as propagating material, requires the authorisation of the holder of the Community plant variety right relating to that plant variety where the conditions laid down in Article 13(3) of that regulation are fulfilled.

The third question

40 By its third question, the referring court asks, in essence, whether Article 13(3) of Regulation No 2100/94 must be interpreted as meaning that the fruit of a plant variety, which is not liable to be used as propagating material, is to be regarded as having been obtained through the 'unauthorised use of variety constituents' of that plant variety, within the meaning of that provision, where those variety constituents were propagated and sold to a farmer by a nursery in the period between the publication of the application for Community protection and the actual grant of that protection.

41 In that regard, it should be noted, first, that, following the grant of Community plant variety rights, effecting one of the unauthorised acts referred to in Article 13(2) of Regulation No 2100/94 in respect of the protected plant variety constitutes an 'unauthorised use' within the meaning of Article 13(3) of Regulation No 2100/94. Thus, in accordance with Article 94(1)(a) of that regulation, any person who, in those circumstances, effects one of those acts may be sued by the right holder to enjoin such infringement or to pay reasonable compensation or both.

42 Secondly, as regards the period prior to the grant of such protection, that right holder may, pursuant to Article 95 of Regulation No 2100/94, require reasonable compensation from any person who has, in the time between publication of the application for a Community plant variety right and grant thereof, effected an act that he or she would be prohibited from performing subsequent to that period on account of that protection.

43 In so far as Article 95 of that regulation refers only to the possibility for the holder of the Community plant variety right to claim reasonable compensation, it must be held that it does not confer on him or her further rights, such as, inter alia, the right to authorise or prohibit the use of variety constituents of that plant variety for the period stated in Article 95. That protection mechanism is therefore different from that emanating under the prior authorisation mechanism which applies when the acts referred to in Article 13(2) of Regulation No 2100/94 are effected after Community protection has been granted.

44 It follows that, as regards the period of protection referred to in Article 95 of Regulation No 2100/94, the holder of the Community plant variety right may not prohibit performance of any of the acts referred to in Article 13(2) of that regulation on the ground that he or she did not provide authorisation. Therefore, performance of such acts does not constitute 'unauthorised use' within the meaning of Article 13(3) of that regulation.

45 In the present case, it follows from the foregoing that, in so far as the propagation and sale to Mr Martínez Sanchís of plants of the protected variety at issue in the main proceedings was effected during the period referred to in Article 95 of Regulation No 2100/94, those acts may not be regarded as 'unauthorised use'.

46 Thus, fruit obtained from those plants may not be regarded as having been obtained through unauthorised use within the meaning of Article 13(3) of that regulation, even if harvested after the Community plant variety right was granted. As is apparent from the answer to the first and second questions, planting variety constituents of a plant variety and harvesting the fruit thereof, which is not likely to be used as propagating material, does not constitute an act of production or reproduction of variety constituents, within the meaning of Article 13(2)(a) of Regulation No 2100/94.

47 As regards the plants of the protected plant variety that were propagated and sold to Mr Martínez Sanchís by a nursery after the grant of the Community plant variety right, the Court notes that both the propagation and sale of such plants may constitute such unauthorised use, since, under Article 13(2)(c) and (d) of Regulation No 2100/94, offering for sale and selling or other marketing of the fruit of a protected variety is subject to the prior authorisation of the holder of the Community plant variety right.

48 In those circumstances, the fruit of the plants of the protected plant variety referred to in the previous paragraph that was harvested by Mr Martínez Sanchís may be regarded as having been obtained through the unauthorised use of variety constituents of a protected variety within the meaning of Article 13(3) of Regulation No 2100/94.

49 Nevertheless, for the purposes of applying the latter provision, it is also necessary that the holder did not have reasonable opportunity to exercise his or her right in relation to the plant variety at issue in the main proceedings, as regards the nursery which propagated and sold the variety constituents.

50 Since the order for reference does not contain any specific information in relation to that condition laid down in Article 13(3) of Regulation No 2100/94, it is, in any event, for the referring court to carry out the necessary verifications in that regard.

51 In the light of the foregoing considerations, the answer to the third question is that Article 13(3) of Regulation No 2100/94 must be interpreted as meaning that the fruit of a plant variety, which is not likely to be used as propagating material, may not be regarded as having been obtained through the 'unauthorised use of variety constituents' of that plant variety, within the meaning of that provision, where those variety constituents were propagated and sold to a farmer by a nursery in the period between the publication of the application for a Community plant variety right in relation to that plant variety and the grant thereof. Where, after such protection has been granted, those variety constituents were propagated and sold without the authorisation of the right holder, the latter may assert his or her right under Article 13(2)(a) and (3) of that regulation in respect of that fruit, unless he or she had reasonable opportunity to exercise his or her right in relation to those variety constituents.

Costs

52 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 (Seventh Chamber) hereby rules:

1. **Article 13(2)(a) and (3) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights must be interpreted as meaning that the activity of planting a protected variety and harvesting the fruit thereof, which is not likely to be used as propagating material, requires the authorisation of the holder of the Community plant variety right relating to that plant variety where the conditions laid down in Article 13(3) of that regulation are fulfilled.**

2. **Article 13(3) of Regulation No 2100/94 must be interpreted as meaning that the fruit of a plant variety, which is not likely to be used as propagating material, may not be regarded as having been obtained through the 'unauthorised use of variety constituents' of that plant variety, within the meaning of that provision, where those variety constituents were propagated and sold to a farmer by a nursery in the period between the publication of the application for a Community plant variety right in relation to that plant variety and the grant**

thereof. Where, after such protection has been granted, those variety constituents were propagated and sold without the authorisation of the right holder, the latter may assert his or her right under Article 13(2)(a) and (3) of that regulation in respect of that fruit, unless he or she had reasonable opportunity to exercise his or her right in relation to those variety constituents.

[Signatures]