



Farmer's privilege new

Regarding the farmer's privilege, the Court of Justice of the European Union published an interesting judgment on March 16, 2023 (Case C-522/21), in which was analysed the compatibility of a provision of Regulation No. 1768/95 of July 24, 1995, adopting detailed rules for the application of the agricultural exemption (Regulation 1768/95) with another article of Regulation (EC) No. 2100/94 of July 27, 1994, on Community plant variety rights (PVR). This judgment arises from the infringement of the requirements for the exercise of the farmer's privilege. Specifically, it all started with a request for information from a group of holders of protected plant varieties (STV), in accordance with the plant variety holder's right under the farmer's privilege, to a farmer (MS or farmer) who cultivated a protected plant variety of winter barley (the variety was KWS Meridian) for four seasons. After submitting the requested information, STV filed an ordinary claim against the farmer to get the payment of the royalty due to the licensed use of the seeds.

STV also claimed the payment of an additional compensation for the damages suffered (four times the royalty), in accordance with the provisions of Article 94.2 PVR in relation to Article 18.2 of Regulation 1768/95. Faced with this situation, the farmer refused to pay this amount, considering that the imposition of an additional and flat-rate compensation for damages was not in accordance with the case law of the Court of Justice of the European Union. All this resulted in STV's claim being upheld at first instance, which was subsequently appealed by MS before the Higher Regional Court of Zweibrücken (Germany), which, given the complexity of the case, decided to ask to the Court of Justice of the European Union the compatibility of the compensation under Article 18.2 of Regulation 1768/95 with the compensation under Article 94.2 ROV.

In this situation, the Court of Justice considered that insofar as article 18.2 of Regulation 1768/95 fixes the amount of the compensation due taking as a reference the license fee, it is establishing a condition *iuris et de iure* as regards the minimum extent of the damage suffered by the licensee and limits the discretion of the judge hearing the case to set a certain amount of compensation. This means that, according to the aforementioned provision, the compensation must be at least “*a lump sum calculated on the basis of four times the amount charged, on average, for the licensed production of a corresponding quantity of propagating material of protected varieties of the plant species in question in the same area*” (art. 18.2 Regulation 1768/95), which would prevent the judge hearing the case from determining a lower compensation than that indicated in the article and which is in accordance with the specific circumstances of the case in question. However, this provision is contrary to article 94.2 of Regulation 2100/94; and not only that, but also that the Commission exceeded the limits of its implementing powers when drafting article 18.2 of Regulation 1768/95. For all these reasons, the Court of Justice concluded by declaring article 18.2 of Regulation 1768/95 to be null.

