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OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 3 FEBRUARY 1982 [1]

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Mr President,
Members of the Court,

I — By an application dated 27 November 1978 the firm L. C. Nungesser KG and Mr Kurt Eisele requested the Court to declare void a part of Commission Decision No 78/823 of 21 September 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.824 — breeders' rights — maize seed).

This particularly complex case involves a number of considerations and the application of various principles in the very specialized field of plant breeders' rights. The preliminary explanations which it requires are doubtless a little long, but it seems to me that they are indispensable for an understanding of all the aspects of the case and for the solution which I shall be proposing to the Court.

Before I turn to the case itself it is necessary to define a certain number of terms used in national or Community legislation dealing with seeds, in particular from the point of view of industrial and commercial property rights, consumer protection, the safeguarding of supplies and the organization of trade.

(a) I must first mention hybridization, not in order to pass any value judgment on that process, but in order to draw attention to a certain number of points which are important from a legal point of view. Hybridization is the cross-breeding between two different varieties or species known as "lines". In the language of the specialists, "lines" constitute the prime basic genetic

material; it is a question of seeds of total purity, obtained after 15 years of cross-breeding. They are also known as "pre-basic seed". Amongst the varieties of the species *Zea mays L.* it is necessary to distinguish between open-pollinated varieties and *hybrid* varieties. In the second generation there are *simple* hybrids, brought about by the cross-breeding of two lines, and in the third generation double hybrids brought about by the cross-breeding of two simple hybrids. It has even been possible to develop three-cross hybrids, which is achieved by the cross-breeding of a simple hybrid with an inbred line, and "top cross" hybrids, which are developed by the cross-breeding of an inbred line or a simple hybrid with an open-pollinated variety.

The process of hybridization has been known for a long time. The resulting product is in general superior to the parent varieties as regards characteristics such as vigour, size and yield.

The process has, however, certain drawbacks. First, the hybrid variety is more demanding than its parent variety as regards watering, feeding and health treatment. Secondly, if the farmer uses a part of his harvest of hybrids as seed-corn the following year, he will discover that, by the operation of Mendel's laws, the following generation becomes heterogeneous with the result that the average yield diminishes by at least 20% in the first year and even further thereafter.

Thus hybridization establishes a distinction between maize seed used as seed-corn and maize seed intended for consumption. The result is twofold. Every year the farmer must buy his seeds from breeders, whereas previously he was able to keep aside a part of his harvest as seed-corn. In the case of maize, the farmer now practically never uses such seed-corn because he makes his sowings with a view to obtaining a new plant from each seed.

More importantly, if the creator of the hybrid (the breeder) succeeds in keeping confidential the pure parental lines (the so-called confidential formula), he needs no law to protect his commercial varieties since it is impossible to reproduce seed from a commercial hybrid. The genealogical components are thus known only to the breeder and to the inspectorate.

Confidentiality of the method of obtaining the new variety is expressly provided for by Article 6 (3) of Council Directive No 66/402/EEC of 14 June 1966 on the marketing of cereal seed:

"The Member States shall ensure that the results of the examination and the description of the genealogical components are, if the breeder so requests, treated as confidential."

Similarly, Article 7 (3) of Council Directive No 70/458/EEC of 29 September 1970 on the marketing of vegetable seed provides:

"Where examination of the genealogical components is necessary in order to study hybrids and synthetic varieties, the Member States shall ensure that the results of the examination and the description of the genealogical components are, if the breeder so requests, treated as confidential."

That is what is known as working with a "confidential formula".

(b) The term "plant breeding" refers to the process of creating new varieties. A

new variety is officially recognized, registered and called a new variety if, in addition to being new, it satisfies three criteria laid down by law: namely that the variety must be distinct, uniform and stable in its essential characteristics. Regard is also had to its value for cultivation and use.

Where the variety is bred by means of a confidential formula the protection conferred by the legal status of breeder is in addition to the protection already resulting from the confidential nature of the breeding process, but it remains necessary to have the variety entered on the national list of varieties in order to be able to market it. The "confidential" variety is then produced and sold only by the breeder or by his representatives.

Protection is granted for a limited period; 20 years in the case of annual species. Infringement of a breeder's rights constitutes a criminal offence. In France certificates recognizing new varieties are issued by the Comité de Protection des Obtentions Végétales [Committee for the Protection of New Plant Varieties] after tests carried out by a department of the Institut National de la Recherche Agronomique [National Institute for Agricultural Research, hereinafter referred to as "INRA"] on behalf of the Comité Technique Permanent de Sélection [Permanent Technical Committee on Selection], the body responsible for entering new varieties in the official French catalogue.

(c) The term "basic seed" or "parent seed" or "progenitore" signify seeds which have been developed under the direct responsibility of a breeder according to the rules of maintenance breeding applicable to that variety. They are also described as "seed intended for production" (Article 2 D of Directive No 66/402). That seed is used by firms engaged in propagation which, by combining those progenitors and propagating them, obtain certified seed intended for marketing and used for the production, not of cereal seed, but of grain intended for consumption. Nearly eight years are required between the creation of a new variety and its distribution.

(d) The variety developed by the breeder (basic seed) is thus propagated either by the breeder himself if he engages in that trade or by a "propagator", that is to say by a person who cultivates the seed developed and supplied by the breeder and thus produces, by means of propagation, new seed which becomes certified seed. Where the breeder and propagator are different persons contracts are generally entered into between them in order to fix the volume of production of a particular variety and the amounts payable by the propagator to the breeder.

Breeders and propagators do not only have rights; they also have obligations. The certification of propagated seed is subject to very strict control (Article 6 (4) of Directive No 66/402). Certification is regulated according to species and in France is carried out by the Service Officiel de Contrôle [Official Inspectorate] of the Groupement National Interprofessionnel des Semences et Plants [National Committee

for Seeds and Propagatory Material]. A detailed protocol governs cultivation techniques and seeds must satisfy standards laid down as regards purity, germinating capacity and humidity.

As we have seen, hybridization guarantees that the breeder, working confidentially, will be rewarded for his efforts. It ensures that any new plant varieties developed by him will in any case be protected (except in the event of a compulsory licence or an expropriation) even in the absence of legislation on breeders' rights. Under those circumstances it is easy to see that the process has caused an upheaval in the production of seed and that it has been responsible for private investments in this field, which would not otherwise have taken place.

(e) On the other hand, in the case of varieties obtained "openly", the genealogical components are generally known and available to all interested parties. In such a case, in accordance with the Saatgutverkehrsgesetz [Law on the marketing of seeds] of 20 May 1968, the seed is recognized in the Federal Republic of Germany as certified seed and entered on the list of varieties, but the producer (the breeder) may not claim any absolute protection under civil law by virtue of the legislation on plant varieties (the Sortenschutzgesetz [Law on the protection of plant species] of 20 May 1968). That situation normally arises when a variety has been developed by public research bodies (universities or similar) which make the results of their efforts available to the public or the State in return for a financial consideration which is normally less than would be required by a private breeder (ordinary authorization, licence, Jedermannserlaubnis, under Article 21 of the Sortenschutzgesetz).

Until the end of the 1950s maize was cultivated in France with the use of local varieties descended from maize lines brought over from the New World.

After the introduction in France of the first hybrid maize seeds by researchers at INRA, the years 1957 and 1958 were marked by the creation of early-type hybrid maize by the same researchers. The variety INRA 200 was registered in the official French catalogue in 1957 and the variety INRA 258 in 1958. INRA thus prepared the ground for the extension of maize cultivation towards northern zones, which is without doubt one of the objectives of the Treaty of Rome (Articles 39 (1) (a) and Article 85 (3)). Twenty years later hybrid maize was to cover nearly three million hectares, with a yield of 50 quintals per hectare; despite that progress the Community deficit in maize still amounts to nearly 12 million tonnes a year.

Until the early 1970s, INRA worked with "open" formulae. The formulae of the hybrids which it had developed were known and everybody could take advantage of them. Its varieties INRA 200 and INRA 258 were amongst the least expensive, which was in keeping with its role of performing basic research and was fitting for an "autonomous national public body". INRA was created by a Law of 18 May 1946 and is financed by the French State. It made great efforts to obtain the participation of private associations and French cooperatives in the breeding and

production of its hybrid varieties. INRA itself is neither a producer (propagator) nor a seller of seed, although it is a breeder and is responsible for maintenance breeding. It produces only "pre-basic seed".

Whilst INRA thus produced the essential seed, private undertakings lost no time in benefiting from its researches. They quickly realized the potential of this sector and, being either cooperatives or private undertakings which were not hampered in their quest for profit by any commitment to provide a public service, they produced from the INRA material their own "private" varieties. Even today INRA lines are to be found in 90% of commercial hybrid maize seed. Those undertakings have thus gradually followed the lead given by INRA. Whilst INRA varieties accounted for almost all sales of maize seed in France in the early 1960s, they have continually lost ground since then and only accounted for about 10% of that market in 1981.

In France the production and sale of French and foreign varieties of seed intended for commercial cultivation are handled by persons or associations approved by the French Ministry of Agriculture and holders of credentials issued by the National Committee for Seeds and Propagating Material. Since the INRA is merely an administrative body, it became necessary in 1960 to establish a company with the task of dealing with problems of propagation, conservation and marketing of basic and certified seed of INRA hybrid varieties. Those duties were entrusted to Société des Semences de Base de Maïs [hereinafter referred to as "SSBM"], a commercial body controlling private undertakings (grouped together within the Syndicat National des Etablissements de Semences Agréés pour le Maïs [hereinafter referred to as "SNESAM"] and cooperatives (grouped within Synco-Maïs). SSBM and SNESAM had their registered offices at the same address.

As from the 1970s, the way in which varieties developed by INRA were marketed came under criticism and the marketing of INRA products was entrusted to the Société Anonyme Française des Semences de Maïs (hereinafter referred to "as Frasema"), which on 18 June 1973 took the place of SSBM. All undertakings producing INRA maize are thus shareholders in Frasema and that undertaking is open to every approved breeder of seed who applies to join. Both in France and abroad, it enjoys exclusive production and marketing rights over progenitor seed cultivated from stock bred by INRA. The Board of Directors of Frasema is made up of the principal private breeders of maize seed, who are thus the first to benefit from the achievements of that public establishment and at the same time its main competitors.

Just as INRA encouraged interested French undertakings to engage in the propagation of those varieties which it had developed, so, at the request of French merchants wishing to export propagated seed of those varieties to Germany, INRA made efforts to secure the registration of those varieties on the German list of varieties, which under the German legislation on new plant varieties, is an essential precondition for marketing seed in that country.

To represent it at the Bundessortenamt [Federal Office for Plant Varieties], it appointed Kurt Eisele, of Darmstadt.

Kurt Eisele is the sole active partner in the limited partnership L. C. Nungesser KG [hereinafter referred to as "Nungesser"], Darmstadt. Founded in 1775, that firm employed 192 people in 1977 and in that year achieved a turnover of DM 80 million. The only limited partner was Christoph Eisele Junior.

Nungesser also has a wholly-owned subsidiary in Strasbourg which markets, in eastern France, seed imported by the parent company from Denmark, the Netherlands and certain non-member countries. Its main activity is concerned with the marketing of grass seed, bird seed and clover seed. A small part of its turnover (less than 5%) is accounted for by sales to agricultural merchants in eastern France and maize seed which it purchases from cooperatives in that region. It has never sold maize seed originating in the Federal Republic of Germany.

Pursuant to a contract drawn up in French and signed in Paris on 14 December 1960 and in Darmstadt on 16 December 1960, Kurt Eisele undertook to carry out all steps needed to secure the registration with the German authorities of INRA varieties 200, 244, 258 and 321. For his part, he undertook to keep INRA informed of all matters relating to the marketing of maize varieties in Germany.

By four identical declarations drawn up in German and signed in Darmstadt on 19 January 1961 and in Paris on 8 February 1961, INRA assigned its breeders' rights over those four varieties of hybrid maize (named "Darmstadt") to Mr Eisele and he acquired breeders' rights over those varieties and ancillary rights with effect from 14 December 1960.

The use of the name "Darmstadt", the city where Nungesser has its registered office, is due to the fact that for the duration of the proceedings before the Bundessortenamt it is possible to use a provisional name which need not comply with the requirements relating to the denomination of varieties.

As to the definitive names (Inrafrüh, Inrasil, Inrakorn, Inraweiß), they appear to be based on Article 13 (8) of the International Convention for the Protection of New Varieties of Plants, signed in Paris on 2 December 1961, according to which:

"When the variety is offered for sale or marketed, it shall be permitted to associate a trade mark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable."

The use of names which are different from the French ones is also justified on the ground that the use of the French names without modification could have given rise to confusion. The numbers 200, 244, 258 and 321 are used in France to indicate maturity, but the index of maturity is different in Germany. Finally, I understand that under German law a variety could not be admitted in Germany with a name and number, but that it was necessary for the denomination to be a complete name.

On the back of each of the aforesaid declarations there was another declaration drawn up in German and signed in

Darmstadt on 19 January 1961 by Kurt Eisele as "successor in title" and in Paris on 8 February 1961 by the INRA representative as "former holder of the right", whereby the parties to the contract declared that INRA had assigned to Mr Eisele the breeding material and the seed needed for breeding or propagation (basic progenitors), as well as all breeding records and other papers concerning those four varieties, in conformity with Article 9 (3) of the Saatgutgesetz [Law on seeds] of 27 June 1953; it was further declared that Mr Eisele as successor in title had taken possession of them and that to the extent to which that declaration derogated from the terms of the agreement signed on 14 and 16 December 1960 it should be deemed to be a valid amendment thereof.

The Saatgutgesetz, which it is important to examine, gathered together in a single text the provisions governing the protection of varieties under private law (Part 1) and the rules of public or administrative law relating to the approval of varieties and to trade in cereals (Part 2). It will be seen that thenceforth the German legislature has drawn a distinction between those two kinds of provisions.

Irrespective of the requirements governing the grant of protection, the Law provides that following the grant of such protection the seed may be certified and marketed and that only the registered owner of the breeder's rights is authorized to produce seed of that variety for the purposes of commercial sale and that only he has the right to sell such seed.

Under the heading "Übertragung einer Sorte" [assignment of a variety], Article 9 of that Law provides:

"1. Any agreement assigning the breeder's rights in a variety and the concomitant protection, or the obligations thereby assumed, must be in writing.

2. The assignee shall enjoy the rights and assume the obligations imposed by this Law.

3. In the event of doubt, the previous holder of breeders' rights must hand over to his successor in title the breeding material and the seed needed for breeding or propagation, as well as breeding records and other papers concerning the variety, and ensure that the necessary amendment is made to the Sortenschutzrolle [Register of Protected Varieties]."

Under the heading "foreign varieties" Article 14 provides:

"1. In accordance with the provisions of this Law, foreign varieties may upon application be accorded legal protection on the basis of reciprocity. The Federal Minister shall, by a notice inserted in the Bundesgesetzblatt state whether reciprocity is ensured.

2. Legal protection may be accorded to a foreign variety without reciprocity where the grant of such protection is considered to be of agricultural or economic interest.

3. Any person who is not domiciled, and has no place of business, within the territory covered by this Law may not register a variety or take part in any proceedings governed by Part I of this Law or avail himself of the protection accorded to a variety, unless he has appointed an agent

within the country. The latter shall be authorized to represent that person in proceedings before the Bundessortenamt and, without prejudice to the provisions of Article 78 of the Code of Civil Procedure, in civil disputes relating to the protection of new plant varieties ..."

Article 23 of the Law makes the Bundessortenamt responsible for maintaining the Register of Protected Varieties and lays down detailed provisions governing its maintenance.

In the present case, the purpose of the transactions which took place is therefore evident, namely to enable the four INRA varieties to be produced and marketed in Germany and also to enable Kurt Eisele to comply with the requirements laid down in that respect by the Saatgutgesetz of 27 June 1953. Such transactions were in strict compliance with the law as it then stood, before the common market in agriculture, before Regulation No 17, before the Common Catalogue of Varieties of Agricultural Plant Species, and before Community case-law on the exhaustion of industrial and commercial property rights. The appointment of Kurt Eisele as INRA's agent was the only means by which the varieties developed by the INRA might be marketed in Germany, whether they were propagated in France by French cooperatives or private undertakings or in Germany by Mr Eisele.

Internationally, the protection of new varieties of plants is governed by the Paris Convention of 1961, subsequently amended in Geneva on 10 November 1972 and 23 October 1978.

As I understand it, all the Member States, with the exception of Luxembourg and Greece, are parties to the Convention. They have founded the Union for the Protection of New Varieties of Plants, known by the French initials as UPOV.

According to Article 5 (1) of the Convention, the effect of the right conferred on the breeder of a new plant variety, as defined by the Convention, is that his prior authorization shall be required for the production, for the purposes of commercial marketing, of the reproductive or vegetative propagating material, as such, of the new variety, and for the offering for sale or commercialization of such material.

Under the heading "limits to the exercise of protected rights" Article 9 provides that:

"The free exercise of the exclusive right accorded to the breeder or his successor in title may not be restricted ortherwise than for reasons of public interest.

When any such restriction is made in order to ensure the widespread distribution of new varieties, the Member State of the Union concerned shall take all measures necessary to ensure that the breeder or his successor in title receives equitable remuneration."

Article 11 (3) provides that:

"The protection applied for in different Member States of the Union by physical persons or bodies corporate entitled to benefit under this Convention shall be independent of the protection obtained for the same new variety in other States whether or not such States are members of the Union."

In conformity with the Convention, Italy enacted Law No 1096, on 25 November 1971, Belgium enacted the Law of

10 May 1975 on the protection of new plant varieties and the United Kingdom enacted the Plant Varieties and Seeds Acts 1964.

In France, the first paragraph of Article 3 of Law No 70-489 of 11 June 1970 on the protection of new plant varieties provides:

"In respect of any new plant variety a document entitled 'certificate of a new plant variety' may be applied for conferring on its holder the *exclusive* right to produce, *within the territory* where this Law is applicable, to sell or to offer for sale, all or part of the plant, or any material needed for the reproduction or vegetative propagation of the variety under consideration and of the varieties which stem from it by way of hybridization where reproduction requires the repeated use of the original variety."

The Convention was ratified by the Federal Republic of Germany in 1968, and it was the need to adapt the German legislation in accordance with the principles of the Convention that led to the enactment of the Sortenschutzgesetz of 20 May 1968 (subsequently amended on 4 January 1977) dealing merely with the protection of varieties under private law, and the Saatgutverkehrsgesetz (subsequently amended on 23 June 1975) governing the approval and marketing of seed under public law.

Thus, both in France and in Germany, as in other Member States which have enacted legislation governing new plant varieties, a variety may only be marketed if it is registered in the offficial national list of varieties. The sale of seed or propagating material is prohibited if the identity of the variety, which must appear on the label, does not correspond to the name given by the registered breeder. That person lodges a "production certificate" in respect of his variety and controls its production since each receptacle must bear a label giving the name of the variety and since, to produce that variety, all other propagators must apply for a licence. Even in the absence of any contractual provisions the law is adequate to give the breeder or his successor in title a monopoly in marketing seed of that variety.

The tests and formalities needed in order to obtain the registration of a variety in Germany require approximately five years. Calculating that the varieties assigned to Kurt Eisele would be registered by the end of 1965, INRA approached SSBM in October 1964, requesting it to supply for 1965 the lines and the simple and double hybrids needed to comply with the registration formalities and to demonstrate that it was possible to produce seed from INRA hybrids in Germany so that the German supervisory agency might satisfy itself that they were reproducible without undergoing any changes.

It was stated in that correspondence that INRA had agreed with Kurt Eisele that he would be permitted to produce a maximum of one third of all the seed which he sold in Germany, on condition that a minimum of two thirds were imported from France. INRA therefore requested SSBM to supply Mr Eisele with the simple hybrids needed for the production of seed of the four varieties on an area of 51 hectares.

At the time when the registration of the new plant varieties applied for by Mr Eisele was to become effective, an agreement was signed in Paris on 5 October 1965 between INRA and Mr Eisele restating and clarifying those various obligations and confirming Mr Eisele as INRA's approved dealer. I shall quote that agreement verbatim, since in the last analysis it is upon those provisions that the issue turns:

"Clause 1

INRA confers on Mr Eisele the exclusive right to organize sales in the Federal Republic of Germany of its maize varieties INRA 200, INRA 244, INRA 258, INRA 270, INRA 300 and INRA 321, which are at present being registered with the German authorities and of which INRA is the registered breeder.

It is agreed that the exclusive rights granted to Mr Eisele are limited to the organization of sales and do not imply exclusive selling rights.

Mr Eisele undertakes to refrain from organizing the sale of maize varieties other than INRA varieties.

Clause 2

Mr Eisele undertakes to supply seeds of each variety referred to in this contract to every German undertaking or cooperative which places an order and offers the necessary assurances, technical and other.

He undertakes not to restrict unilaterally the sale of the seed in question.

Should it not be possible to honour all orders placed as a result of a lack of seed or for any other reason, Mr Eisele will submit to INRA for approval his scheme of rationing between those persons having placed orders.

The prices of the varieties in question charged to the undertakings selected in the manner described above will be fixed by agreement between INRA and Mr Eisele, and Mr Eisele undertakes to adhere to those prices. Those prices must reflect the selling prices of French exporters, on the one hand, and the normal market situation in the Federal Republic of Germany, on the other hand. It is agreed that, in fixing those prices, the costs incurred by Mr Eisele in distributing the various varieties will be taken into account and Mr Eisele is authorized to use all means at his disposal to effect such distribution, provided that he observes all relevant rules and usages.

Clause 3

Mr Eisele undertakes to import at least two thirds of the German market's seed requirements from France through the intermediary of the French organization responsible for centralizing and coordinating maize exports.

Mr Eisele is authorized to produce or cause to be produced under his own responsibility the balance, that is to say no more than one third, of the seed necessary to satisfy the German market.

Mr Eisele undertakes, in respect of the seed produced directly under his control and marketed in Germany, to pay royalties to INRA at the same rate and on the same terms as those required in France by the Caisse de Gestion des Licences Végétales. The payment of such

royalties shall be effected by Mr Eisele at the end of each calendar year.

Clause 4

Mr Eisele undertakes to enforce INRA's proprietary rights in its varieties, in particular against passing-of, and its rights in the trade mark 'INRA', which is registered by INRA in France and in Geneva and which Mr Eisele is authorized to use.

Mr Eisele shall have all powers to take such action as may be necessary in order to ensure that INRA's rights are observed.

Clause 5

INRA undertakes to ensure that the relevant organization takes all necessary steps to prevent INRA maize varieties mentioned in Clause 1 from being exported to the Federal Republic of Germany other than by way of Mr Eisele.

Clause 6

In respect of all matters for which no provision is made in this contract Mr Eisele will obtain the prior agreement of INRA.

Clause 7

This contract is entered into for a period of five years with effect from 1 September 1965. The contract shall automatically be extended on the same terms for the same period unless terminated by notice to that effect served by either party on the other by registered letter one year before the expiry of each such period.

Clause 8

Any dispute arising under this contract shall be submitted to the exclusive jurisdiction of the Tribunal de Commerce de la Seine."

The Caisse de Gestion des Licences Végétales [hereinafter referred to as "the Caisse de Gestion"], which was mentioned in Clause 3 of the agreement, had its registered office at the same address as SSBM and SNESAM referred to above. It is an incorporated company of which one of the shareholders is INRA. It is responsible for exploiting new plant varieties unless breeders prefer to exercise their rights themselves. It licenses on an annual basis the propagation, subject to its control, of the varieties for which it is responsible. The sale by undertakings holding licences for the production of those varieties is made subject to the payment of a royalty to the Caisse de Gestion, which passes it on to the breeder, having made a deduction in respect of its administrative costs. It exploits, in particular, all INRA maize varieties and varieties derived from INRA lines and it charges for its own account the royalties under the licences granted to French producers, whilst INRA itself charges royalties under the licence granted to Kurt Eisele.

Although not expressly named, the organization referred to in Clause 3, responsible for centralizing and coordinating exports of Fench maize to all foreign countries in which INRA had, or would have, contractual relations was SSBM. That undertaking was responsible for dividing between the private sector (establishments grouped within SNESAM) and the cooperative sector (cooperatives within the grouping SYNCO-MAIS) what might usefully be called the "Eisele" quota, ensuring that

orders for seed from Mr Eisele were carried out and centralizing the exports intended for him; it also attended to the invoicing.

In reality, that contract constitutes a transposition to the German market of the production and sales organization for INRA commercial hybrids existing in France, with the important difference that the organization of production and sales in Germany is entrusted solely to Kurt Eisele, but that he, as sole buyer, has a great number of suppliers to choose from. Moreover, as regards basic INRA seed, the agreement does not by itself grant exclusive buying rights to Mr Eisele. Although certified seed is sold exclusively by Frasema, basic seed may be obtained by any buyer in Europe, including Germany. Thus in 1976 Frasema sold large quantities of INRA basic seed to the German firms Kleinwanzlebener Saatzucht and Nordsaat.

The first order from Kurt Eisele was placed on 24 August 1966 and honoured in February 1967. There followed a certain number of prosperous years for producers and sellers of INRA varieties. Whereas as recently as 1970 there was only one French "confidential" variety on the German market, German maize growers wishing to use French seed, as the majority did, could use INRA varieties such as INRA 200 as from 1967.

On 1 November 1965, pursuant to Articles 4 and 5 of Regulation No 17 of the Council of 6 February 1962 (as amended by Regulation No 118/63), which was the first regulation implementing Articles 85 and 86 of the Treaty, Mr Eisele notified to the Commission's Directorate-General for Competition the agreement which he had entered into with INRA on 5 October 1965 and which was due to expire on 1 September 1970.

Under the heading relating to the content of the agreement he stated "assignment of rights protecting new plant varieties for INRA maize hybrids, pursuant to annexed agreement".

He stated that the agreement concerned supplies between France and Germany.

He expressed the view that Article 85 (1) of the Treaty was not applicable on the following grounds:

"The notification is made merely as a precautionary step in order to avoid any adverse effects due to a failure to notify it. Article 85 is not applicable by reason of:

Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to the production of and trade in agricultural products,

Regulation No 17 itself, and

Regulation No 27 of the Commission of 3 May 1962 (First regulation implementing Council Regulation No 17 of 6 February 1962 — form, content and other details concerning applications and notifications)."

By way of explanation as to how the agreement contributed to improving production or distribution and to favouring technical or economic progress, he mentioned the

"registration of new varieties with the Bundessortenamt for the benefit of German agriculture".

More than 10 years elapsed before the Commission's Directorate-General for Competition responded officially to that notification.

In the meantime, important Community legislation had been enacted concerning the marketing of seed, the Common Catalogue of Varieties of Agricultural Plant Species and the common organization of the seed market.

The marketing of cereal seed in the common market is governed by Council Directive 66/402 of 14 June 1966, which deals with technical data. A codified version of that directive appears in Official Journal C 66 of 8 June 1974, p. 24.

Based on Articles 43 and 100 of the Treaty, that directive seeks to ensure greater productivity in the cultivation of cereals by applying unified rules which are as strict as possible as regards the choice of varieties permitted to be marketed. To that end, it limits the varieties which may be marketed.

On the other hand, it also seeks to guarantee to the farmer an adequate supply of seeds of those varieties. For that purpose, the directive establishes, both for trade between Member States and for trade on national markets, a unified system of Community certification laying down minimum standards (on analytical purity, germinating capacity and health) and based on experience acquired from applying existing international systems such as that operated by the Food and Agriculture Organization of the United Nations.

In order to ensure the identity of the relevant seed, namely basic seed or certified seed, the directive lays down a number of rules concerning packaging, sealing, labelling and the drawing of samples. As regards labelling, the rules have been amended and supplemented on several occasions. The requirements concerning the "date of sealing of the packages" were laid down most recently in Council Directive 78/692 of 25 July 1978.

The marketing of seed satisfying those conditions may be made subject only to the restrictions laid down by Community rules, *without prejudice to the application of Article 36 of the Treaty.*

As a first stage, until the establishment of a *common catalogue* of varieties, those restrictions included, in particular, the right for Member States to restrict the marketing of seeds to those varieties which are of value for cultivation and use on their territory.

Member States had until 1 July 1968 at the latest to adopt the necessary provisions to make their legislation comply with the provisions of Article 14 (1) of Directive 66/402 and until 1 July 1969 at the latest to make their legislation comply with the other provisions of the directive and its annexes.

Thus the 1966 directive guarantees the free movement between States of officially certified seed registered on a national list in one of them and ensures that cereal seed produced in one Member State directly from basic seed certified in another Member State is of uniform quality. It does not affect national provisions justified on grounds of the protection of industrial and commercial property (Article 22).

Apart from certain subsequent amendments, that system remained in force until the adoption on 29 September 1970 of Council Directive 70/457, which laid the foundations for a common catalogue of varieties of agricultural plant species and consolidated the provisions which until then had been dispersed in the Council directives of 14 June 1966 and 10 June 1969 on the marketing of beet seed, fodder-plant, cereal seed, seed potatoes and seed for oil and fibre plants. A codified version of that directive appears in Official Journal 1974, C 66, p. 56.

It states that a common catalogue of varieties can for the moment only be compiled on the basis of *national* catalogues and provides that each Member State shall establish one or more catalogues of the varieties officially accepted for certification and marketing in its territory. Moreover, considering that all seed and propagating material of varieties accepted since 1 July 1967 in one or more Member States in accordance with the principles laid down in the directive should after a certain period be subject within the Community to no restrictions *relating to variety*, the directive provides that those varieties must be included in the Common Catalogue of Varieties and instructs the Commission to ensure that the catalogue is published in the Official Journal of the European Communities.

Article 9 provides that:

"1. Each Member State shall arrange for official publication of the catalogue of varieties accepted in its territory and of the name of the person or persons responsible for maintenance of the variety in its country. When several persons are responsible for the maintenance of a variety, the names need not be published. If the names are not published, the catalogue shall indicate the authority holding the list of names of persons responsible for maintenance of the variety.

2. The Member States shall, as far as possible, ensure at the time of acceptance that the variety is known by the same name in all Member States.

If it is known that seed or propagating material of a given variety are marketed in another country under a different name, that name shall also be indicated in the catalogue."

Article 9 (3), as amended by the Council Directive of 24 July 1979 is worded as follows:

"In taking into account the information available, Member States shall also ensure that a variety which is not clearly distinguishable:

From a variety previously accepted in the Member State in question or in another Member State, or

From another variety which has been assessed with regard to distinctness, stability and uniformity in accordance with rules corresponding to those of this directive, without, however, being a variety known in the Community within the meaning of Article 5 (1),

bears the name of that variety. This provision shall not apply if this name is likely to mislead or cause confusion concerning the variety in question, or if, pursuant to all the provisions of the Member State concerned governing the names of varieties, other facts prevent its utilization, or if the rights of third parties impede the free use of that name in connection with the variety in question."

These provisions seem to me to be important: in effect the Council was acknowledging in 1979 that a third party, having acquired rights "pursuant to all the provisions of the Member State concerned governing the names of varieties" might impede the free use of a name of a variety.

Admission to the catalogue is valid until the end of the tenth calendar year following acceptance. Acceptances granted to varieties in a Member State before 1 July 1972 are to be valid until 30 June 1982 at the latest (Article 12 (1), as amended by Directive 72/418). Acceptance of a variety may be renewed at given intervals (Article 12 (2)).

Article 14 (2) of Directive 66/402 had provided that the Common Catalogue of Varieties should be introduced by 1 January 1970 at the latest. But Article 25 of Directive 70/457 stated that Member States must bring into force, by 1 July 1972 at the latest, the provisions needed to compile a national catalogue according to the principles laid down by that directive. Therefore the introduction of the Common Catalogue, which is merely composed of the various national catalogues, could not take place earlier than 1 July 1972. In fact it was necessary to wait until 21 July 1975 until the first complete edition of the Common Catalogue appeared (Official Journal 1975, C 164). That edition has been supplemented on several occasions to take account of information supplied by Member States. The Common Catalogue enumerates the varieties which, with effect from 31 December 1974, are no longer subject, within the Community as originally constituted, to any marketing restrictions as regards variety (Article 18 of Directive 70/457). As from 31 December 1975 (second edition of the catalogue of 20 March 1976) the catalogue has the same effect in the new Member States as in the original Member States.

However, it is important to distinguish between the concepts of "free movement", "free certification" and "free production". In fact, seed which originates in the Member State where it has been accepted may be marketed in all the other Member States, but may not be *produced* in another Member State unless a decision to that effect has been taken in that Member State.

The common organization of the market in seeds was established by Regulation (EEC) No 2358/71 of the Council of 26 October 1971 (Official Journal, English Special Edition, 1971 (III), p. 894). That regulation which has been applicable since 1 July 1972, lays down common rules on trade with non-member countries and determines the conditions for the grant of Community aid to production in the seed sector (countervailing charges, safeguard clause, system of import licences as amended by Commission Regulations Nos 1117, 1118 and 1119/79 of 6 June 1979).

That regulation also states, in the preamble, without however devoting a specific provision to this matter in the operative part, that in the internal trade of the Community the levying of any customs duty or any charge having equivalent effect and the application of any quantitative restriction or *any measure having equivalent effect* are automatically prohibited from January 1970 under the provisions of the Treaty. It is also provided, in Article 13, that the regulation is to be "so applied that appropriate account is taken, at the same

time, of the objectives set out in Articles 39 and 110 of the Treaty".

Until 1971, the relationships between Kurt Eisele, INRA and SSBM were governed by sales contracts entered into between Nungesser and the French establishments which were members of SSBM.

As regards seed of INRA varieties, those relationships were dealt with in a memorandum of agreement signed in Paris on 23 September 1971 between Nungesser, represented by Mr Eisele, and SSBM. There was provision for the document to be countersigned by INRA, but that did not in fact occur and the memorandum of agreement was not notified to the Commission. It was not mentioned in the contested decision but it may be worthwhile to summarize its provisions in order to give a picture of the situation at that time.

It was stated that INRA had granted to Kurt Eisele the exclusive right to sell maize seed of INRA varieties in the Federal Republic of Germany.

With reference to that exclusive right, Mr Eisele, in addition to the sale in Germany of maize seed of INRA varieties which he was authorized to produce there, undertook to buy INRA maize seed only in France and only from establishments mentioned on a list; those were private establishments coming under the auspices of SNESAM and cooperatives coming under the auspices of Synco-Maïs. Mr Eisele agreed to enter into three yearly contracts renewable unless terminated by notice, with the French producers appearing on that list, to whom SSBM supplied the basic INRA material.

He agreed that the contracts entered into directly between himself and those establishments would be in the form of a model contract annexed to the memorandum of agreement.

For its part, SSBM undertook to supply to Nungesser, as far as possible, basic seed of simple hybrids and progenitors reserved for the production of INRA commercial hybrids in Germany under the terms of the contract entered into between INRA and Mr Eisele on 5 October 1965.

Mr Eisele remained responsible for deciding the quantities apportioned to each establishment, provided however that account was to be taken of the supplies delivered in the two years preceding the signing of the memorandum of agreement.

SSBM was to be responsible for negotiating every year with Nungesser the price to be inserted in the contract. That price, which was to be derived from the tariff laid down at the annual meeting of French producers in September, was to be negotiated and fixed before 1 October preceding the sewing.

A special rebate was to be granted on that price in view of the long-term nature of the contracts and the total quantities involved. Regard was also had to the advertising carried out previously by Nungesser, which it undertook to carry on during the period of the agreement.

SSBM was to supply the French exporters with the necessary basic material, in agreement with INRA.

The model contract valid for the marketing years 1971 to 1974 included in particular the following terms.

It laid down the quantities of seed of INRA varieties which Mr Eisele undertook to purchase annually from each establishment. The certified seed had to comply with a certain number of standards *(inter alia,* germinating capacity 92%, mandatory treatment with "captan") and with the sizes laid down by Nungesser, the purchaser reserving the right to refuse size No 6. In fact, the leaflets accompanying the sacks used by Nungesser, which were produced in evidence, show that that firm only markets seed of a size higher than No 6. The packaging was to be supplied by the buyer with his trade and possibly with the mark of the seller.

The price was to be fixed through SSBM in accordance with the memorandum of agreement entered into between that organization and Nungesser. The seller was to invoice the buyer direct.

Frasema, as we have seen, took the place of SSBM on 18 June 1973, and assumed its legal commitments on the same terms.

From September 1972 Kurt Eisele and Nungesser experienced certain problems.

Mr Eisele noted that, as a result of the collapse in prices on the French market, sales were being made direct from France to Germany by dealers in INRA maize at very advantageous prices. Furthermore, new French maize varieties, developed confidentially, had been registered in Germany and were subjecting INRA varieties to severe competition.

On 1 March 1973 the German authorities responsible for supervising the seed trade noted the presence, in a warehouse belonging to the agricultural buying cooperative in Schrozberg, of 56 sacks of maize, labelled in French, on which was written the name "INRA 258" and not "Inrakorn", in respect of which Mr Eisele was the registered breeder in Germany.

The cooperative in question had obtained supplies of these seeds from a firm in Bamberg; that firm had bought them in November 1971 from a firm in Nuremberg, which had itself bought them from Louis David KG of Meisenheim.

Louis David KG, which was established in 1861, has since 1955 been a limited partnership in which the general partner is Otto David. It employed 25 people in 1977 and specialized in *trading* in seed.

That firm had in fact imported 15 tonnes of INRA 258 from France (via Kehl) in *May 1971.* Delivery was scheduled for March 1971 but could not be carried out until May, with the result that the 15 tonnes imported could not be sold in time for the spring sowing in 1971. For a reason which is still unknown they were not able to be sown in spring 1972 either. This was therefore seed which had been harvested in France in autumn 1970 and which was *two and a half* years old at the time when it was able to be used in Germany.

The competent authorities therefore seized the 56 sacks to prevent their resale and use on the following grounds:

(i) Both the Sortenschutzgesetz of 1968 and the Saatgutverkehrsgesetz of the same year permitted the marketing of varieties which were registered in the German catalogue of protected

plant varieties only under their registered name (in this case, Inrakorn). Kurt Eisele was the proprietor of the breeders' rights in the variety Inrakorn and he marketed the variety INRA 258 only under the name Inrakorn and in special sacks. Under Article 15 of the Sortenschutzgesetz Mr Eisele therefore had sole authority within the territory covered by that Law either to produce seed for commercial sale or to sell seed of INRA varieties or to do both. Furthermore, he had authority to market in that territory the seed of those varieties produced outside that territory, or to make the marketing thereof subject to his agreement;

(ii) Article 21 (4) of the Getreidesaatgutverordnung [regulation concerning cereal seed] of 31 May 1968 provides that packaging of imported seed which does not have any marking in German must be given a supplementary label on arrival on the territory covered by the Saatgutverkehsgesetz. Such a label, which must reproduce in German the details contained on the original label, was absent from the packaging of the seed in question.

On 17 September 1973 Kurt Eisele therefore brought an action before the Landgericht [Regional Court] Bad Kreuznach for damages for breach of his rights as a registered breeder under Articles 15 (1) and 47 (1) of the Sortenschutzgesetz, on the ground that Louis David KG had attempted to pass off seed labelled "INRA 258" as Inrakorn seed.

Louis Davis KG submitted in its defence that the right which Kurt Eisele, as registered breeder, could invoke, must be considered to be exhausted as soon as the royalties due in respect of the imported products had been paid in France. When, after payment of those royalties, the products had been lawfully placed on the market they could not, in the event of further marketing, give rise to a further payment. The rights of the registered breeder (Kurt Eisele) in the importing country had been exhausted by the payment of the amount due to INRA in France and the importation into Germany no longer required his approval.

The case before the Landgericht Bad Kreuznach was settled in court by an agreement between the parties under which Louis David KG undertook to refrain from offering for sale or placing on the market in Germany, without the permission of Kurt Eisele, the variety of maize seed which it imported from France; for every breach of the agreement Louis David KG was to pay a fine to be fixed by the court.

On 19 February 1974 a French dealer in seed, Robert Bomberault, inserted in the German press an advertisement offering for sale the following varieties: INRA 190, Inreaexpreß, INRA 200, Inrafrüh, INRA 258, Inrakorn and INRA 2360 (the latter being registered only in France).

As a result of that advertisement Robert Bomberault received, on the same day, a telex message from Frasema reminding him that "trade between France and Germany in INRA varieties is governed by the exclusive sales contract between

Nungesser, INRA and Frasema". Legal proceedings were threatened.

On 20 February 1974 Robert Bomberault brought this matter to the notice of the Commission's Director-General for Competition.

At the same time, Kurt Eisele sent a telex message to the German journal which had published Robert Bomberault's advertisement informing it that "the maize varieties mentioned in its advertisement could not be marketed in Germany under the name 'Inra 190 — Inraexpreß' ". On 23 February 1974 Nungesser published an advertisement in the same journal stating that direct imports from other Member States of INRA maize seed of the hybrid varieties known as Inraexpreß, Inrafrüh, Inrasil and Inrakorn contravened the Sortenschutzgesetz and the Saatgutverkehrsgesetz, but that those seeds were available in the trade and from cooperatives in Germany in excellent quality and sufficient quantity.

As a result of those developments, on 11 November 1975, the Commission's Directorate-General for Competition finally produced the dossier relating to the contract notified by Kurt Eisele in 1965, addressing itself to the Servant undertaking, whose manager was chairman of Frasema.

That did not however prevent the Varieties Management Office of INRA from reminding Frasema that its members were under an obligation to obtain permission from INRA or Frasema, its exlusive agent, prior to any sale of INRA maize seed "abroad". That letter was also addressed to the Caisse de Gestion.

On 2 March 1976 the Director-General for Competition approached Mr Ehkirch, the chairman of Frasema, within the context of his investigation into the case.

On 3 November 1976 the Commission sent a "notification of objections" to Kurt Eisele, Nungesser, INRA, Robert Bomberault, dealer in seed at Argent-sur-Sauldre (Cher), and Frasema.

It appears from that notification that the Commission made the following allegations of fact against the parties concerned:

(i) The steps taken against Bomberault to prevent him from exporting to Germany and against the German publishing house Strothe to prevent it from publishing that firm's offers for sale in Germany constituted an infringement of Article 85 (1).

(ii) The judicial settlement concluded on 14 November 1973 between Kurt Eisele and Louis David KG was likewise an infringement of that provision.

The Commission therefore proposed:

(i) To order the parties concerned to cease such infringements; and

(ii) To refuse to apply the provisions of Article 85 (3).

After hearing the undertakings in question on 11 March 1977 and consulting the Advisory Committee on Restrictive Practices and Dominant Positions on 7 December 1977, the Commission adopted on 21 September 1978 Decision No 78/823 "relating to a proceeding under Article 85 of the EEC Treaty (IV/28.824 — breeders' rights — maize seed)". That decision was published in the Official Journal of the

European Communities on 12 October 1978.

The contested decision sets out the facts and states that Article 85 (1) is applicable and that Article 85 (3) is not. The decision provides as follows: [1]

"Article 1

The content and application of the following clauses of

(a) the contract of 14 and 16 December 1960 by which INRA assigned to Mr Kurt Eisele the breeder's rights in Germany,

(b) the exclusive propagation and sales contract for INRA maize seeds of 5 October 1965 between INRA and Mr Kurt Eisele and

(c) the settlement reached on 14 November 1973 between Mr Kurt Eisele and Louis David KG to prevent unauthorized imports and sales of INRA seeds by Louis KG in Germany.

constitute infringements of Article 85 (1) of the EEC Treaty;

(a) the contract of 14 and 16 December 1960, to the extent that it is used by Mr Eisele to invoke his own breeder's rights to prevent all imports into Germany or exports to other Member States of maize seed of INRA varieties that has been officially certified;

(b) in the contract of 5 October 1965:

Clause 1

the exclusive nature of the licence granted by INRA to propagate and sell maize seed of its own varieties that has been officially certified, to the extent that this exclusivity is interpreted and applied by the parties as entailing:

the obligation upon INRA or those deriving rights through INRA to refrain from having the relevant seeds produced or sold in Germany by other licensees;

the obligation upon INRA or those deriving rights through INRA to refrain from producing or selling the relevant seeds in Germany themselves;

the obligation upon INRA or those deriving rights through INRA to prevent third parties from exporting the relevant seeds into Germany without the licensee's authorization, for use or sale there;

Mr Eisele's concurrent use of his exclusive contractual rights and his own breeder's rights to prevent all imports into Germany or exports to other Member States of the relevant seeds;

Clause 1:

the obligation upon the licensee during the years when the clause was applied, to refrain from producing or selling seeds from non-INRA varieties of maize;

Clause 2:

the obligation upon the licensee to sell the relevant seeds to certain dealers only;

1 — Translator's note: The English translation of the decision published in the Official Journal is not authentic and has not been followed in all respects.

Clause 3:

the obligation upon the licensee to produce no more than one third of the seed requirements for his territory, and to import the balance from France;

Clause 5:

the obligation upon INRA to ensure that all exports of its varieties to Germany are prevented, in so far as this obligation concerns seed that has been officially certified;

(c) the settlement of 14 November 1973:

Clause 1:

the obligation upon Louis David KG to refrain in future from selling or marketing seeds of INRA varieties in Germany without permission from the German licensee.

Article 2

The application for exemption under Article 85 (3) of the EEC Treaty made by Mr K. Eisele is rejected.

..."

The first two articles of the operative part of the decision were addressed only to INRA and Kurt Eisele but Article 3 required INRA, Frasema, Mr Eisele and Nungesser "to bring to an end the infringements found in Article 1. In particular, they shall immediately refrain from taking any legal or other steps having the object or effect of preventing or impeding imports or exports between the Member States of the Community of seed that has been officially certified". The decision was also addressed to Louis David KG but not to Robert Bomberault.

The decision has been attacked by Nungesser and by Mr Eisele, in support of whom the Governments of the United Kingdom, France and Germany have intervened, as has the Caisse de Gestion. Neither INRA nor Frasema has appeared, although INRA was represented at the hearing.

The applicants request that the decision be declared void, with the exception of those provisions of Article 1 (b) which concern the licensee's obligation, during the years when the licence was applied, to refrain from producing or selling seeds of non-INRA varieties of maize (Clause 1 of the contract of 5 October 1965), the obligation to sell to certain dealers only (Clause 2 of that contract) and the obligation to produce no more than one third of the seed needed to satisfy the requirements of his territory and to import the remaining quantities from France (Clause 3 of the contract).

II — Although no problem arises as to the admissibility of the application and no particular complaint has been made about the procedure under which the decision was adopted, the same cannot be said for the substance of the case.

Before examining the submissions and arguments of the parties, I should like to make the following remarks:

1. Although the notification of objections mentioned, in addition to the varieties INRA 200 and INRA 258, the varieties INRA 300 (Inraspät) and INRA 321 (Inraweiß), there is no mention of the latter two varieties in the decision. At

the "informal meeting" on 19 January 1981 the Commission stated that those varieties, although covered by the contracts, were not sufficiently important, as regards trade between France and Germany, to be dealt with in the decision.

On the other hand, the applicants have acknowledged that the variety INRA 190 (Inraexpreß), not mentioned in the contracts but appearing in the decision, could be covered by the decision since the breeders' rights in respect of it had been assigned by INRA previously and therefore it could be regarded as being included in the relations already existing between them and INRA.

According to the descriptive list of varieties published in 1975 by the Bundessortenamt and in the Common Catalogue, the varieties at issue in this case are the following:

(i) Inraexpreß. The registered breeder (Züchter) is Kurt Eisele of Darmstadt; registration in Germany was effected in 1971; the variety is also registered in France, where it is called "INRA 190". It is a double hybrid (FAO index 230 in Germany and 190 in France).

(ii) Inrafrüh. The registered breeder is Kurt Eisele of Darmstadt; the variety was registered in Germany in 1966; it is also registered in Belgium, in France (since 1957) and in the United Kingdom, where it is called "INRA 200". It is a double hybrid (FAO index 240 in Germany and 200 in France); in other words, it was obtained from the third generation after the crossing of two simple hybrids;

(iii) Inrakorn. The registered breeder is Kurt Eisele; registration in Germany was effected in 1966; this variety is also registered in Belgium, France, (since 1958), the United Kingdom and Luxembourg, where it is called "INRA 258". It is a double hybrid (FAO index 280 for Germany and 260 for France).

The FAO index for these varieties represents a scale of maturity; the index varies for the same variety according to climatic conditions. In general the FAO index for Germany is forty points below the index for France. Maize varieties having an FAO index in excess of 400 (delayed maturity) outside Germany are prohibited from being marketed in that country. Those differences have no further relevance to the case before the Court.

It became apparent during the proceedings that one of Mr Eisele's varieties, INRA 190 (Inraexpreß), had been deleted from the catalogue even before the adoption of the decision because its registration on the German List of Varieties and its registration in France had both expired. More precisely, in Germany Nungesser and Mr Eisele stated in December 1975 that they would abandon the registration effected in 1971, "the variety having been replaced by varieties of a better quality". The variety was thus deleted on 31 December 1976. The registration of the variety likewise expired in France on 4 January 1977. In accordance with Article 1 (2) of Directive 70/457, it no longer appears in the Common Catalogue published on 27 February 1978.

Thus, as the applicants correctly state, "the Commission's decision (adopted in September 1978) sought to prohibit something which was in any case no longer permitted as a result of other provisions".

I do not think that it is the Commission's duty to seek to bring to an end infringements which have been committed in the past. At most, such infringements may be the subject of a fine. If they are to serve any useful purpose, decisions of the Commission refusing exemption should, in my view, only concern agreements which still have effect at the time when those decisions are adopted; otherwise the wording "the parties concerned shall forthwith bring to an end the infringements found" or "they shall immediately refrain from taking any legal or other steps" would have no practical effect. On this ground alone the decision should be annulled in so far as it concerns the variety INRA 190 (Inraexpreß).

2. The decision itself states that as from 1977/78 practically all the seeds of INRA varieties sold by Nungesser in Germany were produced by it and that therefore as from that year the obligation imposed by Clause 3 of the agreement was no longer being respected.

The decision likewise acknowledges that in 1973/74 Mr Eisele began to market the variety "LG 11". Therefore the decision cannot seek to strike down Clause 1 of the agreement, under which the licensee undertook to refrain from producing or selling competing products.

The letter from the Varieties Management Office of INRA, which was mentioned in the decision, proves moreover that as from the end of December 1975 the clause stipulating that "no imports or exports of the variety in respect of which the licence was granted should be made without the breeder's express agreement" was no longer being applied.

3. The decision criticizes Nungesser for not exporting the "Eisele varieties" to *France*. In that connection it quotes an exchange of correspondence from 4 to 19 April 1977 between BayWa AG of Munich and Nungesser. However, the applicants have explained that the reason why they never exported to France seed produced from INRA seed imported into Germany is that they had no interest in doing so. The exportation from *Germany*, a country with a deficit, to other Member States of the Community — in particular to France, an exporting country — would not normally be of interest from an economic point of view for the producer or for the German dealers. Apart from that brief reference in the decision, there are no other indications in the documents before the Court that Mr Eisele had to take steps to oppose the exporting or re-exporting of INRA seed from Germany. If such operations had been economically feasible they would have shown that the prices charged by Nungesser were lower than the French prices; otherwise such operations could not have been profitable. Thus I think that it is merely for the sake of completeness that the Commission speaks of such a prohibition on exports, but that allegation is, I think, inconsistent.

4. The applicants state that the Commission was wrong to refer in Article 1 (a) of its decision to the contract of the 14 and 16 December 1960. They say that that contract had been essentially nullified by the declarations of 19 January and 8 February 1961. The exclusivity claimed by Mr Eisele is based solely on his legal status as a registered breeder under German law and that status is a result of the assignment of the breeders' rights which was made to him by the declarations of 1961. The applicants argue that, since the decision did not mention those declarations, it missed the mark, so to speak.

I agree with the Commission, however, that for the purposes of Article 85 the declarations of January and February 1961 must be read in conjunction with the contract of December 1960.

5. As regards the settlement dated 14 November 1973 between Louis David KG and Mr Eisele, I fail to see how such an agreement can fall under Article 85. It is not an arbitration award, in respect of which Article 4 of the proposal for a Commission regulation concerning the application of Article 85 (3) of the Treaty to certain patent-licensing agreements stipulates that it must be notified to it directly by reason of the fact that "Articles 85 and 86 form part of the Community's public policy, and there is an inherent risk in the case of arbitration that patent-licensing agreements may be given an interpretation which goes beyond the limits imposed by this regulation". If it were adopted, such a provision might seriously impair the right to have recourse to arbitration in an important field. Since it is a *judicial* settlement it seems to me in any event that the Commission and the litigants have other means at their disposal than recourse to Article 85 to test its validity.

The applicants and the interveners criticize the contested decision on the ground that there was a wrongful refusal to apply:

(i) Regulation No 26;

(ii) Article 90 (2), as regards INRA;

(iii) Article 36 (protection of industrial and commercial property), not to mention national legislation, the Convention for the Protection of New Varieties of Plants and the Community Patent Convention; and

(iv) Article 85 (3).

The seeds concerned are undeniably agricultural products, whose production and marketing are the subject of agreements, decisions or practices referred to in Article 85 (1) or 86, within the meaning of Article 1 of Regulation No 26.

The decision considered that the conditions laid down by Article 2 (1) and (2) of Regulation No 26 for declaring Article 85 (1) inapplicable to those agreements were not satisfied and in particular that those agreements were not "necessary for the attainment of the objectives set out in Article 39 of the Treaty". A determination of whether that finding is well-founded overlaps to a large extent with the refusal to grant exemption under Article 85 (3) and I shall return to that problem in

connection with the submissions based on the non-application of Articles 36 and 85 (3). In view of the contested decision's implications for agriculture, I consider that it would have been prudent to have consulted the Standing Committee on Seeds and Propagating Material for Agriculture, Horticulture and Forestry set up by decision of the Council of 14 June 1966.

The decision found (at p. 31, II, 1) that INRA and Frasema were undertakings within the meaning of Article 85. It seems to me, however, that it would be particularly useful to determine first of all whether INRA constitutes an undertaking within the meaning of that article or whether the specific nature of INRA seeds is such that their market may be distinguished from that of maize seeds produced by means of confidential formulae. The classification of INRA for the purpose of deciding whether the competition rules are applicable is of fundamental importance in this case.

INRA is a national public body placed under the administrative authority of the Minister for Agriculture. Its task is not merely to undertake scientific research, to carry out breeding work and to develop the reproductive material intended for experimental cultivation, but also to obtain protection for the varieties developed and thus to exploit those varieties commercially, by way of contract, to an extent which is consistent with its public duties, which necessarily implies that INRA cannot be indifferent to the application of its researches and the distribution of the seeds which it has helped to develop. The importance of that task has further increased as a result of the reform undertaken by the decree of 5 September 1980 which changed INRA from a public body of an administrative nature into a public body of an industrial and commercial nature. INRA's task at present is to develop its relations with the users of its research, be they farmers or industrialists, and to participate more actively in the commercial exploitation of the results obtained by it.

With more than 7 000 employees in 1979, of whom 1 170 were scientists and 770 engineers, and an annual grant of FF 800 million (which amounts to 94% of the Ministry of Agriculture's research budget and FF 100 million from its own revenue, INRA plays a privileged role in the field of agricultural and nutritional research along with other bodies, such as universities, technical institutes and the Centre National de la Recherche Scientifique.

Its resources comprise *inter alia:*

(i) Appropriations from the budget of Ministry of Agriculture,

(ii) State subsidies, and

(iii) Royalties relating to new varieties and procedures.

The contested decision noted the existence of an agreement of 13 August 1973 under which INRA granted a royalty-bearing exclusive licence for the commercial exploitation of its varieties in all countries to Frasema, but stated that the decision did not relate to that agreement and "its assessment under Community law is reserved for possible

later proceedings" (at pp. 26 and 27, c 1). However, it went on to express the view that the agreement between INRA and Frasema "is not capable of constituting a national market organization for maize seeds", since there already exists a common organization of that market, governed by the provisions of Regulation No 2358/71 (at p. 32, B 5).

It should be noted that INRA does not produce, propagate or sell any certified seeds; it merely develops "basic progenitors". It was therefore legitimate for that public body financed by central government to seek to make its operation profitable by disposing of breeders' rights in another Member State; a new variety which was the subject of an "ordinary licence" in France could not be exploited in Germany unless the German registered breeder enjoyed exclusive rights.

It is clear that the amount of the royalty payable for the use of a new variety depends on the number of licensees and the market for that variety. If a private French breeder had known at the time that the seed produced by himself or by his licensee in France was to be sold freely in the other Member States he would not have failed to demand a higher royalty from that French licensee. INRA could not do that on account of its being a public research body. The royalty demanded for an open variety bred by a non-profit making body and produced by a large number of propagators is not so great as the royalty demanded for a confidential variety produced by an individual breeder or a private licensee.

That INRA should have prohibited the production of its varieties in another Member State seems to me to be perfectly normal and consistent with its power to dispose of its new varieties outside France as it sees fit in order to turn them to account and to ensure their good management. In principle that has no influence on the free movement of seed abundantly produced in France with the agreement of INRA.

Thus the fact that INRA granted a licence over its new varieties to turn them to some account is no reason for considering it to be an undertaking within the meaning of Article 85. On the contrary, INRA is entrusted with the operation of a service of general economic interest within the meaning of Article 90 (2) of the Treaty. It is a body which has been given specific tasks. To bring it entirely within the rules of competition law which apply to private undertakings would be wrong since that would obstruct the performance of those tasks. The only limit imposed by Article 90 (2) is that "the development of trade must not be affected to such an extent as would be contrary to the interests of the Community".

The decision finds that during the years when the agreement was implemented the "free movement" of officially certified INRA seed was not fully observed and that such free movement was impeded by the agreements. By

requiring the parties concerned forthwith to bring to an end the "infringements" found to exist, the decision seeks to *facilitate* the importation (or the exportation) from one Member State to another of seed which has been officially certified.

It is for that reason that the decision strikes down the contract of 14 December 1960 and the subsequent agreement on the ground that INRA and those deriving rights through INRA (which here can only mean Frasema) undertook to refrain from producing or selling INRA varieties in Germany themselves (again it can only be Frasema which is meant) and to refrain from having those varieties produced or sold in Germany by persons other than Kurt Eisele.

Frasema cannot be accused of not exporting to Germany itself. On the contrary, it undertook to ensure that the German market was regularly supplied as to two thirds of its requirements for those varieties. The Commission's charge is that Frasema exported *directly* only to Mr Eisele.

Neither INRA nor Frasema could legally prevent organizations which had obtained INRA seed placed on the market by French producers from marketing those seeds in Germany. If the sale by Frasema of INRA varieties had been accompanied by such a condition the sale would have been prohibited under French law. It is true that by virtue of the rule that contracts must be performed in good faith Frasema was obliged to persuade its members to ensure that INRA seed was sold in Germany only by Nungesser. Such an obligation is usally consistent not only with the interest of the producer in increasing his production but also with the interest of the seller in developing his sales to the maximum. It does not follow from the letter of the agreement of 1961 (second paragraph of Clause 1 and Clause 5) that Frasema ever undertook to *guarentee* Mr Eisele absolute territorial rights.

It is true that Frasema sought to prevent or deter its dealers from marketing in Germany seeds placed on the market in France (for example, the Robert Bomberault affair); but in doing so it was merely discharging a moral commitment and there is no evidence that Frasema in fact took proceedings against any of its dealers who engaged in such transactions or that it resorted to reprisals against them. In spite of those attempts at intimidation French seed of INRA varieties did in fact reach the German market by way of French dealers (see for example the Louis David affair).

In truth, the only legal means of enforcing that commitment was by Mr Eisele's relying on his capacity as registered breeder to prevent any importation by third parties.

The Commission was therefore led to strike down the contract of 14 December 1960 (and the agreement of 1961) because it gave Mr Eisele the means of relying on his own rights as a registered breeder in Germany in order successfully to resist the importation of INRA seed otherwise than through him, whereas the marketing of such seed should not, by virtue of the directive on the common catalogue, have been made subject to any restriction *as to variety* and whereas, after being placed on the market in France, such seed should have been

freely importable into Germany by virtue of an application by analogy of the principle of the exhaustion of rights.

In truth, the decision considers unlawful the grant of an exclusive licence by INRA to Kurt Eisele for the production and sale of varieties developed in France.

This may be seen from the following preamble in the decision:

"The present proceeding, in application of Article 85 of the Treaty, does not jeopardize rights granted by national laws or by a Member State's own constitutional order either in relation to the existence of those rights or in relation to their specific subject-matter. Its purpose is simply to define, as Article 36 of the Treaty requires, the limits within which such rights may be exercised if such exercise is to remain compatible with the principles of the Treaty."

The decision refuses to exempt the agreements because exclusive selling rights may only be exempted if, *inter alia*, parallel imports are not restricted and because the tests for the exemption of the exclusive selling rights and their accompanying export prohibitions are not satisfied, principally by reason of the fact that the licensee enjoys absolute territorial protection on his national territory.

A breach of Article 85 (1) has thus been committed not only by Mr Eisele but also by INRA, which by an assignment of rights enabled Mr Eisele to prevent parallel imports.

It may be supposed that the decision was intended to penalize Mr Eisele because he had relied on his national rights to prevent indirect or parallel imports.

The Commission thus wished to prohibit those exclusive rights *per se* and it was only *ex abundanti cautela* that it examined whether, if the exclusive rights were legally justified, they might be exempted unter Article 85 (3). It is quite clear that for the Commission the principle of free movement merges with the principle of free competition: as long as free movement is assured, free competition is also assured; conversely, as soon as free movement, that is to say the possibility of indirect importation by third parties, is threatened free competition is automatically compromised.

As the Government of the United Kingdom has pointed out, that approach on the part of the Commission is contradictory.

There are two possibilities; either the theory of the exhaustion of the protection given by industrial and commercial property rights applies to plant breeders' rights, in which case the restrictions imposed on the marketing of INRA seed in Germany arising from the agreements are inoperative and it is not necessary to go on to ascertain whether the exclusive rights conferred by the contract can be justified, or the theory of the exhaustion of rights does not apply and it becomes necessary to examine those agreements in the light of Article 85. The decision is founded on both grounds: it prohibits the exclusive agreements as such and declines to exempt them under Article 85 (3), which was the sole object of the notification effected more than 13 years before.

As I have stated, although the agreements entered into in 1960 and 1961 were indeed intended to confer on

Mr Eisele an exclusive licence to produce and market the varieties in question, they did not by themselves have the effect of making those exclusive rights territorial in nature; that effect is produced by the German legislation enacted pursuant to the Convention of 1961. The rights in the new varieties stem from registration with the Bundessortenamt, and not from the agreement which preceded it. Mr Eisele has not merely a *contractual* right stemming from the grant of a licence; he is also the proprietor of the breeder's rights. No one has ever contested the validity of his application for certification of his registration. Neither the German legislation nor that of other Member States has been challenged by the Commission acting under Article 169.

In that connection, it is necessary to make a clearer distinction than appears in the decision between the breeder (Züchter) and the person responsible for maintenance breeding (Verantwortlicher für die Erhaltungszüchtung).

The first term relates to the provisions governing the breeding of new varieties (Articles 12 and 15 of the Sortenschutzgesetz); the breeder has the exclusive right under private law to reproduce the propagating material of the protected variety with a view to selling it commercially.

The second term relates to administrative rules concerning the marketing of seeds.

A seed may be marketed in Germany without restriction *as to variety* only if it has been *approved* as basic seed or certified seed (Article 4 (1) (1) of the Saatgutverkehrsgesetz).

Such approval presupposes that the variety has been *registered* on the list of varieties (Article 7 (1) of the Sortenliste). But it is not necessary that the person applying for registration should himself have developed the variety or be the breeder's successor in title. It is sufficient that the person should deal with the variety in accordance with the principles of systematic maintenance breeding (Article 55 (2)). Registration does not confer on the maintenance breeder an exclusive right over the variety: other persons carrying out maintenance breeding may be registered on the list in respect of the same variety (Article 63 (1)) — provided of course that they have been informed of the genealogical components of the variety — and may produce seed eligible for approval. Approved seed of the variety may be marketed even without the authorization of the maintenace breeder entered on the list.

There is however an exception to this principle, which in practice becomes the rule when the variety registered under the Saatgutverkehrsgesetz *simultaneously* benefits from the protection conferred on the breeder by the Sortenschutzgesetz.

In fact, the possibility of requesting registration for the purposes of production and marketing (under the rules of administrative law) would conflict with the breeder's exclusive rights under private law deriving from the Sortenschutzgesetz. In that case, which applies to Mr Eisele, Article 55 (2) (3) of the Saatgutverkehrsgesetz confers *solely on the person responsible for maintenance breeding* the right to set in motion the procedure leading to certification — production of a variety in Germany —

and possibly its renewal within the meaning of Articles 12 (2) and 13 (1) (b) of Directive 70/457. Article 63 of the Saatgutverkehrsgesetz prohibits the registration of any other person as the maintenance breeder. Therefore only Mr Eisele, the registered breeder, may apply for registration on the list of varieties and, by the same token, he is the sole person responsible for maintenance breeding. He is therefore the only person who may not only produce the approved seed but also avail himself of the powers granted by the Saatgutverkehrsgesetz in order to market that seed.

That situation, which is thus the normal situation, admits of an exception only in the case of a variety bred by a public body which makes the results of its work available to the public in return for an equitable remuneration (a "Jedermannserlaubnis" under Article 21 of the Sortenschutzgesetz) or in the case of "compulsory publication" (a "Zwangserlaubnis" under Article 22 of the Sortenschutzgesetz). The varieties are then registered on the list of varieties for the purposes of production and marketing and the registered breeder may no longer rely on the protection under private law of the Sortenschutzgesetz. As a result of the provisions of German law Mr Eisele was thus able, by virtue of the assignment of rights by INRA in France, to privatize, so to speak, in Germany a variety which was not private in France. That fact enabled him, by relying on the protection conferred under private law by the Sortenschutzgesetz, to prevent parallel imports of seed of the variety INRA 190 because only the registered breeder of that variety within the meaning of German law has the right to market it in Germany. As the Commission considers that absolute free movement of goods is a fundamental principle of the common market, the possibility of parallel imports is a condition *sine qua non* for the grant of an exemption. The action taken against Louis David KG and the warnings issued to the undertaking Robert Bomberault and the publisher of its advertisement are sufficient to set at nought the purported benefits of the agreements (technical progress, seed quality, continuity of supplies and reasonable prices) and to justify striking down the exclusive licence for production and marketing.

How is this situation to be appraised in the light of the previous decisions of the Court?

According to the judgment of 13 July 1966 in Joined Cases 56 and 58/64 *(Consten and Grundig* v *Commission* [1966] ECR 299), it is contrary to Community law for an approved *distributor* in a given Member State, which he supplies by means of imports, to invoke his own rights under trade mark law to prohibit the importation of products which his foreign supplier has manufactured and marketed in another Member State.

In the case of parallel assignments of trade mark rights in respect of the same product the Court held in Case 40/70 *(Sirena* v *Eda* [1971] ECR 69) that the exercise of trade mark rights assigned to users in one or more Member States might fall within the ambit of the prohibitions contained in Article 85 of the EEC Treaty each time it manifested itself as the subject, the means or the result of a restrictive practice (paragraph 9); such

a situation may in particular arise as a result of restrictive agreements between proprietors of trade marks or their successors in title enabling them to prevent imports from other Member States (paragraph 10).

The Court, however, was careful to restrict that finding to trade mark rights, stating (at paragraph 7) that "the exercise of a trade mark right is particularly apt to lead to a partitioning of markets, and thus to impair the free movement of goods between States, which is essential to the common market", the more so since, as the Court added in its judgment in Case 192/73 *(Van Zuylen* v *Haag* [1974] ECR 731), trade mark rights, unlike other rights of industrial and commercial property, are valid for an unlimited period.

According to the judgment of 8 June 1971 in Case 78/70 (*Deutsche Grammophon* v *Metro* [1971] ECR 487), it would be in conflict with the provisions on the free movement of goods (Articles 30, 34 and 36 of the EEC Treaty) for the owner of a *copyright or an analogous right* in a given Member State to invoke his rights to prohibit the importation of products placed on the market by *him* in another Member State with the aim of maintaining a price differential between identical products of the *same* manufacturer.

That decision was confirmed by the Court in its judgment of 31 October 1974 in Case 16/74 *(Centrafarm* v *Winthrop* [1974] ECR 1183), in which the Court held that the exercise, by the owner of a trade mark, of the right which he enjoys under the legislation of a Member State to prohibit the sale in that State of a product which has been marketed under the trade mark in another Member State by the *trade mark owner* or *with his consent* is incompatible with the rules of the EEC Treaty concerning the free movement of goods within the common market.

In the field of new plant varieties similar cases have, to my knowledge, come before the German courts on two occasions.

The Bundesgerichtshof [Federal Court of Justice] held on 29 February 1968, in a case involving the importation into Germany of seed potatoes in respect of which the plaintiff had already received royalties in his capacity as registered breeder under parallel protection which had been conferred upon him in the Netherlands, that the right to the protection of new plant varieties — akin to patent rights — was a right, limited in its territorial scope, existing independently of rights of parallel protection in other Member States. Furthermore, an application of the principle of territoriality was justified by reason of the fact that the cultivation of plant varieties is particularly dependent upon soil conditions.

A question of the same kind was referred to the Court of Justice on 17 October 1979 by the Landgericht [Regional Court] Düsseldorf. In that case, as in the one before the Bundesgerichtshof, the person entitled to protection in Germany, in respect of a variety of red clover, who also enjoyed similar protection in France, sought to prevent the importation into Germany of reproductive material of that variety placed on the market in France. The Court was not called upon to give judgment in that case since it was informed by the court making the reference that the plaintiff had withdrawn his action.

There is however an essential difference between these cases and the dispute between Kurt Eisele and Louis David KG: whilst Mr Eisele is the holder of legally protected rights in Germany he is not so in France and he has received no royalties for any sales in France. Similarly, Frasema received no royalties for sales on that market. Only INRA received royalties in France and since the entry into force of the contract of 1965, pursuant to Clause 3 thereof, Mr Eisele pays to INRA, in respect of the seeds which he propagates or which he imports into Germany, a royalty equal to that which is charged by the Caisse de Gestion to French propagators of INRA varieties. The royalty paid by Mr Eisele appears to constitute a *quid pro quo* for the expenses involved in registering the varieties in Germany, which were borne by INRA (Clause 3 of the contract of 1960).

Moreover, the INRA reproductive material marketed in France is not marketed by the owner of the breeder's rights in Germany (Mr Eisele) and such marketing does not require his agreement and is carried out without his consent. It is therefore not possible to say that the rights over INRA varieties in respect of which Mr Eisele enjoys protection under German law were exhausted by the first sale of the INRA varieties in France by *Mr Eisele* or *with his consent*, as occurred in the *Centrafarm* case.

Nor is the situation the same where a patentee or a licensee *manufacturing* products in his own country invokes his patent rights to prohibit the importation of products manufactured in another Member State by the patentee himself, by an undertaking which is economically connected with him or by another licensee. It would be necessary to make a further jump to admit that the exhaustion of rights in one Member State operates in another Member State even where the owners of the rights are not the same entity or are legally independent.

The Court has not therefore previously decided a case on the "exhaustion of the exercise of rights over new plant varieties".

The view taken by the Commission would be correct if:

1. A new plant variety were strictly equivalent to a patent and if the territorial effect of the protection granted to that form of invention were, as in the case of a trade mark or a patent, exhausted by the first marketing of the product covered; and

2. The limitation thus imposed on that protection remains applicable even when, after the licensing or assignment of a new variety, that variety is exploited independently and reliance upon the protection conferred by national law in such a case constitutes an abuse *per se*.

If the legitimacy of protecting plant breeders' rights is accepted in principle it should not be forgotten that a system of protection established for living organisms (agricultural products), which are perishable and subject to variations, entails problems which are different from those which arise when such a system is applied to technical inventions (industrial products).

Plant breeders' rights are a particular type of patent owing to the active participation of nature in the development of the invention. It is not possible simply to equate seed-corn with grain intended for consumption (finished products). Even if the former are "goods" within the meaning of the Treaty, it is clear that they warrant a different kind of protection from that given to industrial products.

The special nature of plant breeders' rights is confirmed by the fact that in a number of countries new plant varieties are covered by special legislation. In the course of these proceedings mention has been made of the "proposal for a Commission regulation on the application of Article 85 (3) of the Treaty to certain categories of patent-licensing agreements" (Official Journal 1979, C 58, p. 12) which has been before the Council for more than four years and which was to enter into force on 1 January 1980. Under Article 5 (4) of that proposal the regulation is not to apply to licensing agreements relating to plant breeding "since individual decisions issued so far have not yet provided sufficient experience". Thus the Commission itself acknowledges that in respect of agreements under which the parties divulge secret manufacturing processes or other confidential knowledge relating to plant breeding special rules are required which take account of the specific nature of plant breeding. For my part, I consider that this first decision of the Commission falls far short of exhausting all the problems raised in connection with the question whether such agreements should be brought within the scope of the proposed regulation or not.

Unlike the protection of utility models, which is given as a result of notification and registration, protection of new plant varieties stems in Germany from *an administrative decision* by the Varieties Committee of the Bundessortenamt (Article 67 of the Saatgutverkehrsgesetz).

The costs of improving or creating a new variety must normally be spread over four to ten years before it is possible to market the variety. Before a variety may be registered and certified a period of several years for compulsory tests (five years in the case of INRA varieties) is necessary, and that involves expenditure.

As regards new plant varieties, charges are made (i) for the scrutiny of the application (filing fee), and (ii) for the issue of the certificate of a new plant variety (examination charge). In addition, the registered breeder (or the person responsible for maintenance breeding) must pay an annual charge in order to ensure the continuing validity of the certificates. This may involve 20 or 25 annual payments.

More generally, any new entry or deletion of an entry on the national register of plant varieties gives rise to a charge. According to the documents before the Court, Kurt Eisele must pay DM 80 000 in his capacity as the person responsible for maintenance breeding.

In order to maintain protected rights over new plant varieties it is not sufficient simply to describe a process once and for all, as in the case of a patent, but it is necessary permanently to reproduce the seed obtained by a biological process in order to maintain its characteristics and this is known as maintenance breeding. The registered breeder's fields are subject to inspections.

Refrigerated premises are necessary for stocking and maintaining the lines, simple hybrids and basic seed. This method of preservation enables stocks of seed to be carried over from one year to the next whilst maintaining adequate germinative qualities.

In return for the advantages conferred by the protection of plant breeders' rights the owner of such rights must guarantee that the variety will be *maintained* for the duration of the period of protection which he enjoys and such protection is lost as soon as that guarantee can no longer be given (Article 11 of Directive 70/457; Article 16 of the Sortenschutzgesetz; Article 67 of the Saatgutverkehrsgesetz).

The product covered by a certificate recognizing a new plant variety may be used, notwithstanding any clause conferring exclusivity, for the creation of further new varieties. Since "genetic erosion" shortens the life of new varieties the depreciation period is often reduced to five or six years, whilst the investment remains considerable owing to the use of sophisticated equipment and methods. Finally, the variety becomes public property after a certain period (20 to 25 years depending on the Member State) governed in France by Article 6 of the Law of 11 June 1970.

Where a variety is *produced* under different denominations in two Member States, account must also be taken of the particular problems posed by the co-existence of two registered varieties and by the need to grant protection for the marketing of seeds bearing a certain denomination in the country where they have a different denomination.

Indeed, although the directives of 1966 and 1970 provide that the marketing of seeds registered in one Member State and in the Common Catalogue must not be made subject to any further *restriction as to variety* than those provided for in those directives, they do not broach the problem raised by the existence of parallel rights over plant varieties and by the use of the protection which those rights confer.

That problem has preoccupied the Community legislature and the Member States. They have sought to resolve it, *as regards patents*, by the Luxembourg Convention of 15 December 1975 relating to the European Patent for the common market, known as the Community Patent Convention.

During the administrative procedure preceding the adoption of the decision Kurt Eisele relied upon Article 43 of that Convention, which provides:

"1. A Community patent may be licensed in whole or in part for the *whole* or part of the *territories* in which it is effective. A licence may be *exclusive* or non-exclusive;

2. The rights conferred by the Community patent may be invoked against a licensee who contravenes any restriction in his licence which is covered by paragraph 1;

3. . . ."

The decision does not deal with that argument at all. However, at the administrative hearing and at the hearing before the Court the Commission invoked the provisions of Article 2 (2):

"Community patents shall have a unitary character. They shall have equal effect throughout the territories to which this Convention applies and may only be granted, transferred, revoked or allowed to lapse in respect of the *whole of such territories* . . ."

But that provision leaves intact the possibility of granting one or more licences for a part or the whole of the territory where the patent has effect.

The Commission also invoked Article 93 of the Convention, according to which "no provision of this Convention may be invoked against the application of any provision *of the Treaty* establishing the European Economic Community".

But no provision *of the Treaty* deals expressly with the exhaustion of rights conferred by the Community patent. That question is dealt with in Article 32 of the Convention, whilst the exhaustion of rights conferred by national patents is governed by Article 81.

It is known that deep differences of opinion regarding the Convention existed between the High Contracting Parties, on the one hand, and the Commission, on the other hand, when the wording of the text was being agreed, as appears from the Commission opinion "on the draft Convention for the European Patent for the common market" (Official Journal 1975, L 261, p. 26). However, the Commission never commenced proceedings for failure to fulfil obligations arising from the Treaty as a result of the signing of that Convention, as it had forewarned at the end of its opinion.

The Commission stated in that opinion that "there is no obvious justification for treating someone who acquired a national patent as a result of an assignment differently from the holder of an exclusive licence, which from a commercial point of view *is very close to an assignment*".

The United Kingdom Government pointed out that, if the grant of an exclusive licence is very close to a disposition of the form of property constituted by a new plant variety, such a licence does not raise any problem in principle under Article 85 since its effects are exhausted immediately by the transfer of the owner's legal and economic status to the licensee. As such it does not restrict the owner's freedom of action. It therefore falls within the ambit of property rights, which are in no way prejudiced by the Treaty (Article 222).

It is moreover somewhat paradoxical to criticize INRA for having restricted its own freedom of action when the varieties which it developed were in practice publically available in France whereas the assignment granted to Kurt Eisele was absolutely necessary to enable him to penetrate the German market.

The Commission explains that: "The decision is confined, by Article 1 (a) thereof, to a finding that a certain exercise (Ausübung) of plant breeders' rights is incompatible with Article 85 (1), but does not deprive the applicant of any of his legal rights. It also prohibited the applicant's future use (Gebrauch) of his plant breeder's rights in the manner criticized by the decision."

Thus, in order to prevent Mr Eisele from abusing the privileges conferred on him

by his national law, the decision also prohibited INRA from granting a *production* licence in the future and Mr Eisele from acquiring such a licence. That seems to concern the very subject-matter of property rights and no longer bears much relevance to Article 85. If the decision were confirmed on that point it could amount to *a kind of retroactive expropriation of Mr Eisele.*

It is possible under the present state of Community law for there to be parallel varieties with different denominations: a "Community" variety is not possible. The theory of exhaustion of rights cannot therefore, in my opinion, apply as such when as in the present case, the new variety was bred by a national research organization and has been the subject, in a Member State, of what Article 44 of the Community Patent Convention describes as a "licence of right" as opposed to a "contractual licence". The "compensation" which the breeder of such a variety receives is not subject to the same rules as the royalty which a breeder receives in respect of a variety developed confidentially under a licence granted on competitive terms between a breeder and a propagator independent the one from the other. Article 81 (3) of the Convention provides that:

"The preceding paragraphs [relating to the exhaustion of the rights conferred by a national patent] shall not apply in the case of a product placed on the market under a compulsory licence [under Article 44]."

It is therefore certainly not possible to invoke the provisions of the Convention, much less to invoke those of the proposal for a Commission regulation "on the application of Article 85 (3) of the Treaty to certain categories of patent-licensing agreements", to support a prohibition of *exclusive territorial patent licences,* particularly since it is conceivable that a different solution may be adopted for plant breeders' rights. For as long as there is no "Community Convention on plant breeders' rights" the grant of an exclusive territorial licence remains possible in this field, provided that it is justified under Article 85 (3). If it is not so justified, then its territorial extent would be sufficient to invalidate it, whatever the economic benefits of the granting of such a licence may be; in that case it would not even be necessary to adopt a Community Convention.

The Commission is prejudging the setting up of a "Community" system of plant breeders' rights by asserting that the specific subject-matter of a plant breeder's right is to reserve to its owner the privilege of producing the propagating material of the protected variety and of being the first to place it on the market; and by asserting that the exclusive nature of that right has as its sole object to guarantee the identity of the variety and that "protection of a licensee against competition from the licensor, from other licensees or from third parties is not within the specific subject-matter of breeders' rights" (point 7 of the decision at p. 33).

The protection conferred by plant breeders' rights, especially when exploited commercially in the form of licences capable of affecting distribution in the various Member States of goods

"incorporating" the protected variety, falls within the scope of the exemption provided for by Article 36 of the Treaty (cf. judgment of 20 January 1981 in Joined Cases 55 and 57/80 *Musik-Vertrieb Membran* v *GEMA* [1981] ECR 147, at p. 161, concerning copyright). The exercise of rights in a new variety granted pursuant to the legislation of a Member State does not in itself contravene the rules on competition laid down by the Treaty. The new variety taken by itself, irrespective of any agreement of which it may be the subject, is not akin to any of the categories of agreement exhaustively listed in Article 85 (1) but stems from the legal status granted to it by a State (judgment of 29 February 1968 in Case 24/67 *Parke, Davis* v *Centrafarm* [1968] ECR 55, at p. 71).

It is nonetheless true that, if the theory of exhaustion of rights could not apply during the years in which the agreements were given effect, the assignments granted by INRA in conjunction with the provisions of the German legislation brought about a monopoly situation as regards the production and sale of seeds of certain INRA varieties by way of Kurt Eisele. Under the legal situation existing in 1965 it was therefore necessary for there to be *direct* imports from France to Germany, which was not self-sufficient in maize seed. The clause which provided that Mr Eisele was to buy from INRA two thirds of the seeds of INRA varieties which he marketed in Germany was intended to cover this point; it was in reality a clause which restricted his freedom of action and in the meantime he has ceased to observe it and does not seek to challenge its prohibition.

The only question which remains to be considered is whether the clauses providing for those direct sales brought about any appreciable restrictions on competition and whether they had an appreciable effect on trade between the Member States (see the judgment of 9 July 1969 in Case 5/69, *Völk* v *Vervaecke* [1969] ECR 295, and the judgment of 6 May 1971 in Case 1/71 *Cadillon* v *Hoss* [1971] ECR 351). The question whether the agreements in question fall within the ambit of Article 85 (1) thus depends less on their legal nature than on their effects on competition and on trade between Member States (see the judgment of 10 July 1980 in *Lancôme* v *Etos* [1980] ECR 2536). The applicants and interveners have rightly pointed out that in such a situation, if Nungesser enjoyed a dominant position in that field and if it had abused that position, the provisions of Article 86 should have been applied. However, since the decision is not founded on this basis, it remains for us to make an assessment from an economic point of view of the agreements in the light of Articles 39 and 85 (3), and it is all the easier to make such an assessment inasmuch as there is a sufficiently long period of time which may be examined.

We have seen that the registration of a variety in the Common Catalogue has the effect of allowing that variety to be *imported* into a Member State other than the State of origin, even if it has not been recognized by the importing State (the second sentence of Article 23 (2) of the Saatgutverkehrsgesetz). On the other hand, in order that a variety entered in the Common Catalogue may be *produced* in a State other than the State of origin for marketing there, registration in the national catalogue of the State of production is necessary (Article 4 (1) of the Saatgutverkehrsgesetz).

There were two aspects to the registration in the national catalogue obtained by Mr Eisele:

Registration for *the purposes of marketing*, which was necessary at the time when it was obtained in order to sell INRA seed in Germany but which is no longer necessary since the adoption of the Common Catalogue;

Registration *for the purposes of certification and production*, which remains necessary if he is to propagate, from "basic seed" supplied by Frasema, "certified seed" which he then markets.

The German Government has explained that it is only in the case of parallel registration for the purpose of production that the variety is tested as to its value for cultivation in the light of the conditions prevailing on national territory (Article 38 of the Saatgutverkehrsgesetz and Articles 4 (2) (b) and 5 (4) of Directive 70/457).

Seeds of a particular variety sell better when their agronomic value for the Member State concerned has been officially certified. Registration makes the advertising and marketing of the variety easier. The bodies which advise farmers (Chambers of Agriculture and others) prefer to recommend varieties which have been approved by the national authorities.

Thus, whilst the Common Catalogue for 1981 lists about 180 maize varieties which may in theory be imported into Germany, the German catalogue includes only 48 varieties (100 in 1978). 99·5% of the seeds used in Germany come from varieties registered in the German catalogue. Only a small number of varieties (20) are sold in large quantities. More than 99% of the licences granted in 1978 in connection with seeds were exclusive licences.

The parallel registration of a variety in the German catalogue, which presupposes that that variety is produced in Germany, favours the distribution of that variety under its German name; that effect in turn favours seeds of the same variety produced in France and distributed under the German name. In commercial terms this is only possible if the French seeds are "Germanized". Since Mr Eisele enjoys the undoubtedly legitimate benefit of exclusive selling rights for seeds of his own production he must necessarily, in commercial terms, enjoy the same exclusive rights in respect of seeds of the same varieties produced in France; otherwise he would have no interest in maintaining his variety, nor in bearing the costs which that entails, and finally that would have repercussions on the distribution of seeds produced in France. If the exclusive selling rights in respect of imported seeds were withdrawn, that would be likely to remove any interest in the grant of the exclusive right to propagate INRA seeds in Germany or the exclusive right to market the seeds produced and would in the long run lead to the discontinuance of the German production, which, as we will see, has in fact happened.

Clearly it was only in exchange for the grant of exclusive rights that Mr Eisele agreed to pay royalties to INRA, to endeavour to promote INRA varieties and to assume financial and legal re-

sponsibility for maintenance breeding under German law. The territorial dimension is indispensable as an essential element of a contract granting such an exclusive licence.

The decision acknowledges (at p. 28, point 2) that despite the provisions to the contrary in the contract of 5 October 1965 (Clause 2) Nungesser's selling prices in Germany were always fixed without reference to INRA. It may be thought that that clause was to enable INRA to exercise a certain degree of control over Mr Eisele and to prevent him from abusing the position which he held on the German market by virtue of the other clauses.

Nevertheless, the decision (see point 1.D.4. at pp. 29 and 30) was adopted *inter alia* because the prices charged by Nungesser in Germany were excessive in relation to the French prices ("70% difference in spring 1974 from one bank of the Rhine to the other"; "solely for INRA maize seed sold by Mr Eisele in 1974 the extra margin borne by German farmers, and ultimately by German consumers, ran into several million units of account."). That clearly prevented the contract from qualifying for exemption.

The purpose of the decision is thus to permit German farmers to participate equitably in any benefits resulting from the agreements in question and to prevent them from suffering excessive divergences in price.

At an "informal meeting" on 19 January 1981 the parties agreed that the differences between their respective figures concerning prices on the *German* market were inconsequential. However, they were unable to reconcile their views concerning prices on the French market, where considerable variations in the estimates were disclosed.

It is above all in respect of the year 1972 (and not the year 1974 singled out by the decision) that those differences remain irreconcilable. The applicants maintain that in 1972 the price of INRA 258 rose to FF 700 per quintal owing to a shortage of seeds of that variety, whilst the Commission accepts only a figure of FF 300. As I understand it, these are seeds harvested in 1971 intended for planting in the spring of 1972; by contrast, the rest of the year 1972, after the autumn harvest, was marked by a collapse in prices.

It nevertheless became clear during that meeting that the French prices in 1972 were far from being as low as the Commission claimed. It was therefore forced to play down the importance which it attached to the question of prices. As far as the Commission is concerned, these proceedings concern not an infringement connected with prices but the exclusive nature of a licence. However, unless the exclusive nature of the licence is reflected in unjustifiable price differentials, it does not, in my view, impair "effective competition" as defined by the Court in *Metro v Commission* ([1977] ECR 1875, at p. 1904) and its prohibition would be of no appreciable benefit to the consumer. That is why a comparison between the

French and German prices is important in determining whether the application is well-founded.

The thorough examination of the case which has taken place revealed that the Commission based itself exclusively on prices which had been supplied to it by 10 cooperatives situated in the principal production areas of France which offered particularly attractive prices. However, the share of the French market held by those cooperatives was no more than 30 or 35% of the turnover at all levels without weighting according to the time of sale. During the same year prices may vary strongly, depending on whether they relate to seed intended for one marketing year or to seed harvested during the following year. On the other hand, independent dealers constitute an important part of the market and that sector of the trade is very sensitive to speculative movements, unlike the cooperatives, which are concerned primarily with maintaining regular supplies to their customers. That is due to the fact that in respect of *open* INRA varieties, which are very susceptible to market fluctuations, there is a complex network for distribution and marketing.

I can well understand why, for the purposes of demonstration, the Commission should play down the importance of the dealers who do not belong to the cooperative sector in France. But that seems to me to be in contradiction with the importance which the Commission attaches to the independent sector and the brokers (Robert Bomberault and Louis David KG) and with the interest which it shows in maintaining that "indispensable" sector of the market.

It appears that the average price in 1972 must in all probability have lain somewhere between FF 400 and FF 450 per quintal. The average difference between French and German prices at the same stage could not have been in excess of 25%. In their last document lodged on 12 May 1981 the applicants went as far as maintaining that the differences in price fluctuated between 14 and 15%. That assertion is not entirely improbable, for that percentage was the profit margin which Kurt Eisele disclosed in the proceedings before the Landgericht Bad Kreuznach in which he claimed damages for the loss suffered as a result of the unauthorized imports carried out by Louis David KG. Mr Eisele obviously had an interest in increasing to the maximum his profit margin in order to obtain the highest compensation possible.

Only the commissioning of an expert opinion could perhaps settle this issue between the parties, but after so many years it would be very difficult to undertake. As far as I am concerned, it is sufficient for me to state that the price differences stated in the decision are incorrect.

Having regard to those price differences, the "services" (Article 39 (1) (a) of the Treaty) rendered by Mr Eisele, whilst not being as exceptional as he claims, were not without some value. The parties argued fiercely as to whether those services were purely commercial, as the Commission maintained, or whether they were imposed by the German legislation, as the applicants maintained.

Experts distinguish between germinative capacity or germination (Keimfähigkeit, Keimkraft) and germinative energy (Triebkraft). The minimum germinative

capacity prescribed by Community rules is 85% for maize seeds (Article 4 (2) of Directive 66/402). The germinating energy of a batch of maize seeds, that is to say their ability to germinate in hot or cold conditions is determined by a cold test. However, until now the internationally recognized methods have not included the cold test; moreover, many of the large French establishments subject their own produce to this type of control and account is taken of germinating energy in the selection criteria.

According to the provisions of the "Saatgutlandwirtschaft" regulation of 3 July 1975, in the version of the seventh regulation of 23 June 1978 amending the provisions of the Saatgutverkehrsgesetz and of the Saatgutverordnung of 2 July 1975, amended on 23 May 1977, maize seed may only be marketed in Germany if it has a germinating capacity of at least 90% and a germinating engergy of at least 85%. It seems that the additional requirement of a minimum germinating energy was not abolished until July 1980.

Seeds of the double hybrids INRA 200 and 258 sold by Mr Eisele's network in Germany, irrespective of whether they were produced by him or specially conditioned for him in France, had a germinating capacity of more than 92%, higher, according to him, than that of seeds normally distributed on the French market. Furthermore, they had a germinating energy of more than 95%. I have not fully understood whether the German regulations, at the time of importations effected by Louis David KG, restricted the marketing of INRA seeds imported in that way on the basis of germinating characteristics. It seems that it is only as from 1 July 1975 that Article 23 (2) of the Saatgutverkehrsgesetz was formally brought into line with the Community provisions by virtue of an amendment to the effect that for a seed to be able to be imported into Germany it was sufficient that it had been certified or approved in another Member State.

As indicated in the decision (p. 25, note 3), it is generally agreed that beyond a certain level any increase in germinating capacity entails a proportionally greater increase in germinating energy and hence in the number of germinations that actually survive. The decision further states that germinating energy has not been standardized, that it is used in advertising as a sales argument and that it is only of interest in connection with grain maize; but maize for animal fodder accounts for 80% of the total production of maize in Germany.

It is to be noted, however, that the directive does not make that distinction. Maize is classified as a cereal and not as a fodder plant (the seeds of which are governed by a different directive, namely Directive 66/401). Moreover, the same varieties are nearly always used for maize fodder as for maize grain, although the uses of those two categories of maize are different.

In any event it should not be forgotten that Article 5 of Directive 66/402 only sought to lay down minimum requirements:

"Member States may, as regards the conditions laid down in Annexes I and II, impose additional or more stringent requirements for the certification of seed produced in their own territory."

Mr Eisele was therefore perfectly at liberty to exceed the Community requirements and to pursue a policy of quality. The germinating capacity and energy which he achieved in the seed which he produced helped to improve its germinating characteristics, even if the latter were only of interest at most for 20% of the total German production of maize of INRA varieties.

There are 12 to 15 different grain sizes for maize. Mr Eisele offered eight different sizes as regards his own and seven as regards the seeds which he imported from France. The sacks containing the different sizes carried a notice indicating the sowing discs to be used "depending on the specific conditions prevailing in Germany". Those specifications were necessary, according to the applicants, because pneumatic seeders are used in France, whilst in Germany mechanical seeders are used.

It is well-known that each seeder is delivered with discs of different calibres which can be used to sow seed for crops other than maize: peas, beans, etc. But even if the farmer is careful to adapt his seeder to the size of the seed he can never increase the size of the seed and that characteristic can have a decisive influence on his harvest. We do not know the size of the seed sold by Louis David KG or offered for sale by Robert Bomberault. It is not inconceivable that they comprised the tailings of seeds.

On the other hand, we do know that the seeds imported from France by Louis David KG at the end of spring 1971 had not, after changing hands several times, been used by spring 1973. The age of the seed is however of great importance and one of the criticisms levelled at seed merchants is that they sell seed which is too old. Insistence on maintaining at all costs a sector of "independent merchants" who seek to carry out isolated transactions is likely to result in disappointment for the users. It is often better for the seed to be planted in conditions which may be controlled by the first seller; otherwise the users, believing they are making a bargain, risk buying stale seed or tailings of the size number 6, which Mr Eisele specifically refused to supply, as is clear from the correspondence produced in evidence.

The seed sold by Nungesser irrespective of whether it was produced by that company or conditioned for it, exhibited characteristics different from those of seed sold by Louis David KG or offered for sale by Robert Bomberault as regards health treatment and labelling. Although, strictly speaking, it is only a question of commercial services and it is difficult to speak of an improvement, the last particular is of importance as regards free movement.

The applicants state that the German legislation only permitted maize seed to be treated with "captan" and that it prohibited the treatment of seed with certain chemical substances, such as Anthraquinon, whereas those substances

are used to disinfect seed in France, which would have been sufficient to prevent the importation of seed which had not been specially conditioned. The seed which they produced and which they imported was in conformity with the German requirements, as appears from the contracts produced in evidence, inasmuch as it was treated with "captan".

I do not think that that reason alone would have been sufficient to prevent French seed from reaching the German market indirectly. Since July 1975 no controls have been carried out in Germany to detect the possible use of chemical treatment on account of the regulations on the marketing of seed. It may be that, as in the case of germinating characteristics, the German plant-health legislation was more stringent for seed produced in Germany than the requirements laid down by the directive for seed imported from France.

In a document lodged on 28 September 1981 in reply to the question which the Court had put to it on 20 July 1981, the Commission explained that Article 20 of the Saatgutverordnung of 2 July 1975 authorizes *labelling* in several languages and that Article 22 thereof provides that a specific German label is not necessary for seed certified in a manner deemed equivalent to certification in Germany by virtue of Community rules.

In reply to the same question the applicants submitted in a document lodged on 23 September 1981 that, in the version of 14 July 1981, Article 19 of the Saatgutverordnung (corresponding to Article 20 of the former version) provides that any package of seed recognized as basic seed, certified seed or seed intended to be placed on the market must bear a label. That label must accord with the specimen contained in Annex 5, which is of course drawn up in *German*. Article 19 adds that the information appearing in the specimen may in addition be conveyed "in other languages".

Although the explanations given by the Commission relate to a previous version of the Saatgutverordnung, it seems that the applicants are right in asserting that in any event labelling in *German* was necessary.

They add that Article 22 of that regulation contains no exception to that principle in respect of imports from other Member States. Indeed, that provision merely concerns imported seed in respect of which certification or approval is treated as certification or approval under national provisions pursuant to Article 24 of the Saatgutverkehrsgesetz. That article provides for the certification of certain varieties to be recognized by regulation of the Federal Minister for Agriculture; it does not concern the importation of seed from Member States of the Community which has been certified there and which complies with the criteria laid down in Community directives; such "Community" seed is governed by Article 23 (2) of the Saatgutverkehrsgesetz.

Article 10 (1) of Directive 66/402 says as much when it provides that Member States must require packages to be labelled "in *one* of the official languages of the Community". Obviously that provision is not intended to prevent that language from being the official language of the State in question. The labelling is designed to inform farmers using the seed, and details which were worded only in a foreign language would be capable of misleading them.

Therefore, as regards labelling, the seed marketed by Louis David KG in 1973 was in conformity neither with the German rules nor with the Community rules. Moreover, the Commission acknowledges (at p. 8) that the seed imported by that firm was labelled solely in French and paradoxically infers from that fact that there would be no risk of confusion with seed sold by Mr Eisele.

The fact that the seed imported by Louis David KG was labelled solely in French did not obviate the risk that those imports might harm the image of the varieties sold by Nungesser. There was no reason why the seed offered for sale by Robert Bomberault or sold by Louis David KG should benefit from the commercial renown of Mr Eisele's INRA seed and compete with it in a parasitic manner. From that point of view, the uncontrolled importation of seed of INRA varieties was likely to damage the reputation of those varieties in Germany and could perfectly well justify a refusal to apply Articles 30 and 85, contrary to the assertion contained in the decision (pp. 33 and 34, point 7, and p. 35, point 6 (c)). To require that seed sold by Mr Eisele be brought into line with seed sold by Louis David KG or Robert Bomberault would be tantamount to consigning Mr Eisele to oblivion as a registered breeder and leaving him a role as a simple representative.

Those particular differences seem to me to justify in any event the difference in price for the seed produced by Mr Eisele. The fact that the seed produced and conditioned in France for Nungesser is sold by it at the same price as the seed produced in Germany does not stem from the contested agreements, but simply from the fact that there cannot be two different prices for a product bearing the same label: if the quality is similar the cheap seed will inevitably push out the more expensive seed.

In that connection I have difficulty in understanding the passage in the decision (at p. 34) which states that "the Commission leaves open the assessment under Article 85 (3) of the exclusive *propagation* rights granted to Mr K. Eisele, since the tests for exemption of the exclusive *selling* rights and their accompanying export prohibitions are in any event not satisfied".

There is, however, a difference between a "production licence" and a "distribution licence". A production licence may be effective even though the distribution licence accompanying it may be open to criticism. The theory of exhaustion of the protection conferred by a distribution licence raises particular difficulties where, as in this case, it is accompanied by a production licence. The grant of a distribution licence may often be the condition upon which a production licence will be granted. The decision gives the impression that it equates Mr Eisele with a mere distributor or person responsible for maintenance breeding who is preventing free movement in his country of seed produced in another country *by him* or with his *consent*. That is not the case.

Mr Eisele is a genuine breeder who for valid reasons opposes the marketing by third parties of varieties in respect of which he is the registered breeder; although in some respects he derives his rights through other persons, they are nonetheless justified by the national law under which the rights were acquired and by commercial considerations.

Since the decision does not distinguish between seed produced by Nungesser (one third) and seed produced in France (two thirds) and since the obligation to adhere to that proportion has not been complied with and since Mr Eisele is ready to forego that provision and is not challenging the decision on that point, the decision should be annulled in any event in so far as it implies that the seed produced by Mr Eisele was marketed at an excessive price for which there was no justification.

The placing on the market in one country (France) entails the exhaustion of the breeders' rights in another country (Germany), but does not necessarily entail the exhaustion of the obligations attaching to those rights. Where there are two persons responsible for maintenance breeding (INRA in France and Mr Eisele in Germany) in respect of the same variety being marketed under names which are partly different (INRA *190* and Inra*expreß)* in the same country (Germany), inextricable difficulties are likely to arise if one batch of that variety no longer satisfies the legal requirements.

Even if we assume that it is possible to distinguish whether the seed in question was produced in Germany (Inraexpreß) or in France (INRA 190) and that therefore the registration is deleted only in the country of the person responsible for maintenance breeding from which the lot in question came, that decision would inevitably have consequences on the commercial reputation of the variety enjoying parallel registration.

Mr Eisele is the original producer of seed of INRA varieties in Germany. That production is likely to cease as from the moment when, although retaining exclusive protection for the marketing of his own produce, as the Commission concedes, he would no longer be able to rely on the same exclusive rights in respect of seed of the same variety bearing a partly different denomination and produced in France but marketed outside his control in Germany.

That control is particularly necessary in order to make rational decisions as to the production of basic seed (Article 2 (1) D (1) (e) of Directive 66/402) and pre-basic seed (Article 2 (1) E (a) and (b)).

In addition to the quality and the price of seed, availability of supplies (Article 39 (d) of the Treaty) is of the utmost importance for the farmer.

In respect of most species or varieties the production of seed is determined by its multi-annual character. The volume of agricultural production is determined by the quantity of basic seeds distributed,

especially when it is necessary to have recourse each year to propagators which is the case with maize hybrids. The propagation of those hybrids is of a rather special nature. In addition to sowing constraints (alternation of male and female rows) it necessitates the isolation of fields and particular care in the harvest (cleaning, sifting, grading). It is most frequently done by contract, often with the help of temporary labour (for example to castrate the ears). It is therefore necessary to programme the varieties several years in advance in order to ensure that the future needs of farme are covered. In this way production may be regularized by adjusting supply to demand. The registered breeder and the propagator thus cooperate very closely in the realization of the objectives of the common agricultural policy.

In close cooperation with INRA and the Ministry of Agriculture, Frasema draws up, for all its members, a seed production programme expressed in terms of tonnage and area under cultivation. It is given responsibility for the distribution of that production in order to prevent a chaotic distribution network from prejudicing the technical qualities of the seed and in order to ensure its correct usage. Contracts entered into between breeders and propagators ensure that prices and sales are guaranteed for them.

Those constraints underlie the agreements in question. The figures disclosed by the decision show that, far from impeding the regular supply of the German market with seed of good quality, the monopoly over certain varieties enjoyed by Mr Eisele in fact had the effect of stabilizing prices. The contracts produced in evidence, which were entered into in September each year between Nungesser and the members of Frasema, ensured that Nungesser received a given quantity and quality at a predetermined price. Thus in 1972, when the price of INRA 258 had risen to FF 700 per quintal on the French market, according to the applicants, Frasema continued to supply Nungesser with maize at DM 290 in accordance with the terms of the contract.

No provision permitting Mr Eisele to sell only to establishments offering guarantees which he in his discretion considered satisfactory is to be found in the 1965 contract, Clause 2 of which contains a stipulation to the contrary.

If he had refused to authorize the production or marketing of his varieties in sufficient quantity the Bundessortenamt could have applied Article 22 of the Sortenschutzgesetz and compelled him to grant a compulsory licence in return for a fair remuneration.

The examination of the case undertaken has disclosed not merely that the agreements in question did not restrict Franco-German trade or the production of INRA varieties in Germany but that they were instrumental in promoting those varieties and that the monopoly over certain varieties enjoyed by Mr Eisele did not prevent the development of new varieties which have had the effect of considerably reducing the importance of the exclusive rights which he enjoyed.

Even before the contested decision was adopted — but to a still greater extent since then — the volume of such trade and production has continually diminished in favour of the so-called "confi-

dential" varieties produced in the Community or in non-member countries.

In a field where change is rapid the information contained in the decision is considerably out of date. It is incorrect to say, as the decision does (p. 27, point 2), that the varieties produced under licences granted by the large American breeders (Pioneer, Dekalb, Funks, Cargill, Northrup, King, Asgrow) have largely been eclipsed since 1958 and still are today (September 1978) by INRA varieties.

The opposite is true, save that the varieties developed from INRA progenitors (in particular LG 11) have indeed contributed to a large extent to that recession, but those are competing varieties developed confidentially.

Out of more than 750 varieties of maize existing in the world more than 200 could be marketed in France and more than 100 in Germany: to such an extent that it is no exaggeration to speak of a plethora of varieties. But is is also necessary to take account of "genetic erosion" and only a few varieties dominate the market.

The graphs produced show that sales of INRA varieties suffered a spectacular slump between 1973 and 1979. Frasema, which in 1973 accounted for 54% of sales of the first eighty varieties produced and marketed in France, accounted for only 10% in 1979.

Most of the large French undertakings which, like Limagrain, were members of Frasema, became direct competitors of INRA by developing, often from INRA progenitors, confidentially produced varieties. They have their own exclusive representatives in Germany.

Before 1973-74 INRA seeds sold by Nungesser (which accounted for approximately 20% of its total sales in Germany) held between 50 and 70% of the German market and in 1973-74 they still held nearly 40% (decision, p. 27, point 4). Since 1974 INRA varieties have become very much less important. Producers and users have turned towards other varieties developed confidentially. Out of 100 000 quintals of maize seed used annually in Germany an increasing proportion is imported from non-member countries and the proportion of INRA varieties in the seed still imported from France has continued to diminish.

If a distinction is drawn, in Nungesser's sales, between imported seed and seed produced by it, we find that, although until 1974 approximately three quarters or two thirds of sales were of seed imported from France (50 000 out of 60 000 quintals in 1973, 60 000 out of 80 000 quintals in 1974, see decision, p. 28, point 2), seed produced by Nungesser accounted for practically the total quantity of INRA seed sold in Germany by that firm during the marketing year 1977-78.

Whilst, however, until the year 1973-74 Mr Eisele produced and sold only INRA varieties in Germany, in that year he began to market the variety LG 11. In March 1976 the variety INRA 200 was practically no longer marketed and it seems that the Commission overlooked

the disappearance, even before the decision was adopted, of one of the three varieties in question (INRA 190 — Inraexpreß) not only from the German catalogue but also from the Common Catalogue.

If we consider the quantity of maize seed imported into Germany from non-member countries as a proportion of the total quantity of seed used there, we find that in 1976 approximately 52% originated from non-member countries; 4.70% was produced in Germany; 43% originated from France (of which approximately 17% consisted of varieties concerned by the decision and 18% of the variety LG 11).

In 1977 28% of the German requirements of maize seed were satisfied by imports from France (of which 18% consisted of INRA varieties and 4% of the variety LG 11); 64% of German requirements were satisfied by imports from non-member countries and 6% by home-produced seed.

In 1978 about 10% of the maize seed used in Germany was of German origin, 70% came from non-member countries and about 20% came from France, of which 4% was made up of the variety LG 11 and 0.05% of INRA seeds; the varieties referred to in the decision were completely absent.

It is true that in relative terms French exports of maize seed to Germany increased constantly form 1971 to 1977. Whilst, however, in 1971 the INRA varieties concerned accounted for nearly 58% of those exports, they had fallen to less than 14% in 1977 and to zero in 1978 an 1979.

It is important to emphasize the part played in those developments by imports of seed from non-member countries and it is not correct to state that trade with such countries is minimal. It is true that the common organization of the market in the seed sector provided for the issue of import licences, the grant of Community aid and the levying of charges to compensate for differences in price. But those charges are limited by GATT to 4% of the value of the product. Thus certain organizations are able to have their seeds propagated in non-member countries in order to undercut the prices of competing seeds produced in Europe, and that could lead to the gradual disappearance of research from Europe for lack of financial resources.

The large private undertakings which have developed their own plant varieties may penetrate the common market by creating subsidiary companies instead of granting production licences, which is sufficient to preclude the application of Article 85, and those subsidiaries do not even need to propagate the seeds themselves: it is sufficient that they represent the parent company with the Bundessortenamt, in which case Article 86 alone is applicable. It is well known that the Commission is reluctant to have recourse to that article. On the other hand, the grant of exclusive production and marketing licences in this field enables concentrations to be countered, ensures the existence of independent undertakings and guarantees Community preference.

Moreover, the decision acknowledges that in the years between 1958-59 and 1973-74 three quarters of the sowings of early maize were carried out with INRA varieties or "descendants of INRA varieties", which is not the same thing.

In its observations the Caisse de Gestion stated without contradiction that in 1978 91% of French exports of seed to Germany were made up of the following three varieties:

Dekalb 202 (registered breeder — Dekalb, USA);

Cargill Primeur (registered breeder — Cargill, USA); and

Blizzard (Ciba-Geigy).

Ciba-Geigy today holds more than 40% of the German market. The seed sold on that market is produced either in France or in non-member countries; it is distributed in Germany either by a subsidiary of the registered breeder, as in the case of Ciba-Geigy, or by exclusive representatives.

In 1979 there were still 13 predominant varieties in Germany but of them three accounted for 72% of the market:

(i) Forla, registered in 1975; the person responsible for maintenance breeding is Kleinwanzlebener Saatzucht, which owns four varieties; that undertaking took over Intersaat;

(ii) Edo, registered in 1974 (same person being responsible for the maintenance breeding); and

(iii) Limagold, registered in 1973; the person responsible for maintenance breeding in Germany is Nordsaat Saatzuchtgesellschaft; the person responsible in France for exports is Maïs Angevin Hodée.

During the years in which the obligations undertaken by Mr Eisele were given effect INRA varieties were thus subject, in the territory covered by the licence, to effective competition from products broadly similar by reason of the use for which they were intended. The requirement of competition "within the variety", as demanded by the Commission in respect of INRA varieties obtained openly, seems to me to be unrealistic.

From 1975 the effect of the agreement in question on intra-Community trade had considerably diminished and has diminished still further since the decision was adopted. I do not mean to say that that development was brought about by the adoption of the contested decision, but in any event the prohibition of parallel or indirect imports is totally unconnected with it.

The beneficial nature of the agreements in question may be seen from the following evidence: the absence of a production licence in Belgium for INRA seeds led to a chaotic and unguaranteed marketing of those seeds. They were soon eliminated from the Belgian market, to the detriment of Belgian agriculture and to agricultural research in general, in favour of competing non-European confidential varieties which were able to gain a foothold thanks to the presence of an exclusive representative.

The contracts in question have helped to promote technical progress and to improve production, whilst ensuring equitable prices and a regular supply to users, and those agreements granting exclusive rights which were adhered to were indispensable if that favourable result was to be obtained.

In conclusion I should like to submit the following observations:

There are deep differences of opinion between the Commission, certain private groupings and national experts about the proposed regulation granting block exemption for patent-licensing agreements.

The Commission makes no secret of the fact that it looks forward to the Court's decision in order to establish certain guiding principles in this field. However, I do not think that it would be appropriate in this first case to lay down principles in the field of plant breeders' rights which would be likely to prejudge future developments.

Exclusive rights and selectivity must be assessed for their positive effect on those sectors where objective reasons justify a highly organized distribution system which takes into account in particular the characteristics of the product, within the meaning of the decisions of the Court (cf. *Metro* v *Commission*, cited above), and the responsibilities of the manufacturer, as the Economic and Social Committee stated in its opinion of 10 December 1981, published in the Official Journal of the European Communities, C 322, p. 11.

That is in the same vein as the resolution adopted by the European Parliament on 17 December 1981 in which it:

"Believes that the overall competitive effects of distribution agreements need to be examined in *greater* detail from an *economic* rather than *just a legalistic* point of view;

Considers, in particular, that the issues posed by parallel importing need to be *closely* examined; believes in this context, that there needs to be a balance between opening up the internal market as fully as possible, and at the same time providing safeguards for capital and labour investments against *speculating* importers."

Finally, where the lapse of time between the notification of an agreement and the adoption of the decision refusing to exempt it is too long (13 years in this case), not only are the investments which have been made by the traders in question likely to be put at risk but in addition the decision is likely to be completely out of date.

III — For all those reasons I am of the opinion that:

Commission Decision No 78/823 of 21 September 1978 should be declared void, with the exception of those provisions of Article 1 (b) which concern the obligation upon the licensee during the years when the licence was given

effect to refrain from producing or selling seed of non-INRA varieties of maize, the obligation to sell only to certain dealers and the obligation to produce no more than one third of the seed necessary to satisfy the requirements of his territory and to import the remainder from France;

The costs of the action, including the costs of the interveners, should be borne by the Commission.