In Case 258/78

1. L. C. NUNGESSER KG, Darmstadt,

2. KURT EISELE, Darmstadt,

represented by Jürgen Gündisch, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of Jeanne Jansen-Housse, Huissier, 21 Rue Aldringen,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Erich Zimmermann, acting as Agent, assisted by Hans Ulrich, Rechtsanwalt, Munich, with an address for service at the office of Oreste Montalto, a Member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

with the participation of:

the GOVERNMENT OF THE UNITED KINGDOM, represented by G. Dagtoglou, of the Treasury Solicitor's Office, acting as Agent, assisted by Robin Jacob QC, Barrister, of Gray's Inn, with an address for service in Luxembourg at the Embassy of the United Kingdom, 28 Boulevard Royal,

the GOVERNMENT OF THE FRENCH REPUBLIC, represented successively by Guy Ladreit de Lacharrière and by Noël Museux, acting as Agents, and by Alexandre Carnelutti, acting as Deputy Agent, with an address for service in Luxembourg at the Embassy of the French Republic, 2 Rue Bertholet,

the CAISSE DE GESTION DES LICENCES VÉGÉTALES, represented by Lise Funck-Brentano, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Mr Neuen-Kauffmann, 21 Rue Philippe-II,

and

the GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, represented by Martin Seidel, acting as Agent, assisted by Professor Dr Rudolf Lukes, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Émile-Reuter,

interveners,

APPLICATION for a declaration that Commission Decision No 78/823/EEC of 21 September 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.824 — breeders' rights — maize seed) (Official Journal 1978, L 286, p. 23) is void,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling and A. Chloros, Judges,

Advocate General: S. Rozès
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

A — The facts

1. The *Institut National de la Recherche Agronomique* [National Institute for Agricultural Research, hereinafter referred to as the "INRA"] is a French public body whose task is, *inter alia*, to carry out research with a view to improving and developing plant production. It has been successful in developing varieties of maize seed capable of being cultivated under temperate climatic conditions which hitherto had been considered unsuitable for the cultivation of maize. Thus it developed varieties known as INRA 190, 200 and 258 which are the subject of these proceedings. These are hybrid maize varieties, the seeds of which must each time be developed afresh from basic lines.

2. *Kurt Eisele* is a supplier of seeds in Darmstadt. He is the sole active partner and majority shareholder of the firm L. C. Nungesser KG (hereinafter referred to as "Nungesser"), which specializes in the production of, and trade in, seeds.

3. On 14 and 16 December 1960 INRA and Mr Eisele entered into a contract

under the terms of which Mr Eisele undertook to represent INRA before the Bundessortenamt [the German institution responsible for registering breeders' rights] for the purpose of securing the registration of the maize varieties developed by INRA (Clause 1). Mr Eisele also undertook to keep INRA informed of all matters relating to the marketing of those varieties in the Federal Republic of Germany (Clause 4).

By declarations dated 19 January and 8 February 1961 INRA assigned to Mr Eisele, with effect from 14 December 1960, breeder's rights in the Federal Republic of Germany for four varieties of maize seeds. Those declarations included the following clause: "To the extent to which the contents of this declaration amend the agreement entered into, that agreement is hereby amended by common accord."

Mr Eisele then had the maize varieties which had been developed by INRA registered with the Bundessortenamt and thus became the owner in the Federal Republic of Germany of breeder's rights over those varieties.

4. On 5 October 1965 INRA and Mr Eisele entered into a new agreement relating to six varieties of maize seed, which stated as follows:

"Clause 1

INRA confers on Mr Eisele the exclusive right to organize sales in the Federal Republic of Germany of its maize varieties (. . .). 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 to every German undertaking or cooperative which offers the necessary assurances, technical and other; the prices quoted to such undertakings up to the level of agricultural cooperatives shall be fixed in agreement with INRA; such prices are to take into account the selling prices of French exporters (. . .).

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 (. . .). On payment of a royalty 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 seeds necessary to satisfy the German market.

Clause 4

Mr Eisele undertakes to enforce INRA's proprietary rights in its varieties, in particular against passing-off; he is authorized to use the INRA trade mark, which is internationally protected, and shall have all powers to take such action as may be necessary.

Clause 5

INRA undertakes to ensure that the relevant organization shall take all necessary steps to prevent INRA maize varieties from being exported to the Federal Republic of Germany otherwise than by way of Mr Eisele."

5. That agreement thus conferred on Mr Eisele the exclusive right to produce and distribute INRA varieties in the Federal Republic of Germany. Mr Eisele assigned those exclusive rights to Nungesser. That company was thus subrogated to Mr Eisele's rights under the contract with INRA, save as regards the registration of varieties with the Bundessortenamt, which is always performed in Mr Eisele's name.

It is thus Nungesser which carries out the transactions arising out of the performance of the contract of 5 October 1965. Until 1973/74 approximately 20% of that company's total sales in the Federal Republic of Germany were accounted for by INRA varieties. The INRA seeds sold by Nungesser from 1960 to 1972 accounted for more than 50% of the German market in each year. Since 1974 that proportion has diminished but Mr Eisele has kept his total share of the German market above 25% because in the meantime, without any objection from INRA, he has become the exclusive licensee of the French cooperative Limagrain.

6. For its part, INRA, which, because of its status as a body established under public law, is not empowered to exploit its own varieties commercially, granted an exclusive licence for that purpose to *Frasema*, a French company trading in maize seeds. To that effect it transferred to Frasema, by agreement of 13 August 1973, responsibility for the performance of all contracts which it had previously entered into.

Frasema, which was set up on 18 June 1973, is responsible, *inter alia*, for the production and sale of basic INRA seeds and for the sale and purchase of INRA seeds for export. Its 18 shareholders are all suppliers of maize seed operating in France; more than 60% of its share capital is held by the four main suppliers, one of which is Limagrain.

7. In accordance with Article 4 of Regulation No 17 of the Council of 6 February 1962, the First regulation implementing Articles 85 and 86 of the EEC Treaty, (Official Journal, English Special Edition, 1959 to 1962, p. 87) the contract of 5 October 1965 was notified to the Commission on 1 November 1965.

8. In application of the agreements in question importation and resale in the Federal Republic of Germany by third parties were prevented by threats of legal action by Frasema and by Mr Eisele.

Thus the undertaking *Louis David KG* had to conclude a settlement on 14 September 1973 before the Landgericht [Regional Court] Bad Kreuznach. Under that settlement it was to pay the sum of DM 4 000 damages for importing from France and re-selling in the Federal Republic of Germany, without Mr Eisele's authorization, 15 tonnes of certified seed of INRA varieties. Furthermore, it undertook to refrain from selling or putting into circulation in the future seeds of INRA varieties without Mr Eisele's consent.

9. Similarly, the undertaking *Robert Bomberault*, of Argent-sur-Sauldre (Cher), which had inserted an advertisement in the journal "Ernährungsdienst", published in Hanover by the Alfred-Strothe-Verlag, offering for sale for the first time certified INRA seed which it had lawfully acquired in

France from producers who were members of Frasema, was not permitted to insert further similar advertisements. The reason given for that refusal was that pressure, including threats of proceedings, had been exerted against the publisher, lest he repeat those advertisements, both by Mr Eisele and by Frasema in reliance on Mr Eisele's exclusive contractual rights and on the legislative provisions governing breeders' rights. Frasema exerted similar pressure on Mr Bomberault to deter him from exporting to Germany, in particular by means of several telex messages dated 20, 21 and 22 February 1974.

Following the insertion by Eisele in the same journal of a general warning against any importation of INRA seeds without his authority, certain German undertakings which had expressed interest in Mr Bomberault's offer notified him by telex that they were no longer interested for fear of legal proceedings.

10. In accordance with Article 3 of Regulation No 17 Mr Bomberault lodged a complaint with the Commission on 20 February 1974.

Pursuant to that complaint, and having regard to the notification of the contract in 1965, the Commission intiated the procedure in this case on 25 October 1976.

B — The decision

On 21 September 1978 the Commission adopted Decision No 78/723/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/28.824 — breeders' rights — maize seed) (Official Journal 1978, L 286, p. 23). That decision forms the subject-matter of these proceedings.

Article 4 states that the decision is addressed to INRA, Frasema, Mr Eisele, Nungesser and Louis David KG.

1. The operative part

The operative part of the decision is worded 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 breeders' 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 David 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

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.

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;

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.

..."

2. Summary of the statement of reasons on which the decision is based

The exclusivity of the licence

As regards the restrictive nature of the exclusive licence granted to Mr Eisele, the Commission considered that, by licensing a single undertaking to exploit its breeders' rights in a given territory, the licensor deprived itself for the entire duration of the contract of the ability to issue licences to other undertakings in the same territory, thereby eliminating them as competing suppliers in that

territory. By undertaking not to produce or sell the product itself in the territory covered by the contract the licensor likewise eliminated itself, and also Frasema and its members, as suppliers in that territory.

Furthermore, the fact that third parties may not, without authorization from INRA or Mr Eisele, import the seeds in question into Germany or export them from Germany leads to market sharing and deprives German farmers of any real room for negotiation since those seeds are supplied by one supplier only.

The grant to Mr Eisele of exclusive rights over INRA plant varieties was a decisive element in the establishment of the distribution system for INRA varieties in the Federal Republic of Germany, in so far as the formal status of the licensee could then be used to oppose any importation of original products and thus to reinforce the exclusive nature of the licence both as regards the licensor and as regards third parties.

Inapplicability of Regulation No 26

The Commission considered furthermore that the exemption provided for in Article 2 of Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (Official Journal, English Special Edition, 1959 to 1962, p. 129) does not apply to the present case, in particular for the following reasons:

(i) The agreements do not form an integral part of, or an extension of, a national market organization for maize seeds.

(ii) The agreements are not necessary for the attainment of the objectives set out in Article 39 of the Treaty. The means necessary for that purpose were defined in Regulation (EEC) No 2358/71 of the Council of 26 October 1971 on the common organization of the market in seeds (Official Journal, English Special Edition 1971, (III) p. 894), and the agreements cannot in any way be considered to all within the provisions of that regulation.

Particular characteristics of seeds

As to the possible inadvisability of a strict application of the rules on competition, in view of the particular characteristics of seeds and the specific subject-matter of breeder's rights, the Commission considered that the products concerned were marketed under the producer's responsibility and in accordance with official regulations specially designed to reduce the risks due to their particular charactristics as vegetable products. Since the 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, Article 36 of the Treaty cannot be invoked to justify barriers to the free movement of seeds which have been officially certified and thus approved for sale.

The inapplicability of Article 85 (3) of the Treaty

The Commission considered that, as in the case of a patent, exclusive propagation rights granted by the owner of breeders' rights to a licensee within the common market are, in principle, capable of being considered to have

satisfied the tests for exemption under Article 85 (3). There are even circumstances in which exclusive selling rights linked with prohibitions against exporting might also be exempted, for example, when the exlusivity is needed to protect small or medium-sized undertakings in their attempts to penetrate a new market or promote a new product, provided that parallel imports are not restricted at the same time.

In the present case, however, the Commission left open the assessment under Article 85 (3) of the exlusive propagation rights granted to Mr Eisele, since, in its opinion, the tests for exemption of the exclusive selling rights and the accompanying export prohibitions are in any event not satisfied. This is for the following reasons:

(i) There is no question of a new market being penetrated or a new product being launched;

(ii) In any event, Mr Eisele enjoys absolute territorial protection. All imports through other channels are prevented, notwithstanding a persistent demand for such imports in Germany, so that there is no question of an improvement in the production or distribution of goods as required by the first condition laid down by Article 85 (3).

Furthermore, the consequence of the system of exclusive distribution established was that INRA varieties could be re-sold to German users at a price level which, in relation to prices prevailing in France, precluded them from obtaining a fair share of the resulting benefits within the meaning of Article 85 (3).

C — Procedure

It is against that decision, which was notified to them on 27 September 1978, that the applicants brought the present application. The application was lodged at the Court Registry on 27 November 1978.

By orders of 19 April 1979, 24 July 1979, 12 September 1979 and 30 January 1980 respectively the Court allowed the United Kingdom, the French Republic, the Caisse de Gestion des Licences Végétales and the Federal Republic of Germany to intervene in the proceedings.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court, by letters dated 2 October 1980, invited the parties to supply further information on certain questions of fact, namely:

(a) the varieties of maize seed at issue in the present case,

(b) the price levels prevailing for those seeds in France and Germany during the years prior to the Commission's decision, and

(c) the services which Nungesser in practice provided in order to make the varieties of maize seed in question usable in Germany.

The parties were invited to meet to see whether those questions could be agreed between them before the opening of the oral procedure. Such a meeting was held on 19 January 1981 at the Court of Justice. The outcome was that the parties did not reach agreement on all the points at issue but each of them gave certain supplementary information.

II — Conclusions of the parties

The *applicants* claim that the Court should:

Declare the decision of the Commission of 21 September 1978 void, with the exception however of that part of Article 1 (b) of the decision which provides that the licensee may not, for the duration of the contract, produce or sell seeds of a variety which competes with those of INRA and also that part which relates to Clauses 2 and 3 of the contract of 5 October 1965.

The *defendant* contends that the Court should:

Dismiss the application as unfounded and order the applicants to pay the costs.

III — Submissions and arguments of the parties

The applicants make the following submissions:

Infringement of Articles 30, 36 and 85 (1) and (2) of the Treaty;

Infringement of Regulation No 17, and in particular Articles 4 and 8 thereof, and of Regulation No 26;

Misuse of powers, inasmuch as the Commission did not accurately establish the facts and departed from the consistent administrative practice which it had followed previously.

A — The facts

1. Services performed by Mr Eisele:

(a) Germinating capacity and germinating energy

The *applicants* maintain that the Commission based its assessment of the effects of the contracts in question on the assumption that the batches of maize seed marketed in France and those exported to Germany are broadly comparable. The contested decision was also founded on that assumption. It is, however, erroneous. In particular, it disregards the considerable services which Mr Eisele had to provide to adapt the French seeds to the requirements of the German market.

To illustrate that problem, the applicants begin by explaining the requirements laid down in Germany as regards the germinating capacity ("Keimfähigkeit") and germinating energy ("Triebkraft") of maize seeds.

Germinating capacity is the maximum capacity of a seed to germinate in the most favourable laboratory conditions possible. *Germinating energy* is the capacity of the same seed to grow under difficult cultivating conditions, for example in a cold or dry climate.

It is possible for a maize seed which achieves a high germinating capacity to possess a low germinating energy. According to the applicants, the Commission is overlooking the differences which exist in this respect between France and Germany. In France, where the conditions for growing maize are more favourable, germinating energy is not governed by any special regulations.

Community rules relating to germinating capacity are laid down by Directive 66/402 of the Council of 14 June 1966 on the marketing of cereal seed (Official Journal, English Special Edition, 1965-1966, p. 143). In respect of maize seed the *minimum germinating capacity for marketing is fixed at 90 %* of pure seed. However, on account of the poor climatic conditions prevailing in Germany, German legislation requires, in addition to a germinating capacity of 90 %, a minimum germinating energy of 85 % (Saatgutverordnung-Landwirtschaft [Regulation relating to seeds in agriculture] of 2 July 1975, BGBl, I, p. 1659).

INRA maize seeds imported from France, although having a germinating

capacity of 90 %, are likely to show a germinating energy which is too low to enable them to be marketed in Germany, as has proved to be the case in practice. Therefore the role of Nungesser did not merely consist in buying and selling seeds imported from France, but in the continual adaption of those seeds to the requirements of the German legislation and to the cultivating conditions for maize in Germany. The applicants must in fact always ensure that the quality of the seeds as required by the regulations in force and by the users is not compromised.

The *Commission* considers that the applicants obtained from France INRA maize seeds of the same quality as any French or German dealer could have obtained from the French producers.

It observes that the right reserved to Member States by Article 5 of Directive 66/402 to lay down more stringent supplementary conditions is confined to seeds produced within the national territory. Therefore trade in seeds from another Member State of the Community may not be made subject to legislative or administrative restrictions on the part of the German authorities. In the present case, moreover, trade was not restricted.

Therefore the requirement of a minimum germinating energy provided for under German law (since 1977 85 %, previously 75 %) merely concerned seeds produced in Germany.

Moreover, Article 23 (2) of the Saatgutverkehrsgesetz [Law on the marketing of seeds] of 1 July 1975 (BGBl. I, p. 1453) defines those cases in which seeds are not required to be certified for importation. The second sentence of that provision states that:

"Where seeds have been certified or admitted in another Member State of the European Economic Community, it is sufficient ... for the seeds to satisfy the requirements laid down in that other Member State, provided that those conditions are at least as stringent as the conditions for certification or admission which are laid down in the directives of the Council or the Commission of the European Economic Community relating to trade in seeds and plants ..."

Therefore, in the Commission's view, maize seeds certified in France could be imported into Germany without formalities, the French certification being in compliance with the requirements laid down by Directive 66/402.

In reply to the questions raised by the Court, the *applicants* stated that the 1966 directive had laid down for maize seeds a minimum germinating capacity of 90 % of pure seed. Under the terms of Article 4 of the directive Member States may reduce that figure to 85 %. Article 5 of the directive permits Member States to impose additional or more stringent requirements, in particular as regards germinating capacity, in respect of seeds produced in their own territory.

The applicants stated that German legislation had since 31 May 1968 required a minimum germinating capacity of 85 % of pure seed. Moreover, a *supplementary* requirement of a germinating energy not less than 75 % of pure seed is laid down for maize. As from 23 May 1977 those requirements have been modified. The minimum germinating capacity has been increased to 90 % to conform with Community standards and the *supplementary* requirement relating to germinating energy has been fixed at 85 %.

The applicants stress that since 1968 *all the requirements* relating to the properties of seeds, *thus including germinating energy,* have had to be supervised by official bodies (Article 12 (1) (2) in conjunction with Article 10 of the Getreidesaatgut-Verordnung of 31 May 1968, BGBl. I, p. 566).

Before 1968 German law did not provide for any control of germinating energy except where the minimum germinating capacity had not been achieved.

The applicants observe also that Nungesser produced a part of its seeds of INRA varieties in Germany and imported another part. If the germinating energy of the imported seeds had not been tested there would have been a risk that the imported varieties and the varieties produced by Nungesser might show different levels of quality. Nungesser could not accept such differences because users legitimately expected that all the INRA varieties of maize seed marketed by it should show the same levels of quality.

The *Commission* affirms that the applicant's statements are correct as regards German and Community legislation. It acknowledges that in order to comply with the German regulations laid down in 1968 it was always necessary to check the germinating energy as well as the germinating capacity of maize seeds.

It maintains however that, according to Article 23 (2) of the Saatgutverkehrsgesetz of 1 July 1975, for the seed to be imported it is sufficient that it be certified or admitted in another Member State of the EEC.

Furthermore, it is of the opinion that the applicants have not demonstrated that the controls carried out on the imported seeds showed that, in spite of a germinating capacity of 90 % or more, that germinating energy required by German legislation (75 % and 85 %) had not been achieved.

(b) Chemical treatment

The *applicants* observe that in France seeds are treated with chemical substances the use of which is not authorized in Germany. That fact prevented seeds officially certified and marketed in France from freely crossing the border into Germany.

The *Commission* disputes that assertion. Although in France a different product is used, that product contains the same chemical agent (Anthraquinone), in respect of which French legislation allows the same dosage for the disinfection of seeds.

In reply to the questions raised by the Court, the *applicants* state that plant treatment products may only be imported into Germany if they have been approved by the Biologische Bundesanstalt für Land- und Forstwirtschaft [Federal Biological Institute for Agriculture and Forestry]. The product Anthraquinone does not appear in the list of products permitted in Germany.

The *Commission* replies by stating that it is not a question in the present case of the importation of treatment products.

On the other hand, as regards the problem of seeds imported from another Member State and treated with plant protection products, Article 23 (2) of the Saatgutverkehrsgesetz of 1 July 1975 permits the importation of seeds which satisfy the conditions applicable in another Member State of the EEC.

Moreover, the treatment product Anthraquinone is authorized in France and Germany.

(c) Sizing

The *applicants* state that maize seeds grow in very different forms; they may be small or large, round or flat, etc. The seed dispensers must place a single seed in the hole provided for that purpose and they can only do that if the seeds has been regularly graded, that is to say sized. Since such dispensers are marketed in France and Germany by different manufacturers, which advocate different systems and models, the seeds have to satisfy different requirements, as regards sizing, in those two countries.

The applicants claim to perform an important function in the matter of sizing, inasmuch as they determine the different sizes and supply farmers with the necessary information about the sowing discs to be used for each model of dispenser.

The *Commission* does not dispute that sizing is of importance in sowing seeds. However, it does not consider that the activity of the applicants is important in that respect. French producers offer INRA maize seeds in a series of sizes — around 12 to 14 — from which purchasers may make their choice. In the same way every German or French dealer may choose from among the French producers the grain sizes which he wishes to purchase.

2. The prices of INRA maize seeds in Germany and France

The contested decision stated that the absolute territorial protection enjoyed by the applicants enabled them to make German farmers bear far higher prices than those charged in France for seeds that are absolutely identical. The applicants dispute the figures put forward by the Commission, maintaining that there was no significant difference between the price levels prevailing in France and Germany or in any event that the difference between those price levels was not as great as the Commission alleged.

The information given by the parties on the prices of INRA maize seeds in Germany and France is summarized in the following table:

	1972	1973	1974	1975
Prices in *France* according to the *Commission*	FF 3.00	FF 3.00	FF 3.10	FF 4.00
Prices in *France* according to the *applicants*	FF 7.00	FF 3.55	FF 3.90	FF 4.20
	1972	1973	1974	1975
Prices in *Germany* according to the *Commission*	DM 2.70	DM 2.80	DM 2.85	DM 2.90
Prices in *Germany* according to the *applicants*	DM 2.51	DM 2.65	DM 2.70	DM 2.80

The *Commission* states that the prices which it based itself upon are average prices charged for 1 kg of Inrakorn (258) exclusive of VAT, at the same stage of distribution. The French prices were calculated on the basis of figures originating from 10 of the main regional agricultural cooperatives.

The German prices were calculated by the Commission on the basis of information supplied by Nungesser and by the firm Stroetmann in application of Article 11 of Regulation No 17.

In the *applicant's* view, the prices which the Commission based itself upon as regards France are not representative. The Commission carried out its inquiries largely in the vicinity of Paris and did not take account of the main areas of demand for maize seeds. Furthermore, the Commission simply calculated the average of the prices gathered, without carrying out any weighting.

The *Commission* maintains that it was merely important to show that German farmers had to pay higher prices than French farmers. The aim of the comparison of the prices charged in Germany and France was not to demonstrate that the applicants had made themselves liable to proceedings for abuse of a dominant position by charging excessive prices. For the Commission, it was simply a question of determining the extent of the differences in price, which moreover are not in the order of 2 % to 20 %, as the applicants amintain, but sometimes of 50 % and more.

The Commission confined its inquiry concerning prices to the 10 cooperatives in question because those cooperatives are responsible for a considerable proportion of the distribution of maize seed in France. That proportion amounts to between a quarter and a third of the total distribution of seeds in France.

In reply to the questions raised by the Court, the *applicants* conceded that, as regards the prices charged in Germany, the difference between their figures and those put forward by the Commission is not of such a nature as to influence the decision which the Court is called upon to take. On the other hand, as to the prices charged in France, the differences between the parties remained considerable.

In support of their arguments in that connection the applicants submitted a study by the Institut de Gestion et d'Economie Rurale [Institute for Rural Management and Economy] of May 1980 which gives the average costs per hectare of maize seeds for the years 1971-72 and 1974 to 1977. The resulting figures for the prices of maize seeds were as follows:

1972: FF 416-500 per 100 kg
1974: FF 557-668 per 100 kg
1975: FF 647-776 per 100 kg.

Furthermore, they produced a letter from the Association Générale des Producteurs de Maïs [General Association of Maize Producers] of 3 April 1981 from which it appears that the "recommended prices" for the variety INRA 258 were:

1972: FF 357.50
1973: FF 377.00
1974: FF 396.50
1975: FF 422.50.

In the light of those figures the applicants make the following adjustment to their figures for prices in France (prices per 100 kg):

1972: FF 460
1973: FF 355
1974: FF 390
1975: FF 420.

As regards the structure of the maize-seed market in France, the applicants observe that there are many more private traders selling maize seed (1 393) than cooperatives (523). The share of the market held by the private sector is in the order of 65 to 70 %, whilst the share held by cooparatives may be estimated at between 30 and 35 %. Therefore the information supplied by the Commission is not representative. The applicants add that the market for seed in France reveals considerable fluctuations in price and that those fluctuations are due to the activities of the private sector, the cooperatives confining themselves as a general rule to the regular supplying of their clients.

The *Commission* considers that the documents submitted by the applicants reveal nothing about the retail prices charged by private traders in general nor about the prices of INRA varieties in particular. The study undertaken by the Institut de Gestion et d'Economie Rurale does not constitute an inquiry into price formation on the French maize-seed market but an investigation into the profitability of the cultivation of maize in general. The study cites no prices and merely mentions costs without any indication as to the way in which the prices which form the basis for the calculation of those costs were ascertained. Nor does it say anything about the considerable fluctuations observed by the applicants in prices paid by users.

The documents from the Association Générale des Producteurs de Maïs do not help to clarify that information either. In so far as they contain any reference to prices, those are not real prices but merely the prices recommended by the seed producers.

The information submitted by the applicants as regards the respective shares of cooperatives and private traders in the total volume of transactions carried out in France on the maize-seed market consists of mere assertions. Against those assertions the Commission submits an article published in the specialized press ("La distribution des semences de maïs", appearing in Semences et Progrès No 22, October/December 1979, pp. 21 to 23) which shows that 57 % of sales to farmers were effected by cooperatives and 43 % by private traders. The average figures for sales to farmers are 617 quintals per cooperative and 126 quintals per trader.

Under those circumstances the Commission adheres to the information on prices which it gave previously. It also observes that it based its calculations on figures supplied by the 10 most important cooperatives of the French departments where the production of maize is highest.

Moreover, it claims that the French subsidiary of Nungesser in Strasbourg charged the following prices:

1972: FF 3.20-3.35
1973: FF 3.20-3.30
1974: F 3.50-3.55
1975: FF 4.20-4.30

so that there were considerable differences from the prices charged in Germany.

B — Legal appraisal

1. The subject-matter of the decision

The *applicants* claim that the Commission's decision was wrong in Article 1 (a) to include the contract of 14

and 16 December 1960. That contract was substantially nullified by the declarations of 19 January and 9 February 1961. An assignment of breeders' rights took the place of the representation of INRA by Mr Eisele for the purpose of registering the varieties with the Bundessortenamt. That was necessary because entry in the German list of varieties was only possible through the intermediary of a German breeder.

Therefore Mr Eisele cannot claim any breeders' rights under the contract of 14 and 16 December 1960, which no longer exists. To declare that contract contrary to Article 85 (1) amounts to a misuse of powers. Mr Eisele may, however, continue to assert his breeders' rights by virtue of the assignment dated 19 January and 9 February 1961, which is not affected by the Commission's decision.

The *Commission* maintains that the contract of 14 and 16 December was not superseded by the subsequent decision. The assignment merely amended that contract, which was to continue in force. It is for that reason that the declarations of assignment were antedated to 14 December 1960 and the preamble to the agreement of 1965 still referred to the contract of 1960.

The retroactive attachment of the declarations of assignment of January 1961 to the contract of December 1960 indicates that those declarations were to be used to organize sales in Germany of INRA maize varieties for which the contract of 1960 had prepared the way. Thus they did not confer an economically autonomous status as owner of breeder's rights on Mr Eisele.

The assignment was merely a formal assignment intended to obviate the obstacles then posed by German legislation which impeded the registration of foreign varieties in the German list of varieties. It was necessary to transform a foreign variety into a national variety by means of an assignment of the variety to a German national. Registration then enabled a formal legal position to be acquired permitting absolute territorial protection. Thus the assignment, whilst formally valid, ought not however to be regarded, from an economic point of view, as constituting anything other than one aspect of the selling rights conferred on Mr Eisele.

The Commission stresses, moreover, that the decision states in Article 1 thereof that it relates to "the content . . . of the contract of 14 and 16 December 1960 by which INRA *assigned* to Mr Eisele the breeder's rights in Germany". Therefore the decision also relates to the assignment.

2. Community rules on competition and breeders' rights

The *applicants* state that under the terms of Article 12 of the Sortenschutzgesetz [Law on the protection of plant species] of 20 May 1968 (BGBl. I p. 429) breeders' rights belong to the person entitled. That person is the person who is responsible for the cultivation or the discovery of the variety in question or his successor in title. By virtue of the agreement of 19 January and 9 February 1961 Mr Eisele is the successor in title to the producer, INRA. By virtue of the first paragraph of Article 15 of the aforementioned Law Mr Eisele became the owner of the exclusive right to

produce for sale and to sell seeds obtained by propagating seeds of the protected variety.

According to the applicants, the first paragraph of Article 15 of that Law also entitles the owner of breeders' rights to *prohibit* the importation, without his authorization, of seeds of the protected variety into Germany. That is the interpretation which the Bundesgerichtshof [Federal Court of Justice] gave to Articles 6 and 35 of the former Law on seeds, which was similar in terms to the present Law, in a judgment delivered on 29 February 1968 (GRUR 1969, p. 195) concerning the potato variety "Voran". The Bundesgerichtshof founded its judgment on the principle of territoriality, which applies as much to the law on the protection of plant species — and with greater justification — as to the law on patents.

The Commission, in the contested decision, sought to circumvent the legal consequences arising from German law by applying competition law. That application is, however, incompatible with the interpretation generally given to the laws on the protection of new plant varieties in force in most Member States. Those laws were adopted in implementation of the International Convention signed in Paris on 2 December 1961 for the Protection of New Varieties of Plants (United Nations Treaty Series, Vol. 815 p. 89). That Convention also adopted the principle of territoriality.

The applicants submit that the principles enunciated by the Court as regards possible breaches of Community law by the exercise of industrial property rights may not be applied to the present case because breeders' rights have specific characteristics which demand a strict application of the principle of territoriality.

First, the cultivation of seeds depends on climatic conditions and the nature of the soil, each variety requiring a particular treatment.

Secondly, hybrid seeds must constantly be reproduced by a biological process in order to maintain them.

Thirdly, the introduction of a new variety of seed and the care it must receive will require, in contrast to an industrial patent, more intensive efforts, which must be tailored to the individual characteristics of a country.

The *Commission* first reviews the previous decisions of the Court, which has laid down the principle that the grant of exclusive rights with the purpose of protecting absolutely the marketing of products within a particular territory against the importation of identical products constitutes a breach of the rules designed to protect free competition (judgment of 13 July 1966 in Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299; judgment of 18 February 1971 in Case 40/70 *Sirena* v *Eda* [1971] ECR 69; judgment of 15 June 1976 in Case 51/75 *EMI Records* v *CBS United Kingdom* [1976] ECR 811; judgment of 20 June 1978 in Case 28/77 *Tepea* v *Commission* [1978] ECR 1391).

The contested decision is based on those same principles. The adverse effects on trade between the Member States is a direct consequence of the absolute territorial protection established for France and Germany. As the decision indicates the applicants have, in collaboration with INRA or Frasema, infringed Article 85 (1) of the EEC Treaty because, in the first place, Mr Eisele, on the basis of a contract granting him exclusive selling rights acquired breeders' rights which enabled him to receive absolute territorial

protection on the national market on which he enjoyed those exclusive rights and, secondly, he actually exploited those rights, in agreement with the other party to the contract, in such a way as to protect his market by giving additional contractual protection to those rights against exports.

As regards the objections which the applicants have raised, based on the nature of breeders' rights, the Commission stresses that the judgments of the Court make a clear distinction between two different cases; first, the unilateral exercise by an undertaking of its industrial property rights, which are limited by the principle of free movement (Article 30 of the Treaty), regard being had to the particular nature of the rights invoked and to the reasons justifying the exercise of those rights (Article 36 of the Treaty), and, secondly, a bilateral concerted practice between two undertakings with regard to the exercise of those rights or a unilateral exercise based on an agreement restricting competition, in which case those justifications do not have the same importance. In fact in the latter hypothesis, which corresponds to the present case, the objective of exclusivity ceases to be legitimate to the extent to which the exclusivity is relied upon to further a practice or agreement restricting competiton.

Nor does Community law tolerate obstacles to parallel imports in the case of breeders' rights (judgment of 31 October 1974 in Case 15/74 *Centrafarm* v *Sterling Drug* [1974] ECR 1147; judgment of 29 February 1968 in Case 24/67 *Parke, Davis & Co.* v *Probel and Others* [1968] ECR 55; judgment of 8 June 1971 in Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487).

Historically, breeders' rights are merely an emanation of the law of patents. That relationship manifests itself in the structure of the two rights of property, in the same way that any divergencies between them may be explained by the natural differences existing between their respective subject-matter. Thus both German law and French law grant the same opportunities of exploiting those rights to the holder of the patent and to the registered breeder, save as regards the "utilization" of seeds because it would then be prohibited to use them for the purposes for which they are ordinarily intended. For similar reasons the opportunity of creating derived varieties must remain open. As in the law of patents, protection is limited in time and is only conferred in return for consideration and in the public interest. It is for that reason that the law on patents imposes the obligation of publication, which is intended to ensure, on expiry of the period of protection, the enrichment of collective knowledge, and it is for that reason also that the law on breeders' rights imposes on the breeder the duty to ensure the continuance and maintenance of the protected variety.

Moreover, national laws governing breeders' rights, like national laws on patents, recognize the principle of the exhaustion of rights as soon as the holder or any person authorized by him markets for the first time the protected article.

In the Commission's view, that means in particular — and this is generally consistent with the purpose of breeders' rights — that the protection conferred by exclusive rights covers only the identity of the variety as it appears in the definition of its distinct character. Measures to conserve quality, measures to protect reputation and related matters such as the control of sales are not included. One reason for that is that only the task of breeding as such, that is

to say the creation or the discovery of a new variety, is covered by protection against any imitation by third parties. On the other hand, the maintenance and the guarantee of performance of the variety in different environments do not come within the scope of breeders' rights and are alien to their purpose.

The Commission considers that the reference to the principle of "territoriality" in connection with breeders' rights ignores the fact that a distinction based on that principle inevitably leads to a conflict with the fundamental principles of the organization of the common market.

The Commission emphasizes that it is clear from Article 15 (4) of the Sortenschutzgesetz that the authorization of the owner is not necessary where material for the propagation of the protected variety is brought into a territory where a corresponding degree of protection is guaranteed for varieties of that species. From that it infers that German law at present recognizes that in principle exhaustion of rights must also operate at international level.

Moreover, the wording of Article 15 (4) was specially amended in the light of the Convention of 2 December 1961 for the Protection of New Varieties of Plants, which shows that a refusal to grant protection against parallel imports is compatible with the Convention.

Therefore the applicants' argument to the effect that breeders' rights display special characteristics tied to climatic conditions and the nature of the soil, and thus to national particularities, is not pertinent. Those are factors which only come into play after production and marketing of the seeds and which do not concern the specific subject-matter of the protection of new plant varieties. Those are environmental conditions which affect all varieties, even those which are not protected.

In conclusion, if an exception to the principle of free movement is not justified in this case the principles laid down by the Court in its judgment of 31 October 1974 in *Centrafarm* v *Sterling Drug* are applicable. In the Commission's view, the applicants could not therefore, under the guise of the protection of new plant varieties, invoke a right to oppose imports of products which had already been marketed in France by the French owner of the right himself or with his approval. The reason is that the particularities of a derived acquisition must be taken into account, at least where there are links between assignor and assignee which, from the economic point of view, lead to a division of losses and profits resulting from the exploitation of the exclusion right between the owners thereof. Such a link exists in the present case. In such a case the original owner of the property right is assured, in conformity with his wishes and the arrangements he has made, of the reward which the specific subject-matter of the property right is supposed to bring him.

3. Exclusivity and rules of competition

The *applicants* observe that Article 1 (b) of the Commission's decision declares Clause 1 of the contract of 5 October in breach of Article 85 (1) of the EEC Treaty to the extent to which the exclusivity of the licence granted by INRA is interpreted as entailing

"Mr Eisele's concurrent use of his exclusive contractual rights and his own breeder's rights to prevent all imports of the relevant seeds".

That part of the Commission's decision refers to two matters: first, the use by Mr Eisele of his exclusive contractual rights and, secondly, the use of his own breeder's rights to prevent all imports of INRA products. Both are declared to be contrary to Community law.

In so far as the contract of 5 October 1965 is declared contrary to Community law by reason of Mr Eisele's use of his *exclusive contractual rights* to prevent all imports, the decision is absurd and ought to be declared void as being vitiated by a misuse of powers.

In so far as that part of the decision prohibits Mr Eisele from using his *breeders' rights* to prevent all imports of INRA products into Germany, the applicants refer to their observations presented above (under 2).

As regards the exclusive licence, the applicants submit that it is not contrary to Community law. That is clear from the Community Patent Convention (Official Journal 1976, L 17, p. 1).

Under the terms of Article 43 (1) of that Convention, a Community patent may be licensed in whole or in part for the whole or part of the territory in which it is effective; a licence may be exclusive or non-exclusive.

The proprietor of a Community patent is thus entitled to grant an exclusive licence of his patent delimited as to territory. For example, if INRA had been the proprietor of a Community patent it could have granted an exclusive licence to Nungesser in respect of the territory of the Federal Republic of Germany. That provision of the Community Patent Convention demonstrates that Member States were and remain of the opinion that it is possible by means of a patent licence to grant exclusive exploiting rights delimited as to territory.

In the defence, the *Commission* points out that the contract of 1965 confers on Mr Eisele the exclusive right to sell INRA maize seeds and to produce one third of the total quantity of seeds sold by his efforts. The signing of that contract is thus equivalent to *the granting of an exclusive licence covering breeders' rights* assigned to Mr Eisele for the reasons already described.

The Commission sets forth in detail the reasons of a legal nature for which it considers itself bound to examine, in the light of Article 85 of the EEC Treaty, licensing agreements in which the owner of the property right undertakes to confer rights of user on *one licensee* only, to the exclusion of any other person. It considers that such an undertaking by the owner of the right of property restricts the freedom of action conferred upon him by that right. In fact the owner could neither grant a licence to third parties desirous of obtaining one, nor exercise his property rights himself. By that fact the competition which, in the absence of that *contractual* obligation, would be possible between several licensees or between licensees and other undertakings is prevented. In addition the dissemination of new knowledge is impeded.

In principle restrictions of the freedom of contract or freedom of user enjoyed by the owner of property rights should not be treated differently from other con-

tractual restrictions on the freedom of action of an undertaking. On the contrary, such restrictions must be examined in the light of Article 85 (1) of the Treaty.

That examination must necessarily be supplemented by an examination in the light of Article 85 (3) of the Treaty; that provision provides for the granting of exemptions where the test of promoting technical progress is met, a test which was specifically designed for patent-licensing agreements and which such agreements frequently satisfy. It is for that reason that the Commission is of the opinion that the application of *all* the provisions of Article 85 of the Treaty to exclusive licences can guarantee the balance which should exist between the protection of patents or new varieties and freedom of competition, that is to say promotion of technical progress, on the one hand, and the dissemination of the technical progress thus encouraged, on the other hand.

To avoid misunderstandings, the Commission states that an exclusive licence may not escape examination under Article 85 (1) by the mere fact that it resembles an assignment and so merely displaces or transfers to the licensee the owner's right to preclude third parties from using his invention or his variety. In fact, unlike an outright assignment to an independent third party, a licence constitutes a *division* by way of contract of the right to exploit property rights as between the licensor and the licensee. Consequently, as a result of the contractual relationship, the exploitation of the property rights and therefore competition may be influenced and steered in a concerted manner depending upon the position occupied on the market by the parties to the contract and by their competitors. Neither of the two parties may act independently and without regard to the financial interest of the other. These are *effects of the contract*, not effects of the property rights. Therefore the legal scope of the property right cannot justify the far-reaching restriction of competiton sought or obtained by the contract. What is decisive under Article 85 is the extent to which competition would have been possible without the existence of the restrictive obligation imposed upon the owner of the property right.

As regards the Community Patent Convention, the Commission maintains that the Contracting States confined themselves to making it possible to grant exclusive licences under patent law. They did not prejudge the validity of such licences under the law relating to concerted practices.

In their reply, the *applicants* maintain that the possibility of granting an exclusive licence is an integral part of breeders' rights. The *economic reason*, and thus the justification, for making such rights assignable is to be found in the fact that it is often only by an assignment of his rights that the inventor or the breeder is able to exploit them economically. In fact inventors or breeders are often not in a position to exploit their rights themselves. The rights are then assigned to an undertaking which exploits the invention or variety and allows the inventor or breeder to profit from it by paying him for making the fruits of his research available to the public. The possibility of granting an exclusive licence also serves to ensure that the inventor or breeder obtains a reward for his intellectual achievements.

To state that an exclusive licence constitutes a restriction on competition,

as the Commission is stating, does not justify the application of Article 85 (1) of the EEC Treaty. In principle, Community rules on competition do not in fact override the traditional rights protecting industrial property. Any patent right or breeder's right constitutes in itself a restriction on competition since the right of exclusive user which is reserved to the inventor or the breeder precludes the invention or the new variety from being exploited by third parties. Assignments are likewise restrictions on competition since the inventor or the breeder who assigns his rights is precluded from exploiting his invention or new variety thereafter. But the Commission is surely not of the opinion that any assignment of industrial property rights constitutes an infringement of Article 85 (1).

As regards the Community Patent Convention, the applicants recall that, according to the Commission, the Contracting States did not consider that an exclusive licence could legally be granted, the intention of the Contracting Parties being confined to patent law.

That argument of the Commission is only of value at first sight. It would be valid if exclusive territorial licences were in principle lawful both under patent law, as it is formulated in the Convention, and under the competition rules of the EEC Treaty, and if the possibility of a collision between those two systems existed only in certain cases; that collision would then fall to be resolved by reference to the competition rules of the EEC Treaty.

However, the Commission's observations on the significance of an exclusive licence demonstrate with abundant clarity that the Commission regards *an exclusive licence itself as an unlawful restriction* on competition constituting by its very nature a breach of Articles 85 (1) of the Treaty.

In its rejoinder, the *Commission* states that an assignment constitutes a simple transaction which does not establish any lasting contractual relationship between the assignor and the assignee. It is different in the case of a licence because the profits deriving from that licence are divided in accordance with the obligation to pay a royalty. Furthermore, the licensor and the licensee continue to be contractually bound.

The Commission has never maintained that exclusive licences constitute restrictions on competition which are inadmissible *per se*. On the contrary, it has always stressed that the validity of clauses conferring exclusive rights depends *solely* on whether the preconditions for exemption contained in Article 85 (3) of the EEC Treaty are satisfied. The applicants persist in devoting their exclusive attention to Article 85 (1) of the EEC Treaty, disregarding the fact that that provision may only be read and applied in conjunction with Article 85 (3). As a result it cannot be maintained that the Commission seeks to prohibit any clause in licensing agreements which confers exclusive rights. In the practice which it has followed, requests for exemption have had to be refused in only two of the seven cases, including the present one, which it has so far considered under the procedure laid down by Regulation No 17. In other cases the parties voluntarily waived the inclusion of a clause conferring exclusivity.

4. The settlement of 14 November 1973

The *applicants* first observe that the settlement reached on 14 November 1973 before the Landgericht [Regional Court] Bad Kreuznach was based on the breeders' right owned by Mr Eisele. In that connection they rely on the arguments set out above.

They then point out that that settlement was reached in accordance with Article 794 I (1) of the Zivilprozeßordnung [German Code of Civil Procedure]. It is a procedural measure which under Article 794 of the German Code of Civil Procedure is enforceable. It follows that, by declaring that settlement to be contrary to Article 85 of the Treaty, the Commission has encroached upon the jurisdiction of the German courts. Furthermore, by purporting to annul an enforceable order, the Commission was calling in question a legal situation which had become irrevocably established by virtue of German law.

The *Commission* states that the legal settlement is valid only if it satisfies both the requirements of substantive law and those of procedural law. The decision merely finds that the settlement as a contract at civil law is void under Article 85 (2) of the Treaty.

5. The applicability of Regulation No 26

The *applicants* maintain that the Commission was wrong to refuse to apply Article 2 of Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (Official Journal, English Special Edition, 1959-1962, p. 129).

The exercise of breeders' rights in respect of the INRA maize seeds registered in Mr Eisele's name is in conformity with the objectives laid down in Article 39 of the EEC Treaty. The applicants put forward the same argument with regard to the exclusive territorial licence, stating that the means of attaining the objectives of the common agricultural policy indicated in Regulation No 2358/71 of the Council of 26 October 1971 on the common organization of the market in seeds (Official Journal, English Special Edition, 1971 (III) p. 894) are not the only means of attaining those objectives.

The *Commission* repeats that, in its view, the agreements at issue do not form an integral part of a national market organization within the meaning of Article 2 of Regulation No 26. By succeeding, with the aid of those agreements, in eliminating from the German market all competition in INRA seeds, the effect of the applicants' conduct was that the price of those seeds was for a long time higher in Germany than in France, which is contrary to two of the objectives of Article 39 of the Treaty.

Moreover, the Commission is not in the least disputing that the protection of breeders' rights is consonant with Article 39. The point at issue is, however, whether the owner of such a right must be allowed to call upon the courts to prohibit the importation of goods which have been properly put into circulation in another Member State by the owner of breeders' rights in that State. Similarly, although licensing agreements covering breeders' rights are an appropriate method of disseminating knowledge acquired by breeders, it does not follow that clauses conferring exclusive rights, such as those at issue, are necessary for achieving the objectives of Article 39. In

that respect the applicants have failed to supply any justification.

6. The refusal to grant an exemption under Article 85 (3)

The *applicants* maintain that the contract of 5 November 1965 satisfies the conditions laid down in Article 85 (3) of the Treaty for the grant of an exemption.

In its decision the Commission recognized that in principle exclusive rights granted by the owner of a plant variety to a licensee may be considered to satisfy those conditions. However, it refused to grant an exemption on the grounds that, first, there was no question of a new market being penetrated or a new product being launched and, secondly, Mr Eisele enjoyed absolute territorial protection in Germany.

The applicants consider that, at the time of its notification, the purpose of the contract was precisely to open up a new market and introduce a new product. Mr Eisele had to deploy considerable efforts, both with the authorities and with users, to introduce French varieties of hybrid maize into Germany. Under those circumstances it must be accepted that, as from the date of introduction of a new variety, a period of protection of 20 years may be conferred. Nungesser must, moreover, be considered a small or medium-sized undertaking for the purposes of Article 85 (3) since its turnover is far below the limit which has been fixed in that respect by the Commission itself in its proposal for a regulation on the application of Article 85 (3) of the Treaty to certain categories of patent-licensing agreements (Official Journal 1979, C 58, p. 21).

Furthermore, the elements of exclusivity established by the contract of 5 November 1965 do not go further than the provisions which have been declared lawful in principle by Article 1 (1) of the aforementioned proposal. In that proposal Article 85 (1) is declared not to apply to patent-licensing agreements which include the following obligations:

"(1) The obligation on the part of the licensor not to manufacture or use the patented product ... within the common market or a defined area of the common market (licensed territory) or not to permit others to do so;

(2) ...

(3) The obligation on the part of the licensor to refrain from selling the patented product ... within the licensed territory, or to impose a corresponding prohibition on other licensees;

(4) The obligation on the part of the licensee to refrain from selling the patented product ... within the defined territory of the common market reserved by the licensor for himself or in the licensed territories or other licensees."

The applicants observe that the practice followed by the Commission, before taking a decision, is to request the undertaking concerned itself to revoke the clauses of the contract which cannot be exempted. It may also exempt from the prohibition a contract of which the greater part is unimpeachable, on

condition that certain other clauses are deleted within a certain period. The fact that, in the present case, the Commission adopted a different procedure constitutes a misuse of powers. In accordance with the principle of proportionality, the Commission is required to impose such conditions where to do so would be less drastic than a decision pohibiting the agreement. Since the agreement was notified more than 10 years prior to the adoption of the contested decision, the Commission disregarded the principle of the protection of legitimate expectation by totally prohibiting an agreement when a conditional exemption would have been possible.

The *Commission* maintains that products manufactured under exclusive licence must be able to circulate freely throughout the common market. Protection for the licensor or the licensee or the mutual protection of several licensees in respect of the *distribution* of the products in question is not in principle justified. It is only exceptionally, and in the presence of particular circumstances, that protection ensured by export prohibitions at the distribution stage helps to improve distribution, for example when a small or medium-sized undertaking proposes to launch a product on a new market. However, even in that case parallel exports must remain possible.

The particular characteristic of the present case is that the applicants themselves produced only a part of the quantities needed to satisfy their requirements in INRA maize seeds (one third) and that they relied on members of Frasema, French producers, for the rest. As regards the seeds supplied by French breeders, the applicants' activity is confined to distribution. The service of breeding is provided not by them but by their suppliers. In such a case, protection of the applicants against direct supplies from French breeders to Germany, ensured by means of export prohibitions, raises fundamental objections.

In any event, the applicants' undertaking may be considered neither small nor medium-sized, since it is one of the leading German seed suppliers, and cannot be regarded as being entitled to special protection against competition from INRA or against French breeders of seeds belonging to Frasema.

Moreover, the applicants have misunderstood the true scope of the principle of proportionality. Exemption under Article 85 (3) constitutes an exception to the prohibition laid down by Article 85 (1). It is a dispensation to which the applicants are only entitled if all the conditions for the grant thereof are satisfied (fettered discretion). The fact that the Commission is bound by the conditions laid down in Article 85 (3) means that it cannot be required to grant an exemption where one or more of those conditions is not satisfied. The fact that the defendant is empowered to attach certain conditions to an exemption does not alter the matter. That power was not conferred on it for the purpose of amending agreements not satisfying the conditions laid down by Article 85 (3) in such a way as to enable them to benefit from an exemption. Rather, the object of that power is to enable the Commission to take the steps needed in order that agreements which satisfy the conditions for the grant of an

exemption are not applied in such a way that they would run counter to those conditions.

IV — The interventions

1. Economic and technical considerations

The *Caisse de Gestion des Licences Végétales* [Office for the management of plant breeders' rights, hereinafter referred to as " the Caisse de Gestion"] observes that the system established by INRA and Frasema for the distribution of seed varieties completely satisfies the needs of users. The latter have stated through their representative bodies that:

"Agricultural undertakings and seed suppliers which play a part in the production and marketing of protected varieties must be able to rely on the knowledge and competence of the breeder as regards general planning adapted to needs and as regards technical information, marketing strategy and production orientation. Indeed, only the breeder can operate an appropriate production and marketing strategy concerning the distribution of basic seeds and the provisions to be made in order to take account of the specific nature of each of the varieties concerned. The breeder must be required to bear that responsibility, which, moreover, makes it possible to protect other persons involved in the trade from errors of judgment."

The Caisse de Gestion criticizes the Commission on the ground that, instead of undertaking a study of the seed market, it based itself entirely on the prices charged by the applicants in Germany and then concluded that there was a restriction on competition. It states that the result of the procedure initiated and the decision adopted by the Commission was that the German market was lost for INRA varieties produced in France, these being replaced on the market by other comparable varieties.

The Caisse de Gestion maintains that it is necessary to take account of the specific nature of the product. In the present case it is in fact a pre-product. From one grain of seed spring hundreds of seeds. Therefore any alteration of the seed leads to consequences which are multiplied in proportion to the number of grains produced by that seed. Conformity of the product with Community regulations does not eliminate the risk that the quality of the product may suffer. The responsibility of the breeder constitutes the only adequate guarantee that the product placed on the market satisfies the requisite conditions as to quality.

The *Commission* states, with regard to the satisfaction of users, that the observations of the Caisse de Gestion are not representative. In fact dealers have on a number of occasions stated their dissatisfaction. It observes also that a right to "determine policy" on the part of the breeder, as advocated by the Caisse de Gestion, is incompatible with competitive economic conditions.

INRA varieties did not disappear from the German market following the Commission's intervention. On the contrary, they simply disappeared from the market altogether, including the French market, and were replaced by varieties such as the variety LG 11 produced by Limagrain.

According to the Commission, the exact market shares held by competitors are of no interest in the present case. The Commission has given details of the market shares of the applicants, which in principle have not been disputed. Those market shares show that the applicants had competitors and prove that the

restriction on competition was appreciable. The Caisse de Gestion, in the Commission's view, ignores the fact that it is not merely a question of restrictions on competition with other varieties (inter-brand competition) but that even restrictions on competition with products of the same variety (intra-brand competition) are sufficient to bring into play Article 85 (1) of the Treaty.

Moreover, that article comes into play not merely where competition is "compromised" but from the moment when it is in one way or another restricted or distorted appreciably. If that is the *object* of the agreement there is no need to examine its effects in practice. Having established that the agreements entered into between Frasema and the applicants were restrictive of competition simply by reason of their object, the Commission had no reason to support its decision with any further arguments.

2. The application of Article 85 (1) of the Treaty to exclusive licences

The *Government of the United Kingdom* observes that the Commission appears to have ignored the existence of the rules relating to the free movement of goods. If Louis David KG and Robert Bomberault were merely dealing in seeds first put into free circulation by the French licensors, then they each had a clear defence to any infringement action in Germany. Therefore the agreements had no restrictive effect in law so far as those parties are concerned.

The Government of the United Kingdom maintains in that respect that an assignment of rights under which there is a continuing commercial relationship between the parties must be treated in the same way as an exclusive licence. Typically an exclusive licence is conferred by virtue of a contract under which the licensee may exercise the industrial or commercial property right in a given territory, in which the owner refrains from exploiting the right, and the licensee acquires the right to bring proceedings for any infringement of his rights.

The application of Article 85 (1) to exclusive licences would have the result of making owners of industrial property rights reluctant to exploit those rights by way of exclusive licences. They could of course apply for an exemption under Article 85 (3) but the risk that such an application might be refused would be too great to allow major investments. Thus the Commission would be obliging operators to take a complete bundle of rights under a licence covering the whole Community; that would favour the growth of large pan-European companies trading throughout the common market to the detriment of small and medium-sized undertakings.

The Government of the United Kingdom maintains that the licence has an entirely liberalizing effect as regards the licensee: without the licence the exclusive licensee has no right to make or market the goods at all.

A consideration of the specific subject-matter of the industrial property right demonstrates that the essential feature of such a right is the control by the owner thereof of the manufacture and first marketing of the protected products. The capacity to pass control of the protected right to others is part of the essential subject-matter of the industrial property

right. In commercial terms, the property may be worth a good deal less if it cannot be exploited by selling to another the right of first marketing in a particular territory.

Accordingly, the United Kingdom contends that the Commission erred in law in the following respects:

(a) In holding that the fact that the licensor "deprives himself ... of the ability to issue licences to other undertakings" causes the exclusive licence to fall within Article 85 (1);

(b) In holding that the fact that the licensor undertakes not to make or sell in the licensed territory causes the exclusive licence to fall within Article 85 (1);

(c) In holding (by implication) that it is not part of the specific subject-matter of plant breeders' rights that they may be transferred to another party;

(d) In holding (in so far as goods put in free circulation by or with the consent of INRA are concerned) that the effect of the agreements was that "third parties may not import ... from other Community countries";

(e) In holding that obligations imposed in France upon licensees in France not to export directly to Germany fall within Article 85 (1);

(f) In holding that the application of Article 85 (1) in the present case does not "jeopardize rights granted by national laws ... either in relating to the existence of those rights or in relation to their specific subject-matter".

The *French Government* considers that the particular characteristics of this case must not lead to general interpretations which would be prejudicial to the effective exercise of industrial property rights. The contract between Mr Eisele and INRA may be construed as an assignment. One of its important elements is the period of duration of the obligation undertaken by both parties.

The products covered by the plant breeders' rights are not mechanically reproducible and their production involves a considerable financial commitment. It follows that the assignee must be protected throughout the duration of the risk due to the fragility of the seed.

The *Caisse de Gestion* submits that the right to grant exclusive licences forms part of the specific subject-matter of the protection of plant varieties. It takes the view that exclusive licences increase competition because a market is being supplied on which the owner of the breeders' rights could not operate himself.

Competition is not restricted by the fact that the owner, by granting an exclusive licence, deprives himself of the right to grant licences to others. The owner is also entitled not to grant any licence, a factor which has never been analysed as to its restrictive effects on competition.

The owner's undertaking not to compete with the licensee in the territory covered by the licence is justified by necessity. Licensees must be able to exercise their rights undisturbed. The effect of removing that restriction would be to confine the exercise of incorporeal rights solely to undertakings capable of exploiting those rights over the whole area of the common market.

The Caisse de Gestion emphasizes that the Court defined the substance of industrial property rights in its judgment of 31 October 1974 in Case 15/74 (*Centralfarm* v *Sterling Drug* [1974] ECR 1147, at paragraph 9). The grant of licences to third parties forms part of the specific subject-matter of industrial property rights, the exclusive right granted to the owner of that right being intended to reward creative effort. If the issue of ordinary licences were considered to form part of the specific subject-matter of the right whilst the issue of an exclusive licence were not covered by that concept the exclusive right of the owner would lose its true purpose. The owner would then be deprived of his just remuneration whenever a right could be exploited profitably only by means of the grant of an exclusive licence.

The Caisse de Gestion is of the opinion that the Commission in its analysis did not distinguish between the contracts which it condemned, with the result that it disregarded the difference between the rights conferred by those contracts on the applicants. As far as the Commission is concerned, the assignment of breeders' rights under the system established has no purpose other than to reinforce the exclusive rights already granted. The Commission thus treated on the same footing two different rights: breeders' rights and exclusive distribution rights.

The *Government of the Federal Republic of Germany* first points out that, according to the decisions of the Court, those industrial property rights which are defined by the national laws of the Member States are not affected by Community law either in their existence, their substance, their specific subject-matter or their main function. However, individual cases revealing a certain manner of exercising those rights might constitute an infringement of Community law. In its judgment of 31 October 1974 in *Centrafarm* v *Sterling Drug* the Court recognized that the right of a patentee to exploit his invention by granting licences to third parties forms part of the specific subject-matter of the patent.

In the present case it must therefore be ascertained whether the right to grant licences also forms part of the specific subject-matter of other industrial or commercial property rights, in particular breeders' rights, and whether a different answer is called for in the case of an exclusive licence.

The German Government observes in that connection that the specific subject-matter of an industrial property right is composed of the aggregate of the rights conferred on the owner of the right by national legislation. Those include the right to deal with the property right by assigning it, wholly or in part. The grant of licences is one of the ways of assigning certain rights, whether by ordinary or exclusive licence. Such grants may be explained by the concern of national laws to stimulate innovative tendencies by conferring on industrial and agricultural innovations protection by means of breeders' rights and patent rights. In line with those ideas, it was decided by national legislatures, having regard to the economic interests in question, that exclusive rights limited in time constitute an additional encouragement to innovative efforts. It may be deduced from Article 2 of the

Treaty that this concern to reward invention and encourage innovation was shared by the authors of the Treaty. From that it follows that Community competition law cannot have the effect of reducing the possibilities offered by national legislation and giving a different assessment of the various interests in question. In the pursuit of the objectives of the Treaty the function, performed by breeders' rights and patent rights, of rewarding and encouraging innovation is of the first importance. That function would be compromised if the power of the owner of a right to grant licences were restricted.

The German Government considers that, if exclusive licences were to be considered unlawful in general, and not merely in cases of abuse, undertakings would show less interest in licences and that would give rise to harmful consequences on the market for the products covered by industrial property rights. Such an interpretation — which seems to be the one favoured by the Commission — would prejudice the dissemination of knowledge and techniques within the Community. Besides, it would have unfavourable consequences on small and medium-sized undertakings, which do not normally have a sufficiently strong financial base to be able to set up production facilities or sales organizations. If those undertakings were deprived of the power to grant exclusive licences they could no longer make use of the exclusive powers which belong to them as forming part of their rights. Thus the view that exclusive licences are unlawful would, from an economic point of view, merely tend to favour the concentration of undertakings since only the financial and commercial giants would economically be in a position to set up their own production facilities and sales organizations.

Thus it cannot be that an exclusive licence *per se* is capable of restricting competition. Only supplementary contracts or agreements might have the effect of making Article 85 applicable.

As regards the application of the whole of the provisions of Article 85 of the Treaty, the German Government emphasizes that, for an exclusive licence to be able to benefit from an exemption under Article 85 (3), it must first be prohibited under the terms of Article 85 (1).

The obligation imposed on the owner of the right not to grant licences to other undertakings and to refrain from exploiting the invention or the protected variety himself, cannot constitute a restriction on competition. At issue in the present case is a mere assignment which involves a change in the identity of the person exercising the powers associated with the breeders' rights. That assignment finds its justification in the freedom of action of the owner of the right and thus there can be no question of a restriction on competition. Furthermore, it does not involve a restriction on competition greater than that automatically arising from the exclusive effects of industrial property rights and is the consequence of the latter and not of an agreement.

The German Government is of the opinion that the same considerations are valid against the argument that, since the agreement has the effect of granting a licence to a single undertaking alone, other potential licensees are denied access to the property right because they are no longer able to obtain licences and thus create competition on the market for the invention or the protected variety. Added to that is the fact, at least in the case of breeders' rights, that the

different varieties are interchangeable and therefore the freedom of choice of licensees is not prejudiced since they can fall back on other varieties. Furthermore, the principle of the exhaustion of rights ensures an adequate degree of competition on the market in question.

The German Government maintains that it is for the owner of the right to decide what he considers to be the full value of his industrial property right. The Commission is not in a position to determine what should be the remuneration of the owner of the right.

As regards the application of the rules on free competition to agreements granting exclusive licences of breeders' rights, the German Government states in the first place that breeders' rights are of a particular nature inasmuch as they involve biological material. In particular, the owner of the right must have certain possibilities of disposing thereof; otherwise the breeders' rights would be affected in their very existence. The German Government adds that the scope of breeders' rights in national law is characterized by the fact that, on the one hand, exclusive licences are expressly included therein (Article 17 (3) of the Sortenschutzgesetz) and that, on the other hand, they are narrower in scope than patent rights. Breeders' rights merely cover propagating products; the protection which they give is limited to propagation for sale on a commercial basis and to that sale itself (Article 15 (1) of the Sortenschutzgesetz).

In conclusion, the German Government maintains that the specific subject-matter of breeders' rights encompasses the power of the owner to realize the economic value of these rights by granting an assignment thereof by means of an exclusive licence to a third party in consideration of a payment. To exclude assignability would seriously prejudice breeders' rights. The competition rules of the Treaty apply to transactions transferring rights only in so far as the agreements or practices in question have as their object or effect consequences going beyond that specific subject-matter.

Replying to the Government of the United Kingdom, the *Commission* states that it has a duty to intervene spontaneously to ensure the observance of competition rules in the general interest and thus to ensure that persons in a weak bargaining position are protected.

The definition of an exclusive licence given by the British Government is incomplete. A licence is not merely the right granted to a licensee to make use of the industrial property right in a given area. It is much more a contract by virtue of which a single licensee is authorized to exercise the property right. It is not the exclusivity of the property right but the exclusivity of the licence which is decisive.

The Commission maintains that the views put forward by the United Kingdom would have the effect of reducing the scope of Article 85 (1) of the Treaty to nothing or at least treating favourably certain restraints on competition. Indeed, the reasons invoked by the intervener could also justify other restrictions on competition, for example rationalization agreements, exclusive distribution agreements or joint subsidiaries. These, however, may be rendered lawful only by an exemption under Article 85 (3). They are of no less

interest to the general public than licences of industrial property rights.

As regards the "liberalizing effect" of exclusive licences, the Commission states that such an effect may only be brought about by means of ordinary licences. It emphasizes that an exclusive licence cannot be equated with an assignment.

Replying to the French Government and the Caisse de Gestion, the Commission refers to the explanations in which it demonstrated that nothing other than exclusive distribution rights accompanied by an absolute territorial protection had been granted to Mr Eisele and that he had not acquired, by virtue of a mere assignment, the status of an independent owner of breeders' rights. In fact the Caisse de Gestion fails to explain why it was necessary or indeed possible to grant exclusive distribution rights to Mr Eisele in 1965 when, since 1961, he had been the sole and allegedly free breeder of INRA maize varieties in Germany and was able to propagate them there himself. If he had in truth been an independent owner of breeders' rights it would have been sufficient for him to obtain in France such quantities of seed as he might lack. In the Commission's view, he needed a special right of distribution in Germany only if in reality he was dependent upon Frasema and was its licensee because that body continued to control the exploitation of all INRA maize varieties.

The Commission maintains that it did not affect the specific subject-matter of the breeders' rights by refusing to recognize the assignment thereof in the circumstances of the case. On the contrary, it duly took note of the assignment and did not in any way declare it incompatible as such with Article 85. It merely condemned the exercise of the rights conferred by the assignment in so far as they resulted in the applicants' receiving absolute territorial protection.

It states that the reasons underlying the grant of exclusive breeders' rights are not sufficient by themselves to justify an exclusive licence. In order to justify the choice of an exclusive licence in preference to an ordinary licence, other reasons must be found which go further than those which justify in a general manner the protection of plant varieties. Such reasons are not to be found merely in the *assignability* of the property right, since the assignment of a right and an exclusive licence are two different things.

Furthermore, although the granting of licences forms part of the specific subject-matter of industrial property rights, that does not mean that the granting of *exclusive* licences must be permitted *without control.* It would be truer to say that an agreement confining the right to a licence to a single undertaking and limiting the possibilities of granting licences constitutes a threat to the specific subject-matter of the industrial property right.

The Commission states, in reply to the German Government, that the specific subject-matter of industrial property rights may not be defined absolutely by the national legislature since the latter must take into consideration requirements of Community law. Indeed industrial property rights and free competition are not diametrically opposed to each other since they pursue the same objective, namely technical progress. Although the effect of exclusivity does not guarantee the remuneration of the inventor, the amount of that remuneration depends on the value of the invention on the market. A certain degree of competition must be maintained in order that other innovations by

other undertakings may be encouraged. Industrial property rights, in particular patent rights, are thus a feature of free competition. It follows that the utilization of the exclusive right in conditions of free competition is alone able to satisfy the objectives of the EEC Treaty.

The Commission points out that the judgment of the Court in *Centrafarm* v *Sterling Drug* has no significance other than as a general reference to a specific manner of exploiting a patent, namely exploitation not by the owner but by third parties.

As regards the characteristics of licences, the Commission states that a licensing agreement is always entered into for a given period and may be terminated, whereupon the licensee is automatically disentitled. No reassignment is necessary for that purpose, which demonstrates the difference between an assignment and a licence.

According to the Commission, it is necessary to examine the conditions under which the industrial property right is exercised. The basis upon which that right is exercised changes when it can be exercised only by virtue of a contract, the licensing agreement. Since that contract is necessarily entered into in consideration of the exclusive effect of the property right itself, it is concerned with the concrete effects which exclusivity produces on competition and for that reason comes within the terms of Article 85 of the Treaty. Therefore it is not correct to maintain that in the case of the grant of licences, the effects of the property right on competition do not result from an agreement but merely from the property right itself. In the Commission's view, the German Government is disregarding the fact that the exercise of the property right by the owner, which hitherto was unilateral, is thereafter subject to contractual coordination. If the owner were not prohibited from granting other licences under the terms of the licensing agreement, the licensees could enter into competition with each other, which would lead to an increase in competition on the market in question.

In the Commission's view, the present case demonstrates that the general thesis according to which exclusive licences are granted only to operators exposed to particular risks is not valid. In a case such as the present one, the risk inherent in the manufacture of the protected products is not assumed by the licensee but by the owner of the right; the licence merely serves to control the marketing of the products.

The Commission then states that Article 85 of the Treaty can only be applied in its totality; to confine consideration to paragraph (1) means that only half of the provision is applied. The Commission underlines the positive content of paragraph (3) of Article 85, which answers the concern of the German Government as to the encouragement of technical progress.

The Commission considers that Article 85 itself defines the conditions and criteria on the basis of which the acceptability of the agreements at issue must be decided and that those agreements may not be permitted *a priori* by reliance upon Article 36. As a restriction on competition which promotes technical progress, an agreement relating to exclusive licences must satisfy the conditions laid down in Article 85 (3) of the Treaty.

As regards the scope of breeders' rights under national law, the Commission argues that the grant of exclusive licences of breeders' rights is subject,

even in German law, to the requirement of compatibility with Article 20 of the Gesetz gegen Wettbewerbsbeschränkungen [Law against restrictions on competition]. Thus it must also comply with the requirement imposed by Community law of compatibility with Article 85 of the Treaty. Moreover, Article 17 (3) of the Sortenschutzgesetz merely provides that contracts granting exclusive licences must be in writing.

The scope of breeders' rights varies from one State to another, as do the differences between breeders' rights and patent rights. Furthermore, the limitation of breeders' rights to the protection and distribution of propagating products is merely the logical consequence of the fact that agricultural production takes place in several stages which cannot all be under the control of the breeder.

Measures intended to guarantee the identity of a variety and the observance of the other conditions concerning the approval of the variety relate to all types of licences and not merely exclusive licences. Thus the compatibility of clauses conferring exclusivity, contained in licensing agreements, with competition rules is not affected by the assessment of clauses relating to measures intended to conserve the quality of the varieties in question.

3. The refusal to grant an exemption under Article 85 (3)

The *United Kingdom Government* explains first of all the working of the system of plant breeders' rights. Before a variety of an agricultural crop species may be sold within any Member State it must be entered on the national list of that State or be in the Community Common Catalogue. To be entered on the national list, the variety has to undergo trials to establish its distinctness, uniformity, stability and value for cultivation or use.

Although it may be legally possible for a variety to be sold throughout the Community once it is in the Common Catalogue, in practical terms it is necessary for it to have gone through the tests of each Member State and to have been placed on the national list and sometimes on an even more exclusive recommended list in order to achieve any acceptance. In some Member States it is also necessary for a breeder to produce trial results of candidate varieties obtained within the State before the variety may even be entered for official trials.

For a breeder to be able to cope with such varying situations it is essential for him to have an appropriate technical operation within the boundaries of each State. Only a breeder with very large resources would have the capacity to have his own organization capable of carrying out such work. It is accordingly the practice of breeders to have exclusive agents within each State who possess the necessary technical skill and facilities to enable them to carry out such work. In many cases these agents will be breeders in their own right. Their role as agents goes beyond piloting the variety through official trials to enable it to be listed and includes the protection and promotion necessary to launch the variety on the

market. The breeder may well have spent 15 years breeding his variety and having it entered on his own national list before its initial launch. The agent in each other country may well have spent anything from five to ten years in technical and commercial work preparing the variety for his market. This whole interlocking system is efficient, competitive and to the advantage of the final user, the farmer. It is however one which is critically dependent on the agent's being able to obtain an adequate recompense for his additional costs through the *exclusivity* granted to him by the breeder.

The United Kingdom Government disputes the statement that exclusive licences are restrictions which may only be justified in exceptional cases. In its view the normal exclusive licence is justifiable under Article 85 (3) and it can only be in exceptional cases that an exemption should not be given.

In fact, the licensee is prepared to exploit the right in question because he will have the protection of the exclusive licence, which thus "improves the production or distribution of goods" and also "promotes technical or economic progress" within the meaning of Article 85 (3). The purpose of the exclusive licence is thus to give the licensee the necessary legal protection of the right and to encourage his exploitation of it.

The reasons put forward by the Commission for its refusal to grant an exemption in the present case are based on more stringent tests than those appearing in Article 85 (3).

The United Kingdom Government poses a question of fact: when does a product cease to be "new" or when is a market "penetrated"? It would appear that an exclusive licence granted only for a short time before the market is "penetrated" is of little practical use. After having worked at a loss the licensee must be able to continue to benefit from exclusivity during the period when his efforts begin to bear fruit and when his licence becomes profitable. In general the period of protection for breeders' rights is about 20 years. Experience shows that the product is not successful until late in that period. Therefore the criterion to be used in assessing "newness" should be the duration of the industrial property right concerned.

The *Caisse de Gestion* maintains that the agreements in question satisfy the conditions set out in Article 85 (3) because of the fragile and technically advanced nature of the product in issue. For such a product a selective system of planning and stable market conditions are indispensable. It is in fact the users themselves who demand genuine security of supplies on the market for maize seeds.

The absolute territorial protection which Mr Eisele is alleged by the Commission to enjoy is no more than relative because of the presence on the market of numerous similar varieties which have entered into direct competition with INRA varieties and have in fact entirely supplanted INRA varieties following the adoption of the contested decision. The Caisse de Gestion refers in that respect to the *Campari* decision (Commission Decision of 23 December 1977, Official Journal, L 70, p. 79), where the Commission acknowledged that, having

regard to the existence of other well-known "bitter" brands capable of competing with "bitter Campari", the exclusive agreements satisfied the tests for exemption under Article 85 (3).

The Court of Justice has similarly recognized that, in examining the market for the products in question similar products or products which can be substituted must be taken into account (cf. judgment of 18 February 1971 in Case 40/70 *Sirena* v *Eda* [1971] ECR 69, judgment of 8 June 1971 in Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487 and judgment of 21 February 1973 in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215.

However, in the present case the Commission did not examine whether similar varieties or varieties which could be substituted were able to compete. Apart from the existence of a number of other competitors, INRA itself constantly sold to German undertakings INRA hybrids intended, after crossing and propagation, for sale on the German market under the label or brand of the German purchaser. There was thus genuine competition in Germany between varieties of the same origin.

The Caisse de Gestion maintains that if the Commission considered any provision of the 1965 agreement to constitute a restriction within the meaning of Article 85 (1) it should have investigated whether that provision was *indispensable* for the well-organized distribution of the seed; if so, it should have granted an exemption.

If such a contractual provision could not be judged indispensable the Commission should have given the parties the opportunity of deleting or amending it before striking down the whole of the agreement. Any other approach would be in breach of the general principle of legal certainty, given that in the present case the contract had been notified to the Commission 13 years earlier. If the parties had refused such a request to amend the contract the Commission could merely have struck down those clauses which did not qualify for exemption.

The Caisse de Gestion states further that the Commission disregarded the principle of proportionality. On the one hand, it was not at liberty to strike down the whole of the agreements in question; it would have been more appropriate to limit its intervention to certain provisions. On the other hand, the striking down of the agreements was not appropriate; the improved competition on the market in question which that decision was designed to encourage, has not come about and INRA varieties have disappeared from the market, whilst competing varieties continue to be the subject of exclusive agreements.

The *Commission* states, in reply to the United Kingdom Government, that an equitable and adequate supply, at reasonable prices of all agricultural users on the same terms as those prevailing in the country of origin should also be an objective for those who exploit breeders' rights. The arguments put forward by the intervener do not prevent that objective from being achieved. Moreover, those arguments are only valid as regards propagation licences and not as regards licences conferring selling rights.

It is clear from Council Directive No 66/402 of 14 June 1966 on the marketing of cereal seeds (Official Journal, English Special Edition, 1965-1966, p. 143) and from Council Directive No 70/457 of 29 September 1970 on the common catalogue of varieties of agri-

cultural plant species (Official Journal, English Special Edition, 1966-1972, p. 36) that seeds produced and accepted in one Member State may be marketed in all Member States if the variety in question appears in the Common Catalogue of Varieties.

The maintenance breeding carried out abroad is sufficient (see Article 67 of the Saatgutverkehrsgesetz). There is nothing to prevent the owner of breeders' rights today from being the owner of the variety in the various Member States and arranging for its exploitation in those States by ordinary licensees; it is open to him to grant to an undertaking a licence on preferential terms if the licensee undertakes to maintain the variety. The Commission states that entry on the national list of varieties for the purpose of sale is not required under Community law and entry on the descriptive list of varieties is not necessary; in Germany in any event it is a "descriptive list" and not an official recommendation. Inclusion in that list does not involve supplementary expenses in excess of the expenses which may be involved in gaining official acceptance of varieties. The role of that list is to give official information regarding the characteristics and the dissemination of the varieties. The Commission further points out that it is not necessary in Germany to append to the request for acceptance the results of trials carried out on the national territory.

In conclusion, entry on national lists is not particularly complicated. Nor is it necessary for an undertaking to have itself registered in each Member State as agent for the owner. Development and maintenance breeding costs of the variety are only borne once and only the cost of introducing the variety on the market must be borne afresh in each Member State.

The protection of breeders' rights is, however, intended to reward the breeder and not the distributor authorized to market the product. Admittedly, marketing has a bearing on the size of the return but does so directly only where the grant of particular and exclusive distribution rights over the variety does not intervene between the cultivation of the variety and its sale. In this case the applicants are exclusive distributors. There is no reason to protect them to a greater extent than approved sellers of other products against competition from seeds of the same variety.

In the contested decision, the Commission stated that exclusive licences for *propagation* satisfy in principle the conditions for exemption. The views of the Commission and the United Kingdom Government differ merely on the question how exclusivity is to be assessed as regards *distribution*. For its part, the intervener made no distinction between the exclusive licence for propagation and the exclusive sales licence; it considered that the two types of exclusivity must be assessed in the same way as far as their effects are concerned. The Commission considers that it is necessary to distinguish between production and sale; if *exclusive propagation rights* are granted in respect of a particular territory, that means that the licensor undertakes not to grant any other licence in respect of the territory in question which would allow a third party to propagate the same seed within that territory; if, on the other hand, *exclusive selling rights* are granted, that means that the licensee may only market the seed propagated by him within the territory covered and that the holders of exclusive licences for other territories are prohibited, in common with the licensor, from supplying seeds of that variety within the territory of the licensee. It

must be added that exlusive selling rights may be relied upon where the seed has not been propagated by the licensee himself but is obtained from the licensor or from another licensee. In that case too both the licensor and other licensees are prohibited from supplying seeds of the variety in question within the territory of the licensee. It is clear that the effects of exclusive selling rights are not necessarily the same as those which may be relied on in respect of exclusive propagating rights.

On the issue as to whether the conditions laid down in Article 85 (3) of the Treaty were satisfied, it was decisive that the applicants enjoy *absolute territorial protection* in respect of the INRA seed which they market in Germany on the basis of their exclusive selling rights. By enforcing the German breeders' rights owned by Mr Eisele, the applicants were unable to prevent any importation, through other channels, of the original products, namely INRA seeds produced in France. An essential factor in the examination of the agreement in question was that the applicants themselves produce only a minor part of INRA seeds and obtain by far the largest part of their requirements in France; the function of the applicants thus consisted essentially in marketing seeds propagated in France. The refusal to grant an exemption under Article 85 (3) was founded solely on the restrictions imposed as regards the sale of INRA seeds.

The Commission maintains that it is legitimate to distinguish between small and medium-sized undertakings on the one hand and large undertakings on the other hand. As regards the first category, a concern to be protected against competition from other undertakings is understandable; that is not so, however, in the case of the second category. Moreover, it is not correct that the penetration of the market must extend over the entire period of duration of the industrial property right. Production cycles are much shorter and a considerable profit can be made during each cycle.

In reply to the Caisse de Gestion, the Commission states that in the present case the tests for exemption under Article 85 (3) of the Treaty are not satisfied by "the exclusive selling rights and their accompanying export prohibitions" (Decision, point III (1) (b)).

The concept of "absolute territorial protection" is confined to the products in question. It is therefore of little importance if that protection has been less because of the presence on the market of varieties which are similar or which may be substituted for the products in question. The decision to refuse an exemption was based on the fact that some of the conditions laid down in Article 85 (3) were not satisfied, namely an improvement in the production or distribution of goods and the extending to consumers of a fair share of the resulting benefit.

The problem of market demarcation only arises where it must be ascertained to what extent the condition laid down in Article 85 (3) (b) is satisfied, that is to say, where the question is raised whether the agreement affords "the possibility of eliminating competition in respect of a substantial part of the products in question". For that reason the references to the *Campari* decision (cited above) and to other decisions of the Court are not relevant.

As to the principle of legal certainty, that cannot be construed as meaning that the parties may obtain, after a lapse of time, the right to an exemption even if essential parts of their agreement do not satisfy the conditions laid down for that purpose.

V — Oral procedure

At the sitting on 28 October 1981 the parties presented oral argument.

The Advocate General delivered her opinion at the sitting on 3 February 1982.

Decision

1 By an application lodged at the Court Registry on 27 November 1978, the limited partnership L. C. Nungesser KG [hereinafter referred to as "Nungesser"] and Kurt Eisele, sole active partner and majority shareholder of that firm, both carrying on business in Darmstadt, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission's Decision of 21 September 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.824 — breeders' rights — maize seed), notified to the applicants on 27 September 1978 and published in the Official Journal 1978, L 286, p. 23, is void.

2 Under Article 5 of the International Convention for the Protection of New Varieties of Plants of 2 December 1961 (United Nations Treaty Series, Vol. 815 p. 89), upon which the legislation of Member States is based, breeders' rights are those rights conferred on the breeder of a new plant variety or his successor in title pursuant to which the production, for purposes of commercial marketing, of the reproductive or vegetative propagating material, as such, of the new variety and the offering for sale or marketing of such material are subject to the prior authorization of the breeder.

3 The contested decision found that Article 85 (1) of the EEC Treaty had been infringed as a result of the content and application of certain provisions of two contracts entered into between Mr Eisele and the Institut National de la Recherche Agronomique [National Institute for Agricultural Research, hereinafter referred to as "INRA"], Paris, in 1960 and 1965 concerning respectively the assignment, in respect of the territory of the Federal Republic of Germany, of plant breeders' rights over certain varieties of hybrid maize seeds developed by INRA and the granting of exclusive propa-

gating and selling rights over those seeds for that territory. In addition, it found that the content and application of the settlement reached in 1973 between Mr Eisele and Louis David KG, of Meisenheim (Germany), to prevent that undertaking from importing and selling INRA seeds in the Federal Republic of Germany also constituted an infringement of Article 85 (1) of the EEC Treaty (Article 1 of the decision).

4 The decision also rejected Mr Eisele's application for the exemption of the agreements under Article 85 (3) (Article 2 of the decision).

5 In support of their application the applicants make the following five submissions:

First submission: The contested decision is nugatory to the extent to which it refers to the 1960 contract, that contract having been superseded by other contracts entered into by the same parties in 1961.

Second submission: The contested decision is in breach of Regulation No 26/62 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (Official Journal, English Special Edition, 1959 to 1962, p. 129), the provisions of which preclude the application of Article 85 of the Treaty to the contracts at issue.

Third submission: The contested decision is in breach of Articles 85 (1) and (2), 30 and 36 of the Treaty inasmuch as:

A. The Commission failed to take into account the particular nature of plant breeders' rights, the exercise of which demands strict observance of territorial protection; and

B. The Commission was wrong to consider that every exclusive licence of breeders' rights by definition falls within the terms of Article 85 (1) of the Treaty.

Fourth Submission: The contested decision is in breach of Article 85 (3) of the Treaty, since the conditions for the grant of an exemption under the terms of that provision are satisfied in the present case and, in any event, the reasons given for refusing such an exemption are vitiated by errors of fact and law.

Fifth submission: The contested decision is unlawful for misuse of powers in so far as it relates to the settlement reached between Louis David KG and Mr Eisele, since, under German law, that settlement must be treated as an order of the court.

6 The action does not relate to those parts of Article 1 (b) of the decision which concern the obligations arising out of Clauses 2 and 3 of the contract of 1965 or Clause 1 of that contract to the extent to which it imposes the obligation on the licensee to refrain from producing or selling maize seed of varieties other than INRA varieties.

7 The interventions by the Governments of the United Kingdom, the Federal Republic of Germany and France and by the Caisse de Gestion des Licences Végétales [Office for the management of plant breeders' rights] principally relate to the third and fourth submissions. The French Government also stated that INRA is a public body to which are assigned tasks of general interest and that the applicants were therefore right to have relied upon Article 90 (2) of the EEC Treaty in the course of the administrative proceedings before the Commission.

8 In that connection it must be remembered that under Article 90 (2) of the Treaty undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition contained in the Treaty, in so far as the application of such rules does not obstruct the performance of the particular tasks assigned to them.

9 The contested decision states — and this is not disputed by the French Government — that the particular task which, under French law, is assigned to INRA is that of organizing, performing and disseminating all forms of agricultural research, with particular reference to the improvement and development of crop production and the preservation and processing of agricultural products. The performance of that task is not obstructed by the application of the Treaty's competition rules to a series of contracts whose main subject-matter is not plant breeding, that is to say the creation or development of new varieties, but the marketing of maize seed which orig-

inates from basic lines previously bred and developed by INRA following research activity and which is intended for sale to farmers. Reliance on Article 90 (2) of the Treaty is therefore not relevant to the present case.

First submission: The contracts covered by the contested decision

10 The contract of 1960 marked the beginning of cooperation between INRA and Mr Eisele. Under the terms of that contract, Mr Eisele undertook to represent INRA before the Bundessortenamt, the German authority responsible for breeders' rights, for the purpose of registering the varieties of maize seed developed by INRA which were already protected by the registration of breeders' rights under French legislation. Mr Eisele also undertook to keep INRA informed of all matters relating to the marketing of those varieties in the Federal Republic of Germany.

11 The parties to the contract discovered that under the German legislation in force at the time an owner of breeders' rights established outside German territory was not able to have those rights registered with the Bundessortenamt. In order to overcome that difficulty INRA assigned to Mr Eisele its breeders' rights over four varieties of INRA maize seed in respect of German territory by four declarations made in January and February 1961, but effective from the date of signature of the contract of 1960.

12 Article 1 (a) of the contested decision describes the content and application of certain provisions of the contract of 1960 as being in breach of Article 85 (1) of the Treaty, without referring to the contracts of 1961. The applicants' first submission is that the decision is nugatory to the extent to which it refers to the 1960 contract, that contract having been "substantially superseded" by the assignments.

13 It is apparent, however, from the papers before the Court that the declarations of assignment all included the following clause:

"To the extent to which the contents of this declaration amend the agreement entered into, that agreement is hereby amended by common accord."

14 It is thus clear that the contract of 1960 was amended and not abrogated by the declarations of assignment. Moreover, the Commission also interpreted the contract in that way by stating in the preamble to the decision (I, D, No 1.1) that "on the basis of this contract" Mr Eisele had INRA's maize varieties registered in his name at the Bundessortenamt, thereby acquiring breeders' rights for those varieties in Germany", and by referring in the operative part of the decision (Article 1 (a)) to the contract of 1960 by which "INRA assigned to Mr Kurt Eisele the breeders' rights in Germany".

15 Such an interpretation is all the more justified since the contract of 1960 and the declarations of assignment amending it marked only the beginning of the cooperation between INRA and the applicants, a cooperation which was to increase as time went by, in particular as a result of the contract of 1965 which conferred on Mr Eisele the exclusive right to organize sales of INRA maize seed in Germany. The assignments thus formed part of a series of operations intended to organize the distribution of INRA maize seed in Germany.

16 Therefore the first submission must be rejected.

Second submission: The applicability of Regulation No 26/82

17 Under the terms of Article 2 of Regulation No 26/82, adopted pursuant to Article 42 of the Treaty, Article 85 (1) of the Treaty does not apply to agreements, decisions or practices relating to the production or sale of agricultural products, if they form an integral part of a national market organization or are necessary for the attainment of the objectives of the common agricultural policy set out in Article 39 of the Treaty.

18 In that connection the decision contains the following observations: the agreements between INRA and Mr Eisele do not form an integral part of, or an extension of, a national market organization for maize seed (II, No 5, first indent); as from 1973 INRA entrusted the commercial exploitation of its

maize seed in France and elsewhere to Frasema, a French private company the shareholders of which are the main suppliers of certified seed of every variety used by French agriculture; INRA maize seed is not of such a special nature as to permit the organization of that market to be distinguished from the organization of the market for maize seed in general; as a result the agreements between INRA and Frasema cannot be regarded as constituting a national organization of the market in maize seed; moreover, the market for maize seed is governed by the provisions of Regulation No 2358/71 of the Council of 26 October 1971 on the common organization of the market in seeds (Official Journal, English Special Edition, 1971 (III) p. 894).

19 The decision then finds that the agreements at issue are not necessary for the attainment of the objectives set out in Article 39 of the Treaty (II, No 5, second indent); the means of attaining those objectives are defined in Regulation No 2358/71 and the agreements cannot in any way be considered to fall within the terms of that regulation; moreover, the agreements allowed the applicants to eliminate all competition in INRA maize seed on the German market, with the result that the prices charged for such seed in Germany were much higher than the prices charged in France; that result conflicts with two of the objectives of Article 39 of the Treaty, namely to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture, and to ensure that supplies reach consumers at reasonable prices; finally, by restricting production of INRA maize seed in Germany, the agreements were likely to jeopardize the objective laid down in Article 39 of the Treaty concerning the availability of supplies, since they restricted significantly the geographical distribution of that production in those parts of the Community where production was practicable.

20 The second submission contests the validity of the second part of the arguments set forth above. The applicants maintain first that the prices of INRA seeds in Germany were not markedly higher than those prevailing in France. They then maintain that an exclusive territorial licence to exploit breeders' rights is the best means of attaining the objectives of Article 39 of the Treaty; on the one hand, exclusive licences enable the knowledge acquired by the producer of seeds to be disseminated and agricultural

productivity to be increased by promoting technical progress, which leads to an increase in the individual earnings of persons engaged in agriculture (Article 39 (1) (a) and (b)); on the other hand, only an exclusive licensee is able, in concert with the licensor, to operate a long-term policy aimed at satisfying the demand for seed within the territory reserved to him and thus to ensure market stability and the availability of supplies (Article 39 (1) (c) and (d)).

21 It appears therefore that the second submission is based on the argument that the contracts at issue, by granting an exclusive licence over breeders' rights for INRA maize seeds in respect of Germany, constitute the most appropriate means of attaining the objectives of the common agricultural policy, having regard to the particular requirements inherent in the production and marketing of those seeds. That argument will be examined in the context of the third submission.

22 It is therefore not necessary to examine separately the second submission.

Third submission

A — The particular nature of plant breeders' rights

23 The applicants explain first that Mr Eisele was the owner of breeders' rights which had been assigned to him by INRA in respect of Germany. Under the relevant German legislation the owner is granted the exclusive right to produce seed for sale and to market seed of the protected variety and to prevent the importation of such seed without his consent (Article 15 (1) of the Sortenschutzgesetz [Law on the protection of plant varieties]).

24 They then argue that the principle of the territoriality of the protection conferred by breeders' rights pursuant to that legislation is justified by the particular nature of the plant species which are the subject of it. In the first place, cultivation of the seeds depends on climatic conditions and on the nature of the soil; the seeds must be adapted to the particular conditions of the country where they are to be used. Secondly, hybrid seeds, once developed, must be constantly reproduced by a biological process in order that they may be maintained; the risk of destabilization of the variety is s:

that marketing which is not controlled by a breeder or his licensee is likely to cause considerable damage to agriculture within the territory in question.

25 Those arguments are supported by the French Government and by the Caisse de Gestion des Licences Végétales, which state *inter alia* that the promotion of technical innovation in the field of plant species depends upon the possibility of benefiting from absolute territorial protection. Very long periods of time are necessary to develop the basic lines which generate the certified seeds covered by breeders' rights and the considerable financial commitment which that entails is only acceptable if the breeder and his licensee are assured of the undisturbed enjoyment of their rights.

26 The applicants and the two interveners infer from those arguments that the contested decision is unlawful in so far as it considers that the contracts at issue are intended to bring about a partitioning of the markets, whereas the territorial protection enjoyed by Mr Eisele is merely the result of the legitimate exercise of the breeders' rights which he owns in Germany.

27 It should first be noted that the contested decision expressly condemns the content and application of the contract of 1960 to the extent to which it enabled Mr Eisele "to invoke his own breeders' rights to prevent all imports into Germany or exports to other Member States of maize seed of INRA varieties" (Article 1 (a)).

28 It should then be remembered that, as the Court held in the judgment of 15 June 1976 in Case 51/75 *(EMI Records* v *CBS United Kingdom* [1976] ECR 811), an industrial or commercial property right, as a legal entity, does not possess those elements of contract or concerted practice referred to in Article 85 (1) of the Treaty, but the exercise of that right might fall within the ambit of the prohibitions contained in the Treaty if it were to manifest itself as the subject, the means or the consequence of an agreement.

29 As the Court emphasized in its judgment of 20 June 1978 in Case 28/77 *(Tepea* v *Commission* [1978] ECR 139), there is such an exercise of an

industrial or commercial property right prohibited by the provisions of the Treaty, in particular by Article 85 (1), where an agreement granting exclusive rights to utilize an industrial or commercial property right in a certain territory, in conjunction with an agreement appointing the licensee sole distributor for that territory, has the effect of ensuring absolute territorial protection for the licensee by preventing parallel imports.

30 Underlying the arguments advanced in support of Part A of the third submission is the claim that those principles, which were developed by the Court in relation to trade mark and patent law, cannot apply to breeders' rights on account of the specific characteristics of those rights and the products which form the subject-matter thereof.

31 In this connection it should be noted that the contested decision is concerned with INRA maize seeds covered by breeders' rights of which INRA was the owner in France and of which, following the assignments, Mr Eisele was the owner in Germany; those seeds were officially certified and capable of being imported, sold and produced in Germany with a view to being made available to agricultural users.

32 It is true that under Clause 3 of the 1965 contract Mr Eisele also received from INRA basic lines so that he himself might cultivate certified seeds on condition that he should not produce more than one third of the certified seed required by German users and that he should import the balance from France. The decision finds that the obligation imposed upon Mr Eisele not to produce more than one third of the seed sold is contrary to Article 85 (1) of the Treaty (see Article 1 (b) of the decision, with regard to Clause 3 of the 1965 contract). The applicants have not, however, challenged that part of the decision. The other parts of the decision do not concern the development or importation of basic lines, but rather the marketing and production of certified seeds.

33 That finding enables the arguments based on the promotion of technical innovation in the agricultural field to be better appreciated. Although the development of new seeds may involve considerable financial sacrifices, that risk is encountered at the time of production of the basic seeds. On the other hand, when the newly-developed variety has found its definitive form, in the sense that it may be used for the production of seeds capable of being officially certified and marketed, the rules relating to trade in products, including competition law, must in principle be applied to the marketing of those seeds.

34 The certified seeds which form the subject-matter of the contracts at issue are hybrid maize seeds, a seed variety whose stability can only be guaranteed if the seeds are cultivated again every time from basic lines. According to the applicants, the reproduction of those seeds poses a special problem in comparison with the reproduction of products protected by trade mark or patent rights, in particular because the procedure to achieve it is more complicated and reproduction depends to a very marked degree on the hazards of climate and soil.

35 That line of argument fails to take into account, however, that many products capable of forming the subject-matter of a trade mark or a patent, in particular certain food or pharmaceutical products, are in a similar situation. Although the reasons put forward by the applicants are based on correct findings of fact, they are not sufficient to justify a special system for breeders' rights in relation to other industrial or commercial property rights.

36 The main argument which the applicants put forward in support of their contention is that the owner of breeders' rights in Germany is the guarantor, as regards the Bundessortenamt, of the stability of the protected variety. It is argued that the responsibility thus imposed on that owner demands that he exercise an absolute control over all marketing of seeds of the protected variety in Germany. According to the applicants, it is precisely for that reason that the very nature of breeders' rights under the German legislation relevant to the present case prevents parallel imports from being carried out outside the control of the owner.

37 In that connection it should be observed that Articles 12 and 15 of the Sortenschutzgesetz (codified version, Bundesgesetzblatt 1977, I, p. 105) provide that breeders' rights belong to the original breeder or discoverer of a variety or to his successors in title and that the effect of those rights is that only the owner thereof is entitled to produce or sell for commercial purposes the reproductive material of the protected variety. As regards the conservation of the variety, Article 16 of that Law provides that the owner of breeders' rights is required to supply all information needed for the testing of the variety by the Bundessortenamt, to allow that authority to verify the measures taken to ensure the conservation of the variety and to send that authority all the material which it might need for that purpose.

38 As was explained by the Government of the Federal Republic of Germany in its replies to the questions put by the Court, that Law does not govern the approval of the seeds for marketing or the associated tests, those being matters which are governed by the Saatgutverkehrsgesetz [Law on the marketing of seeds] (codified version, Bundesgesetzblatt 1975, I, p. 1453). Under Article 4 (1) of that Law, seed may only be marketed after having been approved as basic seed or certified seed. Such approval presupposes, in particular, that the variety in question has been entered on the list of varieties (Article 7 (1) of the Saatgutverkehrsgesetz) pursuant to an application by the breeder of the variety or, if it is a protected variety, by the owner of the breeders' rights. Neither entry on the list of varieties nor approval of the seed confers exclusive production or marketing rights over the reproductive material.

39 By virtue of Article 38 (1) of the Saatgutverkehrsgesetz a variety may only be included in the list of varieties if it is distinct, sufficiently homogeneous and stable, and if it is of agricultural value and is designated by a variety name which is capable of registration. It is the duty of the Bundessortenamt to examine whether the requirements laid down for the registration of the variety have been met (Article 57 (1)). The entry of a variety may be struck off by the Bundessortenamt if one of the five conditions mentioned above is not or is no longer being fulfilled (Article 62 (2)).

40 The Saatgutverkehrsgesetz also provides that the breeder who has registered the variety on the list of varieties is required to conserve that variety as it was when he registered it, and that the Bundessortenamt is to supervise the conservation of registered varieties (Articles 67 and 68).

41 That synopsis of the German legislation shows that seeds certified and approved for marketing are subject to quality control on the part of the public authorities and that that control extends to the stability of the variety. However, breeders' rights are not intended to substitute for controls carried out by the competent authorities, controls carried out by the owner of those rights, but to confer on the owner a kind of protection, the nature and effects of which all derive from private law. From that point of view the legal position of a breeder of seeds is not different from that of the owner of patent or trade mark rights over a product subject to strict control by the public authorities, as is the case with pharmaceutical products.

42 Moreover, it should be observed that maize seeds imported from France which have already been approved in that Member State may be marketed in Germany without undergoing a further acceptance procedure. The Government of the Federal Republic of Germany explained that it has adopted regulations to that effect on the basis of Articles 23 and 24 of the Saatgutverkehrsgesetz and Community directives concerning the marketing of cereal seeds.

43 It is therefore not correct to consider that breeders' rights are a species of commercial or industrial property right with characteristics of so special a nature as to require, in relation to the competition rules, a different treatment from other commercial or industrial property rights. That conclusion does not affect the need to take into consideration, for the purposes of the rules on competition, the specific nature of the products which form the subject-matter of breeders' rights.

B — The application of Article 85 of the EEC Treaty to exclusive licences

44 By this submission the applicants criticize the Commission for wrongly taking the view that an exclusive licence of breeders' rights must by its very nature be treated as an agreement prohibited by Article 85 (1) of the Treaty. They submit that the Commission's opinion in that respect is unfounded in so far as the exclusive licence constitutes the sole means, as regards seeds which have been recently developed in a Member State and which have not yet penetrated the market of another Member State, of promoting

competition between the new product and comparable products in that other Member State; indeed, no grower or trader would take the risk of launching the new product on a new market if he were not protected against direct competition from the holder of the breeders' rights and from his other licensees.

45 This contention is supported by the German and British Governments and by the Caisse de Gestion des Licences Végétales. In particular, the two governments claim that the general character of the reasons given for the contested decision is incompatible with the terms of Article 85 of the Treaty and conflicts with a sensible competition policy. The reasons given for the decision are said to be based on the ill-conceived premise that every exclusive licence of an industrial or commercial property right, whatever its nature, must be regarded as an agreement prohibited by Article 85 (1) and that it is therefore for the Commission to judge whether, in a given case, the conditions for the grant of an exemption under Article 85 (3) are satisfied.

46 During the course of the proceedings objection was made to the use of the expression "exclusive licence" on the ground that, in the present case, the applicants' exclusive right to market the seeds at issue in Germany derived from breeders' rights of which Mr Eisele was the owner in that Member State. Therefore, it was argued, that exclusive right was founded neither on the grant by INRA of an exclusive right to use, within German territory, industrial or commercial property rights vesting in INRA, nor on the contract of 1965 which appointed Mr Eisele sole distributor of the seeds in question for that territory.

47 However, that argument disregards the fact that, from the point of view of Community law, the contract of 1960 initiating the cooperation between INRA and Mr Eisele, the "assignments" of breeders' rights in 1961 and the contract of 1965 organizing the distribution of INRA seeds in Germany make up an indivisible whole. In economic terms, Mr Eisele's position on the German market was that of an exclusive licensee, since the authorization given by INRA to Mr Eisele to have registered in his name in Germany breeders' rights of which INRA was the owner in France was due to the fact

that that body was not able at that time to have its own breeders' rights registered with the Bundessortenamt and since that operation is to be seen within the context of the grant to Mr Eisele of the exclusive right to organize the sale of INRA seeds in Germany.

48 The statement of reasons on which the decision is based refers to two sets of circumstances in order to justify the application of Article 85 (1) to the exclusive licence in question (II, No 3). The accuracy of the facts thus stated has not been challenged.

49 The first set of circumstances is described as follows: [1]

"By licensing a single undertaking to exploit his breeders' rights in a given territory, the licensor deprives himself for the entire duration of the contract of the ability to issue licences to other undertakings in the same territory . . ."

"By undertaking not to produce or market the product himself in the territory covered by the contract the licensor likewise eliminates himself, as well as Frasema and its members, as suppliers in that territory."

50 Corresponding to that part of the statement of reasons is Article 1 (b) of the decision, which in its first and second indents declares the exclusive nature of the licence granted by the 1965 contract to be contrary to Article 85 (1) of the Treaty in so far as it imposes:

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

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

51 The second set of circumstances referred to in the decision is described as follows:

"The fact that third parties may not import the same seed [namely the seed under licence] from other Community countries into Germany, or export

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.

from Germany to other Community countries, leads to market sharing and deprives German farmers of any real room for negotiation since seed is supplied by one supplier and one supplier only."

52 That part of the statement of reasons is also reflected in Article 1 (b) of the decision, which in its third and fourth indents declares the exclusive nature of the licence granted by the 1965 contract to be contrary to Article 85 (1) of the Treaty in so far as it imposes:

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

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.

53 It should be observed that those two sets of considerations relate to two legal situations which are not necessarily identical. The first case concerns a so-called open exclusive licence or assignment and the exclusivitiy of the licence relates solely to the contractual relationship between the owner of the right and the licensee, whereby the owner merely undertakes not to grant other licences in respect of the same territory and not to compete himself with the licensee on that territory. On the other hand, the second case involves an exclusive licence or assignment with absolute territorial protection, under which the parties to the contract propose, as regards the products and the territory in question, to eliminate all competition from third parties, such as parallel importers or licensees for other territories.

54 That point having been clarified, it is necessary to examine whether, in the present case, the exclusive nature of the licence, in so far as it is an open licence, has the effect of preventing or distorting competition within the meaning of Article 85 (1) of the Treaty.

55 In that respect the Government of the Federal Republic of Germany emphasized that the protection of agricultural innovations by means of breeders' rights constitutes a means of encouraging such innovations and the grant of exlusive rights for a limited period, is capable of providing a further incentive to innovative efforts.

From that it infers that a total prohibition of every exclusive licence, even an open one, would cause the interest of undertakings in licences to fall away, which would be prejudicial to the dissemination of knowledge and techniques in the Community.

56 The exclusive licence which forms the subject-matter of the contested decision concerns the cultivation and marketing of hybrid maize seeds which were developed by INRA after years of research and experimentation and were unknown to German farmers at the time when the cooperation between INRA and the applicants was taking shape. For that reason the concern shown by the interveners as regards the protection of new technology is justified.

57 In fact, in the case of a licence of breeders' rights over hybrid maize seeds newly developed in one Member State, an undertaking established in another Member State which was not certain that it would not encounter competition from other licensees for the territory granted to it, or from the owner of the right himself, might be deterred from accepting the risk of cultivating and marketing that product; such a result would be damaging to the dissemination of a new technology and would prejudice competition in the Community between the new product and similar existing products.

58 Having regard to the specific nature of the products in question, the Court concludes that, in a case such as the present, the grant of an open exclusive licence, that is to say a licence which does not affect the position of third parties such as parallel importers and licensees for other territories, is not in itself incompatible with Article 85 (1) of the Treaty.

59 Part B of the third submission is thus justified to the extent to which it concerns that aspect of the exclusive nature of the licence.

60 As regard to the position of third parties, the Commission in essence criticizes the parties to the contract for having extended the definition of exclusivity to importers who are not bound to the contract, in particular parallel importers. Parallel importers or exporters, such as Louis David KG in Germany and Robert Bomberault in France who offered INRA seed for sale to German buyers, had found themselves subjected to pressure and legal proceedings by INRA, Frasema and the applicants, the purpose of which was to maintain the exclusive position of the applicants on the German market.

61 The Court has consistently held (cf. Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299) that absolute territorial protection granted to a licensee in order to enable parallel imports to be controlled and prevented results in the artificial maintenance of separate national markets, contrary to the Treaty.

62 The Government of the United Kingdom advanced the view that a contract between two undertakings could not impede the freedom of importers to buy seeds in the country of the owner of the breeder's rights with a view to exporting them to the country of the licensee since, according to previous decisions of the Court, a commercial or industrial property right cannot be invoked against the marketing of a product which has been lawfully placed in circulation on the market of another Member State by the owner of that right or with his consent. Therefore such a contract cannot be regarded as an agreement prohibited by Article 85 (1) of the Treaty.

63 However, that view fails to take into account the fact that one of the powers of the Commission is to ensure, pursuant to Article 85 of the Treaty and the regulations adopted in implementation thereof, that agreements and concerted practices between undertakings do not have the object or the effect of restricting or distorting competition, and that that power of the Commission is not affected by the fact that persons or undertakings subject to such restrictions are in a position to rely upon the provisions of the Treaty relating to the free movement of goods in order to escape such restrictions.

64 It is clear from the documents in the case that the contracts in question were indeed intended to restrict competition from third parties on the German market. In fact under Clause 5 of the 1965 contract INRA promises that it and those deriving rights through it will do "everything in their power to prevent the export" of the varieties of seeds in question to Germany.

65 In the contested decision that clause is interpreted as seeking to prevent third parties who purchase INRA seeds in France from exporting them to Germany (II, No. 3 (b)). It may be inferred from the obstructions which the parties to the contracts have placed in the way of the efforts of Louis David KG and Robert Bomberault to sell INRA seeds in Germany that that interpretation is correct.

66 Article 1 (b) of the decision expressly refers to Clause 5 of the 1965 contract and to the exercise of breeders' rights by Mr Eisele so as to prevent the marketing of INRA seeds in Germany by third parties. Therefore, to that extent Part B of the third submission is unfounded.

67 An examination of Part B of the third submission therefore leads to the conclusion that that submission is well-founded in part and that Article 1 (b) of the decision must be declared void to the extent to which it relates to Clause 1 of the 1965 contract and in so far as that contract imposes:

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

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

Fourth submission: The grant of an exemption under Article 85 (3) of the EEC Treaty

68 In support of their fourth submission, the applicants observe that the contested decision refused an exemption under Article 85 (3) of the Treaty because there was no question of a new market being penetrated or a new

product being launched and because Mr Eisele enjoyed absolute territorial protection in Germany. According to the applicants, those two reasons are incorrect: on the one hand, the very purpose of the 1965 contract, at the time of its notification to the Commission, was to open up a new market and to introduce a new pruduct; secondly, the exclusivity established by that contract did not go beyond what was necessary for the distribution of the varieties which could be grown outside their country of origin and thus for the improvement of the production and distribution of goods.

69 In support of that submission, the Government of the United Kingdom observed that only the benefit of the protection afforded by an exclusive licence is capable of encouraging the licensee to exploit the breeders' rights in question and that that protection thus serves to improve the production and distribution of goods and promote technical and economic progress within the meaning of Article 85 (3). It was therefore submitted that the criteria applied by the contested decision were excessively severe.

70 The Caisse de Gestion des Licences Végétales argues that these proceedings concern a fragile and technically advanced product and that in such a case availability of supplies can only be achieved by the establishment of a selective system for planning and stabilizing the market. In refusing to grant an exemption the Commission disregarded the specific nature of the contracts in question.

71 It should first be stated that the contested decision left open the assessment under Article 85 (3) of the exclusive production and propagation rights granted to Mr Eisele und that it confined itself to stating that the conditions for the exemption of the exclusive selling rights and the accompanying export prohibitions were not satisfied (III, No 1 (b)).

72 It follows that, since Part B of the third submission was partially successful, the Court's appraisal of the refusal to grant an exemption may be confined to an examination of the Commission's arguments relating to the exclusive selling rights in so far as they confer absolute territorial protection.

73 On that point the decision states that Mr Eisele enjoyed absolute territorial protection in respect of the distribution in Germany of the seeds for which he had exclusive rights, and that by its absolute nature the sole and direct consequence of such protection was to prevent all imports through other channels of the original products, namely INRA seeds originating in France, despite a persistent demand for such imports in Germany, which in itself is not capable of contributing to an improvement in the production or distribution of goods within the meaning of Article 85 (3) (III, No 1 (b), second indent).

74 The Caisse de Gestion des Licences Végétales disputed that reasoning. In its view, the territorial protection enjoyed by the licensee in the present case was rather a relative protection on account of the presence on the market of numerous varieties of maize seed which could be substituted for INRA varieties and which could thus enter into direct competition with those varieties.

75 However, the Commission rightly stated in reply that that view put forward by the Caisse de Gestion des Licences Végétales concerns the problem of the demarcation of the market; that is a problem which arises when the Commission has to examine whether an agreement affords "the possibility of eliminating competition in respect of a substantial part of the products in question" (Article 85 (3) (b)) but which is not relevant to the question whether an agreement is capable of improving the production or distribution of goods.

76 It must be remembered that under the terms of Article 85 (3) of the Treaty an exemption from the prohibition contained in Article 85 (1) may be granted in the case of any agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical progress, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives.

77 As it is a question of seeds intended to be used by a large number of farmers for the production of maize, which is an important product for human and animal foodstuffs, absolute territorial protection manifestly goes beyond what is indispensable for the improvement of production or distribution or

the promotion of technical progress, as is demonstrated in particular in the present case by the prohibition, agreed to by both parties to the agreement, of any parallel imports of INRA maize seeds into Germany even if those seeds were bred by INRA itself and marketed in France.

78 It follows that the absolute territorial protection conferred on the licensee, as established to exist by the contested decision, constituted a sufficient reason for refusing to grant an exemption unter Article 85 (3) of the Treaty. It is therefore no longer necessary to examine the other grounds set out in the decision for refusing to grant such an exemption.

79 Therefore the fourth submission must be rejected.

Fifth submission: The settlement concluded between Louis David KG and Mr Eisele

80 The fifth submission relates to Article 1 (c) of the decision, whereby the Commission declared Clause 1 of the settlement concluded on 14 November 1973 between Louis David KG and Mr Eisele to be contrary to Article 85 (1) of the Treaty in so far as it obliged Louis David KG not to sell or place in circulation in Germany seeds of INRA varieties without the authorization of the German licensee.

81 It appears from the documents before the Court that that settlement was reached in the framework of legal proceedings brought by Mr Eisele before the Landgericht [Regional Court] Bad Kreuznach for infringement of his exclusive rights after Louis David KG had imported from France and resold in Germany, without Mr Eisele's authorization, a quantity of certified seeds of INRA varieties.

82 The applicants claim that that settlement was a judicial settlement within the meaning of Article 794 I (1) of the German Code of Civil Procedure concluded between the parties in order to dispose definitively of a dispute before a German court. They submit that such a settlement, which is legally

enforceable under the terms of the aforementioned provision, is not an ordinary private contract but amounts to an order of the court.

83 From that the applicants infer that the Commission was not able to declare such a settlement void without encroaching upon the jurisdiction of the German courts; but in view of the automatic nullity decreed by Article 85 (2) of the Treaty the Commission did declare the settlement void when it held that a part of it was contrary to Article 85 (1).

84 The Commission replies that under German law a settlement concluded for the purpose of disposing of a legal dispute must comply with the requirements of substantive law applicable to every civil contract, and in particular with those deriving from competition law. A judicial settlement is a contract of civil law as well as an act of the court and the nullity of the contract nullifies the whole settlement.

85 The Commission adds that decisions of the German courts, in particular the Bundesgerichtshof [Federal Supreme Court], have confirmed that view. According to those decisions, a party to a judicial settlement may not validly invoke clauses of that settlement which conflict with the German law on monopolies. There is no reason why a settlement which offends against Community rules on competition should be viewed differently.

86 The settlement at issue was submitted to the Court, which was able to find that it was indeed a judicial settlement within the meaning of Article 974 I (1) of the German Code of Civil Procedure, namely a settlement concluded before a German court in order to dispose of a legal dispute pending before it.

87 Whilst it is true, as the applicants maintain, that the judicial settlement is enforceable, it does not have the authority of *res judicata* under German law and is therfore not effective against other courts, public authorities or third parties. Furthermore, as the Commission emphasized, the decisions of the German courts are based on the premise that a judicial settlement, to be

valid, must comply with the requirements of public policy and *bonos mores* and therefore cannot infringe mandatory rules of competition law.

88 In adjudging the applicants' submissions it is not however necessary to consider the question whether, and if so to what extent, a judicial settlement reached before a German court may be declared void for infringing Community rules of competition law. The contested decision in fact merely states that the obligation on Louis David KG, arising out of the settlement, no longer to sell or to place in circulation in Germany INRA seeds without Mr Eisele's authorization conflicts with Article 85 (1) of the Treaty.

89 Therefore, the effect of the decision is confined, in this respect, to a prohibition restraining Mr Eisele from relying on Clause 1 of the settlement to prevent the sale or the placing in circulation of INRA seeds in Germany by Louis David KG. Such a prohibition is in conformity with the principle, recognized in German law, according to which a judicial settlement, within the meaning of Article 794 I (1) of the Code of Civil Procedure, constitutes both an act of the court terminating a legal dispute and a contract of private law which does not allow the parties to disregard mandatory rules of law.

90 The fifth submission must therefore be rejected.

91 It follows from the foregoing that the application must be allowed to the extent to which it challenges Article 1 (b), relating to Clause 1 of the 1965 contract, first and second indents, and that the rest of the application must be dismissed.

Costs

92 Under Article 69 (3) of the Rules of Procedure the Court may order that the parties bear their own costs in whole or in part where each party succeeds on some and fails on other heads. In the present case the parties and the interveners must bear their own costs.

On those grounds,

THE COURT

hereby:

1. Declares Article 1 (b) of the Commission's Decision of 21 September 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.824 — breeders' rights — maize seed; Official Journal 1978, L 286, p. 23) to be void to the extent to which it relates to Clause 1 of the contract of 5 October 1965 and in so far as that contract imposes:

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

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

2. Dismisses the rest of the application;

3. Orders the parties and the interveners to bear their own costs.

Mertens de Wilmars Bosco Touffait Due

Mackenzie Stuart O'Keeffe Koopmans Everling Chloros

Delivered in open court in Luxembourg on 8 June 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

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1 — Translated from the French.