OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 9 December 1987 *

Mr President,
Members of the Court,

1. Proceedings have been brought before the tribunal de commerce (Commercial Court), Liège, between Louis Erauw-Jacquery SPRL and La Hesbignonne, a cooperative, concerning an 'agreement for the propagation of cereal seed' (hereinafter referred to as 'the Agreement') under the terms of which La Hesbignonne is authorized to propagate and sell in Belgium species and varieties of cereals of which Erauw-Jacquery is the breeder or for which it is the agent. Both undertakings are established in Belgium.

2. Article 2 of the Agreement includes the following provisions:

'The second-named undertakes *vis-à-vis* the first-named to propagate those species and varieties of cereals with a view to sale, on the following terms:

(a) to propagate in Belgium all the E2 basic seed or equivalent provided by the first-named and submit it for inspection to the ONDAH in accordance with the regulations in force; Not to sell or assign E2 basic seed or equivalents of those varieties to other growers or to any other persons with the exception of the propagating grower and not to export it to another country;

(. . .)

(f) not to export, whether directly or indirectly, seed of varieties of which the first-named is the breeder or for which it is the agent, irrespective of the class of seed, without the prior written authorization of the first-named;

(. . .)

(i) not to sell certified seed of any of the species, varieties and classes in respect of which the first-named is the breeder or for which it is the agent below the minimum selling prices imposed by the first-named'.

3. The tribunal de commerce, Liège, asks the Court whether paragraphs (a) and (i) of Article 2 fall within the scope of Article 85 of the Treaty establishing the European Economic Community or of any other provision of that Treaty.

4. Since Article 2 (f) of the Agreement is also significant from the point of view of Community competition law it seems to me worthwhile also to comment on that provision, on the understanding, of course, that in the context of a request for a preliminary ruling under Article 177, the Court of Justice may not apply the Treaty to a specific case as that task falls within the exclusive jurisdiction of the national court trying the case.

5. I would refer to the Report for the Hearing for a more detailed description of

* Translated from the French.

the facts and of the Community and Belgian legislation concerning cereal seed.

6. Before commencing my examination of the question submitted I would also like to recall that in the judgment of 8 June 1982 *Nungesser* v *Commission*, [1] the Court defined plant breeders' rights as follows:

'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' (paragraph 2).

7. After analysing the particular features of seed production and marketing the Court reached the following conclusion:

'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' (paragraph 43).

8. Finally, it should be recalled that such a 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 consequences of an agreement. [2]

1 — Case 258/78 [1982] ECR 2015.

2 — Judgment of 8 June 1982 in Case 258/78 *Nungesser* v *Commission* cited above, paragraph 28; judgment of 14 September 1982, in Case 144/81 *Keurkoop* v *Nancy Kean Gifts* [1982] ECR 2853, paragraphs 27 and 28; judgment of 22 June 1976 in Case 119/75 *Terrapin* v *Terranova* [1976] ECR 1039, paragraph 5; judgment of 8 June 1971 in Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487, paragraph 6.

9. It is against that background that I would now like to analyse the various aspects of the question referred to the Court.

I — The prohibition on selling and exporting basic seed

Under the terms of Article 2 (a) of the Agreement the grower is required in essence not to use the basic seed supplied by the breeder for any purpose other than propagation. [3]

10. For my part, I share the Commission's view that that provision is covered by the actual existence of the plant breeders' right and therefore does not fall within the prohibition set out in Article 85 (1) of the Treaty.

11. Basic seed is to a certain extent comparable to a manufacturing process protected by a patent, since certified seed of the first and second generation intended for sale to farmers for use in cereal production is produced from it. The breeder (or his agent) must therefore remain in a position to control the destination and the use of the basic seed; otherwise he would risk the *de facto* loss of the exclusive rights granted to him in respect of the new varieties which he has developed. The Commission is right to point out that the propagation agreement is an agreement where the identity of the other party is essential.

12. The situation of a breeder or his agent therefore resembles in certain respects the

3 — The expression 'basic seed' means seed which has been produced under the responsibility of the breeder according to accepted practices for the maintenance of the variety (Article 2 (1) (C) of Directive 66/402/EEC of 14 June 1966).

situation of a franchisor, in respect of whom the Court has stated that he 'must be able to communicate his know-how to the franchisees and provide them with the necessary assistance in order to enable them to apply his methods, without running the risk that know-how and assistance might benefit competitors, even indirectly. It follows that provisions which are essential in order to avoid that risk do not constitute restrictions on competition for the purposes of Article 85 (1)' (judgment of 28 January 1986 in Case 161/84 *Pronuptia* [1986] ECR 353, paragraph 16).

13. I would therefore propose that the part of the question referring to Article 2 (a) of the Agreement should be answered as follows:

Article 85 (1) of the Treaty does not preclude a provision prohibiting a grower from selling, assigning or exporting basic seed placed at his disposal by the breeder or his agent solely for the purpose of propagation.

II — The provisions imposing minimum prices and prohibiting the exportation of other seed

14. Article 2 (i) of the Agreement requires La Hesbignonne, the defendant in the main proceedings, 'not to sell certified seed of any species, varieties and classes in respect of which the first-named (Erauw-Jacquery) is the breeder or agent below the minimum selling price stipulated by the first-named. These minimum prices will be communicated in writing . . .'.

15. La Hesbignonne's failure to comply with the minimum price as regards seed of Gerbel multi-row winter barley is at the origin of the litigation during which the tribunal de commerce, Liège, submitted the preliminary question now before the Court.

16. It is apparent from the judgment making the reference that Erauw-Jacquery entered into identical contracts with other growers. Those growers must be fairly numerous since the minimum prices are communicated to them by circular letter. The unauthorized sale made by La Hesbignonne in defiance of Article 2 (i) obliged the other growers to lower their prices also. For that reason they consider that they have suffered significant loss (estimated at BFR 15 000 000). They seek compensation for this from the plaintiff, who wishes to pass on liability to the defendant.

17. We are therefore concerned with a whole network of agreements with identical content and it is the effect of this cluster of agreements on competition in the sector concerned and on trade between Member States which we must take into account. Commission Decision 77/66/EEC of 22 December 1976 relating to a proceeding under Article 85 of the EEC Treaty (IV/24.510 — Gerofabriek, Official Journal 1977 L 16, p. 8) constitutes an interesting precedent in this respect, although in that case the agreements also bound undertakings established in other Member States. A case which is yet closer to the main proceedings was the subject of the judgment of the Court of 1 October 1987 (in Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus* v *ASBL Sociale Dienst van de Plaatselijke and Gewestelijke Overheidsdiensten* [1987] ECR 3801).

18. A — Let us now examine whether the object or effect of the minimum price provision was to prevent, restrict or distort competition within the common market.

19. According to the judgment of 30 June 1966 *Société technique minière* v *Maschinenbau Ulm GmbH (MBU)*[4] the fact that those requirements are not cumulative but alternative, as indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement in the economic context in which it is to be applied. It is only where an analysis of the clauses does not reveal the effect on competition to be sufficiently deleterious that the consequences of the agreement should be considered and for it be caught by the prohibition it is then necessary to find that those factors are present which show that the competition has in fact been prevented or restricted or distorted to an appreciable extent.

20. As regards a provision imposing minimum prices it should be recalled first and foremost that Article 85 (1) (a) refers to agreements which 'directly or indirectly fix purchase or selling prices or any other trading conditions'.

21. As regards horizontal agreements, the Court has stated that a system of imposed selling prices is clearly contrary to that provision.[5]

22. Although Commission Regulation (EEC) No 2349/84 of 23 July 1984 on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements (Official Journal 1984, L 219, p. 15) does not apply to plant breeders' rights, it is interesting to note that that regulation does not exempt from the prohibition set out in Article 85 (1) agreements where 'one party is restricted in the determination of prices, components of prices or discounts for the licensed products' (Article 3 (6)). The same applies *a fortiori* as regards networks of agreements.

23. In the Gerofabriek decision, cited above, the Commission stated that 'the system of imposed retail prices makes it impossible for dealers to fix their own retail prices by reference to their own costs and commercial policy. The free formation of prices and the ability to pass on to purchasers any possible resulting benefits are hindered or at least substantially reduced. The system is thus clearly contrary to the prohibition in Article 85 (1)'. In that case retailers *simpliciter* and not licensees were involved and the prices imposed differed depending on the Member States involved. None the less, I think that that reasoning may be applied to this case.

24. Finally, it must be stressed that the prices imposed are applicable to certified seeds of all species, varieties and classes in respect of which Erauw-Jacquery is the breeder or agent. Consequently the provision covers even seed other than seed which La Hesbignonne propagates under its contract with Erauw-Jacquery.

25. It may therefore be concluded that the object of a minimum price provision in an agreement which is one of a cluster of identical agreements concluded by the same breeder or agent of foreign breeders and which is applicable even to seed not propagated under that agreement is to restrict competition.

4 — Case 56/65 [1966] ECR 235.

5 — Judgment of 17 October 1972 in Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 19; judgment of 26 November 1975 in Case 73/74 *Papier peints* v *Commission* [1975] ECR 1491, paragraph 10.

26. As we saw at the beginning, the standard-form contract also includes a paragraph (f) which prohibits the grower from exporting, whether directly or indirectly, seed of the varieties in respect of which Erauw-Jacquery acts as breeder or agent, irrespective of the class of seed, without the prior written authorization of Erauw-Jacquery. That provision covers the exportation of seed for propagation, since the exportation of basic seed is already prohibited by Article 2 (a).

27. It appears from the documents before the Court that, at least as regards Gerbel multi-row winter barley (the seed at issue in the main proceedings), Erauw-Jacquery is the exclusive agent for Belgium of Florimont-Desprez SARL, established at Templeneuve in France. The prohibition on exporation therefore protects that French company and any agents in France or in other Member States against competition from La Hesbignonne and Erauw-Jacquery's other Belgian licensees.

28. However, it is not certain that that provision necessarily falls within the prohibition contained in Article 85 (1) inasmuch as it prohibits La Hesbignonne from *directly* exporting the seeds in question. I would point out that in Raymond-Nagoya decision of 9 June 1972 (IV/26.813 — Journal Officiel L 143 of 23 June 1972, p. 39) the Commission considered that in view in particular of the characteristics of the products in question the fact that a licensee was prohibited from exporting those products to Member States of the EEC could not have a significant effect on competition within the common market. In any event, it does not seem to me to be possible to adopt a position in proceedings brought under Article 177 on the compatibility of such a clause with Article 85 (1) in the absence of sufficient information on the characteristics of the product and the market in question.

29. On the other hand, in so far as the clause prohibits even *indirect exports*, that is to say exports made by third parties who purchase seed from La Hesbignonne, the clause may help to confer absolute territorial protection on undertakings enjoying exclusive rights in other Member States to propagate Gerbel multi-row winter barley. However,

'the Court has consistently held (see Joined Cases 56 and 58/84, *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' (Case 258/78 *Nungesser* v *Commission* [1982] ECR 2015, paragraph 61 at 2070).'

Consequently, the object of paragraph (f) is to restrict competition.

30. B — In order to fall within the prohibition set out in Article 85 (1), the agreements must not only restrict competition but must at the same time be capable of affecting trade between Member States.

31. In the abovementioned judgment in *Société technique minière* the Court set out the following relevant criteria:

'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States [such as to impede] the realization of the single market between Member States. In this respect it is necessary to consider in particular whether the agreement is capable of bringing about a

partitioning of the market in certain products between Member States'.

It is self-evident that a provision prohibiting even indirect imports fulfils this latter criterion.

32. It remains to be seen whether the minimum prices clause is, for its part, capable of affecting trade between Member States. In the judgment of 17 October 1972 (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, at paragraph 29) and the judgment of 26 November 1975 (Case 73/74, *Papiers peints* v *Commission* [1975] ECR 1491, paragraph 25 *et seq.*) the Court ruled that

'the fact that a price-fixing agreement only covers the marketing of products in a single Member State does not rule out the possibility that trade between Member States may be affected'.

Admittedly, in those cases horizontal agreements between producers were involved but it seems to me that in this case the minimum price system applied by Erauw-Jacquery's licensees taken as a whole equates in practice to such a horizontal agreement even though the network of agreements also includes a vertical element.

33. Another relevant judgment in the present context is the judgment of 30 January 1985 in Case 123/83 (*BNIC* v *Clair* [1985] ECR 391, at 425) which was concerned with an agreement which *inter alia* fixed the price of spirits used in the manufacture of cognac, that is to say an intermediate product which is not normally sent outside the Cognac region. The Court declared in that context that

'any agreement whose object or effect is to restrict competition by fixing minimum prices for an intermediate product is capable of affecting intra-Community trade, even if there is no trade in that intermediate product between the Member States, where the product constitutes the raw material for another product marketed elsewhere in the Community.'

34. It may be considered in this case that seed for propagation is an intermediate product and seed for consumption (in this case barley) is a finished product which will, very probably, be exported from Belgium.

35. As regards the intermediate product, we have seen that La Hesbignonne had to undertake not to export seed of varieties in respect of which Erauw-Jacquery was the breeder or agent, irrespective of its class, without authorization. However, it might sell such seed in Belgium to a trader who had the intention, whether disclosed or covert, to export the seed to another Member State. (I have in mind here the case of a contract of sale concluded in Belgium through the agreement of the parties on the price and the subject-matter of the contract.) In such an eventuality, the product might perhaps be exported, but not at less than the minimum price. However, the level of that price might make such an operation unappealing, and hence intra-Community trade would be affected.

36. Let us finally examine whether imports into Belgium may be affected by such a provision (given that the agreement does not contain a prohibition against imports). In that regard the question arises as to whether the growers bound by contract to Erauw-Jacquery would find it worthwhile to import from abroad seed for propagation when they can propagate their own by virtue of their contracts. If, for the sake of argument, they should none the less wish to sell in Belgium such seed purchased at a low price in another Member State the minimum

price provision would come into play. They would therefore lose any competitive advantage which they might have obtained from selling that seed in Belgium at a price lower than the minimum price. In this sense imports could potentially be affected by such a provision.

37. Is it also necessary to show that the restriction on competition and the effect on trade between Member States may be described as appreciable? It is plain from the judgment requesting the preliminary ruling that it is chiefly those points which have exercised the tribunal de commerce, Liège.

38. In two recent judgments (the judgment of 1 October 1987 in Case 311/85, cited above, and the judgment of 3 December 1987 in Case 136/86 *BNIC* v *Aubert* [1987] ECR 4789) the Court appears not to have used that criterion, which it has so often applied in the past.[6] In fact, after having found that an agreement of the type in question in the main proceedings entailed a restriction on competition and was capable of affecting trade between Member States, the Court immediately concluded that such an agreement was incompatible with Article 85 (1) of the Treaty and prohibited by that article.

39. The Court could therefore reach the same conclusion in this case with regard to the provisions requiring compliance with minimum prices and prohibiting indirect exports.

40. Otherwise the Court will have to point out that in a reference for a preliminary ruling only the national court has jurisdiction to determine whether, in the light of all the features of the case before it and of the fuller information which is at its disposal or which it may be able to obtain, the restriction of competition and the effect on trade between Member States, which the Court has held to exist, may be described as appreciable.

41. In the light of the features of the main proceedings, the second approach seems to me the more appropriate. However, the Court may supply the national court with guidance to help it carry out its task.

42. As regards the question as to whether competition is restricted to an appreciable degree by the provisions prohibiting indirect exports and imposing minimum prices, it may be considered that that is very probably the case.

43. The arguments pointing to this conclusion are the presence of a cluster of agreements, the magnitude of the loss claimed by Erauw-Jacquery's other licensees and the acreage on which they and La Hesbignonne grow Gerbel multi-row winter barley, as well as the fact that the provisions of the agreement even cover seed other than seed propagated by La Hesbignonne under its contract with Erauw-Jacquery.

44. Secondly, as regards whether trade between Member States is affected to an appreciable extent, I consider that it is necessary to draw a distinction between the two provisions. The provision prohibiting indirect exports is very probably capable of fulfilling that condition since it makes parallel imports of the seed in question into the other Member States impossible.

6 — See in particular the judgment of 20 June 1978 in Case 28/77, *Tepea* v *Commission* [1978] ECR 1391, and the judgment of 16 June 1981 in Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563.

45. The situation is less clear, as regards the minimum prices provision. It seems to me that certain facts must be clarified before the main proceedings can be resolved.

46. The agreements in question do not contain any provision prohibiting the importation of seed for propagation. Does Erauw-Jacquery none the less use other means to make such imports impossible, as La Hesbignonne maintains?

47. Is Belgian domestic production sufficient to meet the country's needs or is there a need to import seed? If there is such a need, then may identical seed or seed similar to that which is the subject-matter of the agreements concluded by Erauw-Jacquery be offered for sale in Belgium at prices lower than those laid down in the contested agreements? Is Belgium, on the contrary, self-sufficient or a net exporter of seed? For what percentage of Belgian seed production do Erauw-Jacquery and all its licensees account? What is the situation in those respects as regards barley seed? Does barley seed constitute a separate market? Would Belgium's potential output enable it to become an exporter of barley or to increase its exports of barley in the absence of a network of agreements imposing minimum prices for seed? There can be no doubt that only the national court can shed any light on these questions.

Conclusion

48. On the basis of the foregoing observations I propose that the Court should give the following answer to the tribunal de commerce, Liège:

'(1) Article 85 (1) of the Treaty does not preclude a provision prohibiting a grower from selling, assigning or exporting basic seed placed at his disposal by the breeder or his agent solely for the purposes of propagation.

(2) Provisions requiring minimum prices to be charged and prohibiting even indirect exports of seed for propagation which are contained in an agreement identical to other agreements concluded by the same breeder or the same agent of foreign breeders and which apply even to seed not propagated pursuant to that agreement are calculated to restrict competition within the common market and may affect trade between Member States.

It is the task of the national court to determine whether the restriction of competition and the effect on intra-Community trade may be regarded as appreciable.'