European Court of Justice, 8 June 1982, Maize Seed

PLANT VARIETY RIGHTS

Prohibition on cartels

- **Prohibition on cartels under article 85 does not apply to an IP right as such, but to the exercise of the right if it is the subject, the means or the consequence of an agreement**

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. 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.

- **Breeders' rights do not need different approach compared to other IP-rights**

but 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.

- **Open, exclusive license not incompatible with the prohibition on cartels**

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.

- **An exclusive license or concession with absolute territorial protection in an agreement where parties intend to exclude competition for products in that territory for third parties such as importers or license proprietors, leads to artificial upholding of separate markets and therefore is in violation with EC treaty**
- **Absolute territorial protection of licensee goes beyond what is indispensable for the improvement of production or distribution or the promotion of technical progress**

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. It follows that the absolute territorial protection con-ferred 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.

Source: **Eur-Lex**

European Court of Justice, 8 June 1982, Maize Seed
(Mertens de Wilmars, Bosco, Touffait, Due, Mackenzie Stuart, O' Keeffe, Koopmans, Everling, Chloros)

Parties

In case 258/78

1. L. C. Nungesser kg, darmstadt,

2. Kurt eisele, darmstadt,

Represented by jurgen gundisch, 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,

(…)

Subject of the case

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,

[…]

Grounds

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 vegetales (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 such 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 vegetales, 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 vegetales. 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:

'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 vegetales 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 vegetales 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 vegetales 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.

Decision on costs

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.

Operative part

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.