II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 September 1978

relating to a proceeding under Article 85 of the EEC Treaty

(IV/28.824 — Breeders' rights — maize seed)

(Only the French and German texts are authentic)

(78/823/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 [1], and in particular Articles 2, 3, and 4 thereof,

Having regard to the notification made on 1 November 1965 by Mr Kurt Eisele, seed merchant at Darmstadt, Germany, pursuant to Article 4 of Regulation No 17, of a maize seed production and sales licensing contract entered into on 5 October 1965 with the Institut national de Recherche agronomique (INRA), Paris,

Having regard to the complaint filed pursuant to Article 3 of Regulation No 17 on 20 February 1974 by Mr Robert Bomberault, seed merchant at Argent-sur-Sauldre, Cher, France, against the said contract between Mr Eisele and INRA, of 5 October 1965,

Having heard the undertakings concerned on 11 March 1977 in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC [2],

Having regard to the opinion delivered on 7 December 1977 by the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17,

Whereas :

I. THE FACTS

A. The products

1. The relevant products are maize seeds (of the categories described below) of varieties of maize for which INRA has secured or will secure breeders' certificates in France and Germany and inclusion in the national catalogue of varieties officially accepted for certification and marketing. The designations of the varieties involved, in the French and German national catalogues, are given below :

— INRA 200 (France) or INRAFRÜH (Germany),
— INRA 258 (France) or INRAKORN (Germany),
— INRA 190 (France) or INRAEXPRESS (Germany).

Under a contract dated 14 and 16 December 1960 between INRA and Mr Kurt Eisele, Mr Eisele himself secured inclusion of these varieties in the German catalogue under his name thereby assuming breeders' rights and obligations as well as responsibility for maintenance production under German regulations.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.

This proceeding covers only those categories of seed of the above varieties which are normally sold with a view to their being used by farmers for their annual sowings, either directly or after multiplication to obtain sufficient quantities. As defined in Council Directive 66/402/EEC of 14 June 1966 on the marketing of cereal seed (1), these categories are as follows :

— seed that has been officially certified as defined in the Directive, Article 3 of which lays down the general principle relating to the compulsory prior certification of seed for marketing,

— seed that has not been officially certified but which nevertheless has been marketed as seed under exceptional circumstances provided for in Article 3 (4) of that Directive, by virtue of which certain categories of seed may be sold without certification.

This proceeding does not relate to seed intended for tests or for scientific purposes, or for selection work, as mentioned in subparagraphs (b) and (c) of Article 3 (4) of the same Directive, rather than for sale to farmers.

2. The economic importance of maize seeds is linked to that of maize itself, of which nearly 250 million quintals in the form of grain or fodder are consumed annually in the EEC, some for industrial purposes but the bulk as animal feed. In both cases, its profitability has made maize more popular than its technically potential substitutes (such as wheat, barley, oats, etc.), whose market share has to that extent diminished in consequence. Over the last 20 years average yields in the EEC have risen from 23 to 50 quintals per hectare (or even 100 quintals per hectare where the soil is right) and the area under maize has increased from 500 000 to four or five million hectares (according to year), a quarter of this being plant fodder. Depending on the demand for maize, itself, Community maize seed production varies between 1 and 1·5 million quintals annually, representing a turnover of 200 to 300 million u.a. (2) at retail prices. 30 to 35 kilograms of seed are needed to sow one hectare. At current selling prices, the farmer who buys seed for sowing pays between 1·5 and 3 units of accounts per kilogram ; his return depends on the harvest yield and the Community target price for each agricultural year (3). More than three quarters of the maize seed used each year in the EEC is produced in France. Italy and, to a lesser extent, Germany produce the remainder. Relatively little trading takes place with non-EEC countries.

3. The mass production of maize seed for farming purposes is in the hands of 'seed growing establishments', which multiply the source materials (progenitors and basic seeds) supplied by the breeders. By creative selection, breeders work on new combinations of existing varieties to discover novel stable characteristics resulting in the new varieties for which they then obtain entry in the catalogue. In practice, all the maize seeds sold to farmers are seeds of hybrid varieties produced by successive cross-breeding between two or more other varieties, commonly known in France as 'commercial hybrids'. In particular it is by systematically adapting maize to temperate agricultural regions and developing earlier and earlier varieties that breeders have made it possible to extend the maize-growing belt and to improve yields. At present the French national catalogue contains more than 100 varieties, which are thus officially accepted for marketing in France, and in the other Member States too, following promulgation of the common catalogue (4). However, and as with all important cereals, each year between two thirds and three quarters of sowings in each Member State are of not more than four or five successful varieties ; for instance, from 1958/59 to 1971/72 this was the case for just two early maize varieties, INRA 200 and INRA 258. Plant breeders' rights for all these popular varieties are held by 10 or so leading French breeders (INRA included) who hold breeders' rights for most other cereal species as well. With the exception of INRA, all of them are also seed growing establishments, and are thus involved at the beginning of the cycle in the production of virtually all the 'certified seed' used by Community farmers. They subcontract each year the production of this total seed requirement to a greater or lesser extent to thousands of small or medium-sized growers. ('farmer-propagators'), who can offer a suitable acreage or suitably varied climatic conditions. The entire harvest is then bought by, and thus central-

(1) OJ No 125, 11. 7. 1966, p. 2309/66 (as amended by Commission Directive 78/387/EEC of 18 April 1978 (OJ No L 113, 25. 4. 1978, p. 13)).

(2) The estimates and comparative figures given in this Decision are based on the average annual EUR conversion rates for the national currencies, EUR being the unit of account used until 1977 by the Statistical Office of the European Communities ; these rates are published in the 'Finance' section of Eurostat, the monthly general statistics publication produced by the Statistical Office (see e.g. Eurostat of February 1977, page 168).

(3) At the end of 1976/77, the Community target price was 15·2 agricultural units of account (i.e., roughly DM 53 or FF 86) per quintal. On the basis of an average yield of 40 quintals per hectare, the average theoretical cost of seed can be estimated as lying between 10 and 15 % of the farmer's crop receipts.

(4) Common catalogue of agricultural plant varieties, fourth complete edition (OJ No C 48, 20. 2. 1978).

ized at, the seed growing establishment which proceeds to treat and market the 'certified seed' in accordance with the relevant national and Community regulations.

B. Community and national regulations

1. For internal purposes, the Community has adopted a body of rules, designed to reflect the specific nature of seeds and the agricultural activity which depends on them, in order to establish highly elaborate control over growing conditions and minimum standards for all elements determinative of quality, especially of purity and of germinative quality ([1]). Their effect is to guarantee to farmer purchasers that all seeds marketed in the EEC are of high quality, i.e., that they offer the best possible genetic potential and germination record, and are identical in all regions. No new variety can be marketed until it has been admitted to the national catalogue or the common catalogue of varieties, which impose very strict conditions: the variety must be distinct, uniform, stable in its essential characteristics and of proven value for cultivation by comparison with varieties already admitted to the catalogue. The seed growing establishments producing this variety do so under their own responsibility. They (or others acting on their behalf) grow and treat ([2]) the seed in accordance with the rules laid down for certification of seed lots. A lot may not be sold until after certification. Certification attests that the lot has been found, after field inspections by certification officials and analyses of samples by the official control laboratories, to conform to the Community standards as to varietal identity, varietal purity, specific purity, germination and other matters. These analyses are recorded on an official analysis report by the control laboratories, for use by the certification offices who then attach a label to each sack; the label includes certain information which enables the origin of the lot in question to be traced and hence the channels through which any export will have taken place. It also bears a date which enables the user to determine without difficulty whether there is any risk that the product may have fallen below the standards since the latest analyses or whether on the contrary the latter are sufficiently recent to reassure him in this respect.

If the buyer so requests, each lot is accompanied by its official analysis report, among other papers; as far as germination is concerned, 'germinating capacity' means the exact proportion of seeds from a given sample which germinate, compared with the number sown. By contrast, 'germinating energy', which is difficult to measure, indicates no more than the probable ability of the seed to grow in an unfavourable climate ([3]). The Council Directive referred to above has set the Community minimum standard for the germinating capacity ([4]) of maize seed at 90 % of pure seed (as defined in B. 1 above). In fact producers of maize seed in general seek to supply lots consisting of the highest-quality seed possible. In particular, the germinating capacity of INRA maize seed lots produced by French growers as a whole, as recorded by the Commission over the last 10 years, has always been well above 90 %, usually exceeding 95 %. Over the same period the Commission has been unable to find any special requirement in this respect — or in respect of sizing — in the sale or supply contracts entered into by or for French producers with Mr Eisele that had any significant bearing on costs. Neither has the Commission found any evidence in official analysis reports to suggest that there was any difference as regards sizing or germination between seed lots exported to Germany and seed lots sold in France over the same period. Finally, these control regulations are supplemented, in some Member States and in particular in France, by the issue to every breeder, seed grower and seed merchant as well (and so to Mr Robert Bomberault) of a permit authorizing him to do business by reason of the qualities which he is thereby accepted as possessing in his particular field as regards technical competence, equipment and facilities, and reliability.

2. There are also national laws which recognize and safeguard breeders' rights over the varieties they have developed. These include, in particular:

(a) in Germany, the Plant Species Protection Act (Sortenschutzgesetz) of 20 May 1968, as amended on 9 December 1974;

(b) in France, the Plant Protection Act (loi relative à la protection des obtentions végétales) (No 70-489) of 11 June 1970.

Five other Member States (Denmark, United Kingdom, Belgium, Italy and the Netherlands) have similar legislation, while two (Ireland and Luxembourg) do not, or not yet, have it. All these laws were

([1]) Directive 66/402/EEC loc. cit.
([2]) Treatment consists primarily of cleansing, chemical processing, and sizing.
([3]) It is generally agreed that beyond a certain level any increase in germinating capacity entails a proportionally greater increase in germinating energy and hence in the number of germinations that actually survive. But these germinating characteristics are of little importance when the maize is grown for plant fodder, which accounts for about 80 % of German production.
([4]) Directive 66/402/EEC loc. cit.; germinating energy is sometimes used in publicity as a sales argument, but standards have not been laid down in respect of it.

adopted or amended in conformity with the International Convention for the Protection of New Plant Varieties (Paris, 2 December 1961), which laid the foundations for existing national provisions. Furthermore, with the gradual application in all the Member States of the Community Directives on seed marketing and the common catalogue, the breeders' rights will be recognized for each new variety developed which satisfies objectively defined quality requirements. As the law and the facts now stand, this body of law has a number of consequences in the field of competition.

3. These consequences are as follows :

(a) In Germany, the law expressly gives the breeder an exclusive right to produce and market propagation material for his varieties in Germany ; the exclusive right is expressly extended to exports to countries that do not afford equivalent protection (Sortenschutzgesetz, Section 15) ;

(b) in France, the law expressly gives the breeder the exclusive right to produce, import, sell and offer for sale the whole plant, part of the plant or any reproduction or vegetative propagation material of the variety over which he has rights (Law No 70-489, Article 3).

In fact, and as a result of the interpretation and practical application of these national laws in private contracts, by trade organizations, regulatory agencies, government departments and their inspectorates and even by some courts the following situation is gradually becoming widespread for all plant species : every act of production, sale or importation, (even between Member States), whether through a licensee or by any other party, is subject to express prior authorization by the breeder or those entitled under him ; this authorization is required for all seed, including seed for the direct production, i.e., in a single sowing and growing operation, of cereals for consumption. With the exploitation of protected varieties being organized on new legal bases, breeders are resorting to contractual clauses providing for reciprocal representation, or to vertical licensing agreements which place production and sale of all generations and categories of seeds and seedlings of their varieties under their control ; in particular, trade between Member States is subject to their express prior authorization, so that this market has gradually become foreclosed to specialized dealers — either independent merchants [1] working on their own account or brokers acting for others — who used to be the main factor making for market transparency.

4. With specific reference to maize seed, it can be said that all the important varieties now appearing in national catalogues are protected. As a general rule each private breeder exploits (i.e. he produces, propagates and markets 'certified seed') his own varieties in his own country but entrusts exploitation in this sense in other countries to exclusive licensees. Since there is no intra-Community trade in these varieties that is not controlled by breeders or their licensees, there is no intra-brand competition. On the contrary, INRA varieties are jointly exploited by all private breeders operating in France, who must act through an intermediary (currently the FRASEMA) which allocates production and orders between them. Profit margins in recent years have enabled the largest of these private breeders to control or take over production or distribution of the varieties they exploit. On the world market this trend is reflected in the recent acquisition by Sandoz, Ciba Geigy, Shell and other groups of majority holdings in large American breeders and hence in their European agents and subsidiaries, a further illustration of the interest which major international groups are showing in the seed industry.

C. The parties

1. INRA is a State agency of administrative character responsible, amongst other things, for improving and developing crop production. In this connection, its research and dissemination activities have made a major contribution to the development of maize growing in Europe. As a result solely of the creation of INRA 200 and 258, maize yields leapt 25 % after 1957/58. Between 1958/59 and 1973/74 three quarters of the early maize sown in the Community was of INRA or INRA-derived varieties. As a State agency INRA is not empowered to exploit these varieties for commercial purposes itself. Instead it granted commercial rights, for a consideration, to private breeders operating in France, who formed a commercial company for this purpose. Until 1973 this was the

(1) These include a certain number of agricultural cooperatives.

Société des Semences de Base de Maïs (SSBM), Paris. Then, by Agreement dated 13 August 1973, INRA granted a royalty-bearing exclusive licence for the commercial exploitation of its varieties in all countries (including performance of earlier contracts) to the société anonyme 'Française des Semences de Maïs' (FRASEMA), Paris. In this Agreement, which covers INRA varieties including progenitors, INRA confers exclusive rights on FRASEMA for all import purchases and export sales and undertakes to prohibit reimportation into France. INRA's interests for the purposes of its contractual relations with Mr Eisele were thus vested in FRASEMA. This Decision does not, however, relate to that Agreement, which has not been notified to the Commission. Its assessment under Community law is reserved for possible later proceedings.

2. FRASEMA was formed on 18 June 1973. Its objects are to plan the production of INRA seed varieties and to draw up a system for allocating production amongst its shareholders, thus taking over responsibility for the production and sale of INRA 'basic seed' as well as the export sales and purchases of INRA 'certified seed'. The shares are at present held by 18 breeders or growers, who together supply virtually all the 'certified seed' of every variety used in France ; but the four biggest breeders (Coopérative Limagrain, Chappes, Coopérative CACBA, Pau, Etablissements RAGT, Rodez, and SICA France — Maïs, Toulouse) hold more than 60 % between them, while eight others hold less than 2 % each. Limagrain, which currently accounts for more than half of French production, is the breeder of the variety which is at present the most popular — LG 11. This variety, which was developed from INRA progenitors, was entered in the official French catalogue in 1973 and accounted for a good third of all sowings of early varieties in 1975. Since then, and having gained control of the largest French distributor (Etablissements Genest, Lyon) and of its main competitor on the production side, (Etablissements Hodée, Corné, Maine-et-Loire) within a period of two years, Limagrain has achieved a turnover of nearly 40 million units of account. All these major FRASEMA shareholders also grow seed under licences granted by one or other of the large North American breeders (Pioneer, Dekalb, Funks, Cargill, Northrup King, Asgrow), who in this way each account for between 1 and 10 % of the Community market ; however these sales are of varieties which, since 1958 and still today, have been largely eclipsed by INRA varieties and their derivatives.

3. Mr K. Eisele, a breeder and seed merchant in Darmstadt, entered into a contract on 5 October 1965 with INRA which gave him the exclusive right to produce and distribute INRA varieties in Germany. He subsequently transferred this exclusive right to Nungesser KG, a partnership in Darmstadt in which he is the sole partner and holder of the majority of the capital. Mr Eisele's rights as regards his contractual relations with INRA and FRASEMA therefore became vested in this company, except as regards the registration of the varieties at the Bundessortenamt which are all in Mr Eisele's own name. It is therefore Nungesser KG which carries on the commercial activity flowing from the contract entered into on 5 October 1965.

4. Nungesser KG specializes in producing and dealing in seeds in general. Until 1973/74 about 20 % of all its German sales were of the INRA varieties with which this Decision is concerned ; in 1974 these varieties accounted for DM 13 000 000 of its total turnover of DM 64 000 000. Altogether between 1960 and 1972 INRA varieties supplied by Nungesser KG accounted for approximately 50 to 70 % of the German market annually. In the 1973/74 season the proportion was still nearly 40 %. The proportion declined from 1974/75 onwards but, Mr Eisele having in the meantime also become Limagrain's exclusive licensee for Germany, Nungesser KG distributed both the INRA varieties and LG 11, thus maintaining its overall share of the German market for maize seed at more than 25 %.

5. Louis David KG, Meisenheim/Glan, Germany, is a medium-sized family business which traditionally has specialized in dealing in seeds of all kinds, including maize, and notably in the import-export business.

D. The agreements

1. The agreements in this case and those features of them which are of interest from the competition point of view are as follows :

1.1. The contract between INRA and Mr Kurt Eisele dated 14 and 16 December 1960 :

Clause 1

Mr Eisele is to represent INRA before the Bundessortenamt for the purpose of securing registration of its maize varieties ...

Clause 4

Mr Eisele undertakes to keep INRA informed of all matters relating to the marketing of its maize varieties in Germany.

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 these varieties in Germany.

1.2. The contract between INRA and Mr Kurt Eisele dated 5 October 1965 :

Clause 1

INRA confers on Mr Eisele the exclusive right to organize sales of its varieties in Germany ...;

Mr Eisele undertakes to refrain from organizing the sale of other maize varieties ;

Clause 2

Mr Eisele undertakes to supply seeds to every German establishment offering the necessary assurances, technical and other : prices charged these establishments, down to farmers' cooperatives, would be fixed in agreement with INRA ; they would reflect the price charged by French exporters ...;

Clause 3

Mr Eisele is obliged to import at least two thirds of the German market's requirements from France through the French organization responsible for centralizing and coordinating exports (SSBM, later FRASEMA) ; the balance, that is to say no more than one third, may be produced by Mr Eisele himself, or produced under his responsibility, on payment of royalties ;

Clause 4

Mr Eisele undertakes to enforce INRA's proprietary right in its varieties, notably by protecting them against trade mark infringement and passing-off ; he is authorized to use INRA's internationally registered trade mark and is given all the powers necessary to take such action as may be required ;

Clause 5

INRA undertakes to see to it that FRASEMA does everything in its power to prevent INRA maize varieties from being exported to Germany, and bypassing the arrangements with Mr Eisele.

1.3. A settlement reached on 14 November 1973 between Mr Eisele and Louis David KG before the Bad Kreuznach Landgericht (2.0 174/73) :

Clause 1

Louis David undertakes to refrain from selling or marketing, without Mr Eisele's authorization, seed of the INRA 258/INRAKORN variety imported from France ;

Clause 2

Louis David undertakes to pay Mr Eisele the sum of DM 4 000 by way of damages for having imported without authorization ;

Clause 3

Lousis David undertakes to pay the costs.

2. The effect of these agreements as applied by the parties has been as follows : in general, neither FRASEMA nor any of its members have bypassed the German licensee to propagate, sell or import seed, including INRA 'certified seed'. The parties consider that this restraint is a consequence of the exclusive rights given Mr Eisele in Germany. German selling prices have always been fixed without reference to INRA, despite the provisions to the contrary in the contract of 5 October 1965. Each year between two thirds and three quarters of the INRA seed sold in Germany by Nungesser KG have been imported from France in lots certified by the Service officiel de Contrôle français (French Inspectorate) — about 50 000 out of 60 000 quintals in 1973 and 60 000 out of 80 000 in 1974. The rest of Nungesser KG's sales in Germany were produced locally by the licensee, Mr Eisele, who bought the basic seed from FRASEMA and paid the necessary royalties on the 'certified seed' sold. During 1977/78, however, practically all Nungesser KG's sales of INRA varieties in Germany were produced in Germany. Besides this, Mr Eisele refrained from producing or selling non-INRA varieties of maize in Germany until 1973/74 when, with no opposition from INRA, he began to market LG 11 as well. As far as exports are concerned INRA had informed the Commission, in reply to a request for information under Article 11 of Regulation No 17, that any restrictions in its contracts applied to progeni-

tors only and that there was no question of commercial seed being affected. However, to take one example, a letter from INRA's Bureau de Gestion des Variétés (Varieties Management Office), typed on the headed paper of the Ministry of Agriculture, Paris, and bearing the signature of Mr P. Bezot, was sent to FRASEMA as recently as 29 December 1975, making reference to the manner in which certain foreign sales of INRA maize had taken place. It goes on to state without making any distinctions that 'no imports or exports of the variety ... should be made without the breeder's express agreement ... Failure to comply may at any time result in withdrawal of the licence by the breeder without payment of compensation ... I should be grateful if you would remind FRASEMA members that, before selling INRA maize seed abroad, they must obtain authorization either from INRA or from FRASEMA as its sole agent' (1).

3. As far as third parties are concerned, the effect of applying the agreements has been as follows: the exclusive rights given Mr Eisele, backed by threats of prosecution and by court action under the Sortenschutzgesetz of 20 May 1968 by both FRASEMA and the German licensee, have at all times prevented such third parties from importing or reselling in Germany. It was in this way, for instance, that Louis David KG was forced into the court settlement of 14 November 1973 involving payment of DM 4 000 damages for having imported 15 tonnes of INRA 'certified seed' from France for resale in Germany without authorization from Mr Eisele. Similarly, Mr Robert Bomberault, Argent-sur-Sauldre, who placed one advertisement offering INRA certified seed (obtained legitimately in France from FRASEMA producers) in the 19 February 1974 issue of 'Ernährungsdienst', a paper published in Hanover by Alfred Strothe, found that further advertisements were refused. Refusal to publish was due to pressure put on the publisher, who was threatened with legal action in the event of further advertisements appearing by both Mr Eisele and FRASEMA, who invoked both the German law and the exclusive rights held by Mr Eisele. FRASEMA also sought to dissuade Mr Bomberault from exporting to Germany, notably by telex messages dated 20, 21 and 22 February 1974, referring to the exclusive rights conferred on the German licensee and to the French law of 11 June 1970. Finally, on 23 February 1974, Mr Eisele had a notice published in the same paper giving a general warning against importing INRA seeds without his authorization, even from other Community countries. In the days that followed a number of German firms that had responded to Mr Bomberault's offer sent him telex messages disclaiming any further interest for fear of legal action. Even after receipt of the Commission's notice of objections dated 3 November 1976, Nungesser KG continued to take action to ensure that exports of INRA seed from Germany to France should be handled by it alone on the basis of its licensing agreements with INRA. Thus, when Baywa AG, Munich, asked on 4 April 1977 for authorization to export INRA seeds to France, Nungesser KG waited until 19 April before giving its reply. Since seed trade business is normally transacted extremely quickly, often in a matter of hours, a delay such as this is clearly fatal to any possibility of concluding a deal.

4. The exclusive licensee therefore enjoys absolute territorial protection in Germany. As a result he has been able to make farmers in Germany bear far higher prices than those charged in France for seeds that are absolutely identical and that have been chemically processed, size graded and packed in the same way. Taking only average prices per kilogram, exclusive of value added tax, at the same distribution stage and over statistically significant periods, it was found that the free-at-Kehl prices charged for Inrakorn (INRA 258) 'certified seed' by French seed-growing establishments to Nungesser KG were slightly below (10 to 12 % according to statements made by FRASEMA) the prices charged by them to French wholesalers; for spring sowings over the years in question, prices to the French wholesalers were FF 2·60 in 1972, FF 2·55 in 1973, FF 2·75 in 1974 and FF 3·00 in 1975. The average resale prices for the same seed charged by French cooperatives and local retailers to French farmers in those years remained at approximately FF 3·00, FF 3·00, FF 3·10 and FF 4·00 respectively throughout the periods in question (2). Yet in Germany, according to catalogues and price lists published by Nungesser KG and wholesale seed merchants as well as to statements by cooperatives and local seed merchants supplied to the Commission by Mr Eisele himself, average retail prices were as high as DM 2·70 in 1972, DM 2·80 in 1973, DM 2·85 in 1974 and DM 2·90 in 1975. The difference therefore from one bank of the Rhine to the other was the difference between FF 3·10 and DM 2·85, that is to say about 70 %, in the spring of 1974 when Mr Bomberault attempted to export and subsequently filed his complaint. For this reason there is substantial potential demand in Germany each year for seed from French merchants; conversely, in relation to INRA maize seed alone sold by Mr Eisele in 1974 (80 000

(1) This passage is translated from the original French.

(2) For example, in three accounts prepared by Nungesser KG's Strasbourg subsidiary in respect of sales in April and May 1974, the unit prices were respectively FF 3·00, FF 2·80 and FF 3·20 per kilogram. This relates to sales to local retailers or cooperatives; these prices are thus themselves slightly higher than the French average.

quintals according to his statements), the extra margin borne by German farmers, and ultimately by German consumers, over and above the situation which could have prevailed in a single market of Member States, ran into several million units of account.

E. The main arguments raised by FRASEMA and Mr Eisele

1. Seeds are among the products listed in Annex II to the Treaty. Further, it is arguable that the contractual arrangements between INRA, FRASEMA and Nungesser are covered by Article 2 of Council Regulation No 26 [1], concerning agreements 'which relate to production of or trade in the products listed in Annex II' which 'form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty'. In this context FRASEMA and Nungesser KG are the commercial extension of an agricultural activity (propagation) to which they are indispensable (for sales); these activities and indeed the objects of FRASEMA are essentially in line with the objectives of Article 39 of the Treaty relating to productivity, standards of living, market stability, availability of supplies and reasonable consumer prices. For these reasons and in accordance with Article 2 of Regulation No 26, Article 85 is not applicable in this case.

2. FRASEMA is entrusted with the operation of services of general economic interest within the meaning of Article 90 (2) of the Treaty, acting as the agent of INRA, itself a State agency administratively subordinate to the Minister for Agriculture. Strict application to their activities of the rules of competition and the rules on the free movement of goods is inappropriate since this would obstruct FRASEMA and INRA in the performance of the tasks assigned to them, particularly if the Commission should prohibit most of the clauses relating to quality and quantity which are the only means in France and Germany of guaranteeing seed quality, market stability and hence maximum benefit to the user.

3. Breeders' rights are distinct from other rights, and seeds cannot be treated in the same way as an industrial product for the purposes of the competition rules; an industrial product does not run the risk of being adversely affected by the place or the conditions in which it is manufactured or sold. By contrast a seed is not really a 'product', and trade in seed should be subject to all the restrictions imposed by the need to preserve it as a living organism from the moment of 'production' in the strict sense until it is sown by the farmer. Otherwise there would be nothing to protect the breeder from weak links in the distribution chain leading to a quality loss (in germinating energy, or size grading, particularly) with the attendant risks of damage to brand reputation and even legal claims against the breeder or his agent. The same considerations can make it necessary to limit the licensee's output, notably for climatic reasons and this is precisely the situation with maize growing in Germany.

4. An exemption from the strict application of Article 85 is warranted under Article 36 of the Treaty for obvious considerations of plant species protection. Furthermore, both the Court of Justice and the Commission have recognized up till now that the protection of national industrial property rights is not incompatible with the establishment of a single market, even if their protection results in some prohibition or restriction on imports or exports. If they are to be compatible with the Treaty, such restrictions must be justified by the need to protect the specific subject matter of the property right in question. Since the present case relates to plant species protection, the marketing of INRA seed by the licensee in Germany does not exhaust the breeder's right any more than its marketing in Germany without the licensee's authorization; the constant care and monitoring which seed requires is sufficient to justify this conclusion.

5. The allegedly restrictive clauses in the agreements at issue are based on German and French plant species protection laws which date from 1968 and 1970 respectively and are themselves founded on the International Convention of 1961. The Commission may not therefore call these agreements into question under Article 85; all it can do is institute proceedings under Article 169 on the grounds that the Member States concerned, by enacting these laws, have failed to fulfil an obligation under the Treaty. In addition, the present proceeding is in conflict with Article 14 of the Basic Law of the Federal Republic of Germany

[1] Regulation applying certain rules of competition to production of and trade in agricultural products (OJ No 30, 20. 4. 1962, p. 993/62).

since it attacks the right to property, which is there classed as a fundamental right. Lastly, the proceeding is in conflict with the Luxembourg Convention (Community Patent Convention, 15 December 1975), Article 43 (1) and (2) of which allows for territorial licences to be exclusive.

II. APPLICABILITY OF ARTICLE 85 (1)

Article 85 (1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings and decisions by associations of undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

1. INRA, FRASEMA, Nungesser KG and Louis David KG are undertakings within the meaning of Article 85. The same applies to Mr Eisele in that he deals in seeds and has breeder's rights for INRA varieties which he markets by importing, propagating and selling them. The contracts described at I. D above are therefore agreements within the meaning of Article 85 (1).

2. The object and effect of these agreements is to restrict competition within the common market through the clauses discussed below and the way in which they have been interpreted and applied. The resulting restrictions have an appreciable effect on the market in maize seed, notably in Germany and France, given the substantial market share gained by INRA seed over the last 20 years.

3. The restrictions are the following :

A. Contracts between INRA and Mr Eisele dated 14 and 16 December 1960, and 5 October 1965 :

(a) the exclusivity of the licence granted Mr Eisele as stipulated in Clause 1 of the 1965 contract, in so far as in practice it is interpreted by the parties as entailing :

— an obligation upon INRA or those deriving rights from INRA (FRASEMA and the French producers who are its members) to refrain from authorizing other undertakings to produce or use INRA varieties in Germany, and to refrain from producing or using such varieties in Germany themselves ;

— the obligation upon INRA, FRASEMA and FRASEMA's members to refrain from authorizing other undertakings to distribute INRA varieties in Germany, and to refrain from distributing such varieties in Germany themselves ;

these obligations are restrictive in that, by licensing a single undertaking to exploit its breeder's 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, thereby eliminating them as competing suppliers in that territory, despite the fact that they may be willing and able to undertake this role. Further, 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. Such obligations, restraining the breeder from exploiting his right freely, are not part of the specific subject matter of this right ;

— the obligation upon INRA, FRASEMA and FRASEMA's members to prevent third parties from exporting INRA varieties for sale or use in Germany ;

— the use by Mr Eisele of his own breeder's rights, in conformity with the contract of the 14 and 16 December 1960, to prevent third parties from importing those varieties into Germany or exporting them to any other Community country.

The fact that third parties may not import the same seed from other Community countries into Germany, or export from Germany to other Community countries, makes for market sharing and deprives German farmers of any real room for negotiation since seed is supplied by one supplier and one supplier only ; in particular, the action taken in this connection against Mr Robert Bomberault to discourage him from exporting to Germany on the strength of the exclusive contract held by the German licensee and the French Act of 11 June 1970 was, like the action taken by Mr Eisele against Louis David KG and A. Strothe, restrictive in this sense and in this respect ; the same applies to the action taken by Nungesser KG against Baywa AG to prevent the latter from exporting to France. The fact that INRA has transferred its original breeder's rights for Germany to Mr Eisele and that Mr Eisele has thus become the

registered breeder and holder of the derivative rights in Germany could not remove either the 1960 nor the 1965 contract from the scope of Article 85 ; as long as Mr Eisele is not himself the creator of the varieties in question, he remains purely a licensee despite his registration in Germany. On the contrary the grant to Mr Eisele of exclusive rights over INRA's seed varieties is a constituent part of the distribution system for those varieties in Germany, to the extent that the licensee may thus use his formal status as the holder of breeder's rights to resist imports of original products, thereby strengthening his position as exclusive licensee both against the licensor and against third parties.

(b) the obligation imposed upon INRA, FRASEMA and FRASEMA's members by Clause 5 of the 1965 contract to ensure that all exports to Germany are prevented, an obligation which reveals clearly the extent of Mr Eisele's exclusive sales rights and which implies for the parties, and was in practice interpreted by them, as entailing :

— an obligation upon them to refrain from exporting to Germany (direct export ban), and

— an obligation to see to it that third parties did not export to Germany either (indirect export ban) ;

the effects of this obligation have already been considered in the context of exclusivity (see above) ;

(c) the obligation imposed on the licensee by Clause 1 of the 1965 contract not to produce and/or sell non-INRA varieties of maize seed, an obligation which resulted in the elimination of the licensee as a potential supplier of such varieties on the German market during the entire period for which the obligation was respected ;

(d) the obligation imposed on the licensee by Clause 2 to supply the seed in question only to such German establishments as provided the requisite technical and other assurances, leaving it to the licensee to determine what these assurances should be, and thus providing him with an effective means of discouraging to sell or import without his authorization ; furthermore, since each bag of seed ultimately reaches an individual farmer who is in no way bound by Clause 2, the provision serves no useful purpose in the matter of quality control ;

(e) the obligation imposed on the parties, also by Clause 2, to fix resale prices for Germany in concert ; however, the Commission's information is that this clause, which would have had the effect of restricting the licensee's freedom of action in an area vital to competition, has in fact remained a dead letter ;

(f) the obligation imposed on the licensee by Clause 3 to import at least two thirds of the German market's requirements from France, and not to produce, himself or by others, more than one third, removed all freedom of action in another area vital to competition — production policy — for the duration of the period for which the obligation was observed, i.e., until 1977.

B. Settlement of 14 November 1973 between Louis David KG and Mr Eisele.

The obligation imposed on Louis David to refrain from importing into Germany which eliminates a competing supplier and contributes to the effects described in section A above. This obligation is rendered even more restrictive by the fact that the goods in question had already legitimately been marketed in France and should therefore, according to the Judgment of the Court of Justice of 8 June 1971 in Case 78/70, be able to move freely throughout the Community.

4. The restrictions described above set up a system of market sharing, placing trade between France and Germany under the sole control of a single intermediary. They appreciably affect trade between Member States, directly influencing the flow of trade between Member States in such a manner as to impede attainment of the objectives of a single market.

5. Seeds are listed in Annex II to the Treaty. It is therefore appropriate to examine whether the provisions of Article 2 of Council Regulation No 26 are applicable to the agreements in issue. In this respect, the exception for which Article 2 provides is not available, and Article 85 (1) is therefore applicable, for the following reasons :

— the agreements do not form an integral part of, nor an extension of, a national market organization for maize seeds. In fact FRASEMA's sole purpose is the commercial exploitation of INRA maize seeds and the particular characteristics of such seeds are not such as to enable the market for them to be distinguished from the market for maize seeds in general. Thus the agreement between INRA and FRASEMA is not capable of constituting a national market organization for

maize seeds. Further, such a national organization exists neither in France, nor in Germany, and the maize seed market is governed by Council Regulation (EEC) No 2358/71 of 26 October 1971 on the common organization of the market in seeds [1];

— the agreements are not necessary for the attainment of the objectives set out in Article 39 of the Treaty. It is clear from the third recital of Regulation No 26 that the exception in Article 2 is not intended to apply except to the extent that the application of Article 85 (1) of the Treaty to the agreements in issue would place at risk the attainment of the objectives of the common agricultural policy in the maize seed sector. The means necessary to that attainment have been defined in Council Regulation (EEC) No 2358/71, and the agreements in issue cannot in any way be considered as falling within the framework of the provisions of that Regulation. Thus their prohibition or alteration cannot endanger the effective application of those provisions. Further, by enabling Mr K. Eisele to eliminate all competition in INRA maize seeds on the German market, the agreements have had the result, as indicated above, that the prices of the seeds in Germany have long been much higher than the prices in France. Such a result is in itself contrary, at least in Germany, to 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 limiting INRA maize seed production in Germany, the agreements have for many years been of a type which runs counter to the objective of Article 39 relating to the availability of supplies, since they restrict significantly the geographical spread of such production in those parts of the Community where it would be practicable, while a wider spread could give the Community better protection against a shortfall in production due, for example, to adverse local weather conditions;

— the agreements are not agreements between farmers, farmers associations or associations belonging to a single Member State.

6. This proceeding does not relate to propagation material for tests, scientific researches or selection work. It cannot therefore obstruct performance of the tasks assigned INRA as a public undertaking, irrespective of whether INRA may or may not be considered an undertaking for the purposes of Article 90 (2) of the Treaty. Its tasks are in fact delimited as follows by Decree No 64-54 of the French Republic of 16 January 1964 relating to the Institut national de la Recherche agronomique (Title II), which makes no mention of the marketing of seeds for commercial profit:

'Article 8:

the Institute ... shall have as its task the organization, execution and dissemination of all forms of agricultural research, ... with particular reference to:

— the improvement and development of crop production ...

— the preservation and processing of agricultural products ...

— the Institute shall engage in all forms of economic and sociological research relating to agriculture and rural life; it shall study, determine and make public practical arrangements for applying the results of its research ...

— it shall take out patents to protect its inventions.'

7. The question raised by the parties as to the inadvisability of strict application of the rules of competition or the rules on free movement of goods contained in the Treaty, given the nature of seeds and the specific subject matter of breeders' rights, does not arise here. The categories of seed to which this proceeding relates are clearly defined above, in a way which does not prejudice the Commission's position and powers of assessment as regards categories intended for research purposes; the products concerned are thus marketed under the producer's responsibility and in accordance with official regulations especially designed to reduce the risks to which such vegetable products are by their nature exposed. This being so, and 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 between Member States of seed that has been officially certified, whether in the case of imports from one Member State to another (Article 30 of the Treaty) or exports from one Member State to another (Article 34 of the Treaty).

[1] OJ No L 246, 5. 11. 1971, p. 1.

Further it has not been established that there are consequences flowing from the specific nature of seeds which would require the licensee's production to be restricted, for example because climatic conditions in his country are unsuitable. In particular, the Commission has been unable to establish how climatic conditions which allowed the production of 21 000 quintals in 1974 could be unsuitable for the production of the 80 000 quintals which was the requirement for German agriculture in that year. Furthermore, the parties have not shown and the Commission has been unable to establish that the seed lots of INRA varieties advertised in Germany by Mr Robert Bomberault in that year were in any way disappointing as regards germination or any other characteristic specific to maize seed. On the contrary, all the seed lots concerned were acquired on normal terms from French producers; they had been duly certified and were offered for sale by a distributor who was officially recognized in France. In any event, conduct presumed harmful — to the user, and hence to the reputation of a brand — on the part of an uncontrolled link in a distribution chain can in no circumstances be advanced as grounds for a general non-application of Articles 30 and 34, or of Article 85 of the Treaty.

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

9. It follows that Article 85 (1) is applicable.

III. INAPPLICABILITY OF ARTICLE 85 (3)

Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

1. In relation to the exclusive character of the licence:

(a) In principle, just as in the case of a patent, where exclusive propagation rights are granted by the holder of breeder's rights to a licensee within the common market, as is the case for the rights granted to Mr K. Eisele by INRA or those deriving rights through INRA, (i.e. the other seed breeders and producers in FRASEMA) the exclusivity is capable of being considered to have satisfied all the tests for exemption under Article 85 (3). There are even circumstances in which exclusive selling rights linked with prohibitions against exporting could also be exempted, for example, when the exclusivity 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.

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

— there is no question of a new market being penetrated or a new product being launched;

— in any event, and even going back to the time when the INRA varieties 200 and 258 were launched or when they were introduced into Germany, Mr K. Eisele enjoyed absolute territorial protection in respect of the distribution in Germany of the seeds for which he had exclusive rights. The absolute nature of this protection has had the sole and direct consequence of totally preventing imports via other channels of the original products, i.e. INRA seeds from France, notwithstanding a persistent demand for such imports in Germany. Such a situation neither constitutes nor contributes to an improvement within the meaning of the first test under Article 85 (3). Further, it has enabled INRA varieties to be sold over this period to the ultimate users, i.e. German farmers, at a price level which, by comparison with French prices, has excluded them from obtaining 'a fair share of the resulting benefit' as required by the second test of Article 85 (3).

In making this assessment, the Commission has not overlooked the fact that publicity, advertising and other expenses may be especially heavy for a licensee who covers an area which is large, or new, or which is markedly distinct in language, customs, regulations, climate etc. In such cases, those concerned can ease the situation without having recourse to restrictions which are incompatible with the Treaty. For example, lower prices can be reserved in favour of a licensee who has to meet such expenses, as is in fact done by FRASEMA in favour of Nungesser KG.

2. The prohibition against producing or selling competing products, when contained in licensing agreements and actually applied, impedes technical progress by preventing the licensee from developing other, possibly better, products or from taking out licences to this end. In the present case, the fact that Mr Eisele produced or sold the competing LG 11 variety shows that there is no technical reason linked with the intrinsic nature of seeds which could justify *a priori* (for the purposes of Article 85 (3)) a non-competition clause in seed propagation or sales agreements. In the present case, however, the clause is no longer applied.

3. The obligation imposed on the licensee to sell only to establishments offering technical and other assurances could contribute to the improvements envisaged in Article 85 (3) if the assurances were assessed objectively by reference to defined criteria. But no such criteria were applied in this case.

4. An obligation imposed on a licensee to set his resale prices in agreement with the licensor or breeder and to respect those prices thereafter is not such as to produce any of the favourable effects envisaged by Article 85 (3); however, the Commission's information is that the clause has never been applied.

5. The obligation imposed on the licensee to refrain from producing, himself or by others, more than a specified proportion of his sales requirements in his territory does not appear to be, in the present case, such as to make for technical or economic improvements. The parties have not shown and the Commission has been unable to establish that up until 1978 it was impossible to produce more than 20 000 or 25 000 quintals, or indeed any other quantity, of INRA seed in Germany under satisfactory conditions, having regard to Community quality standards.

6. Mr K. Eisele has alleged that the use of disc sowing machines — still the most widely used type in Germany whereas pneumatic machines are already common in France — imposes more stringent requirements in relation to size gradings of seed delivered to farmers in his territory. However this does not call for any modification of the foregoing assessments. Mr Eisele's allegations are in fact contradicted by the following matters:

(a) three quarters of the maize seed sold in Germany during the last 20 years have been imported from France in lots of normal size grading as well as of normal germination and purity standards;

(b) it would not be very difficult to state, in writing, and if need be, orally at the time of delivery, the seed sizes and discs recommended. This is especially true for a wholesaler, who has a long record of specialization and competence in Germany as well as in France;

(c) users, in Germany as elsewhere, are themselves perfectly capable of selecting the appropriate disc and so loading a traditional machine, pending the more general use of the pneumatic machine which, it is true, more readily accommodates a variety of seed sizes.

For these reasons Mr K. Eisele is not justified in his contention that the exclusive distribution system as applied in the present case is the only sure way of avoiding uncontrolled imports of seeds which could be unsuitable for the German market and that the system accordingly improves distribution within the meaning of Article 85 (3). For the same reasons he is also not justified in his contention that in his capacity as exclusive distributor, absolute territorial protection is the only means by which he can undertake and maintain over a reasonably long period and in a satisfactory way the transport and conservation of the product as well as an advisory service for users; and that any other solution would in time endanger the reputation of the INRA brand. Further, during the Commission's investigation of this case, not a single clear example of seeds being brought into Germany to the detriment of users or of the good name of the brand in question was either supplied to, or discovered by, the Commission.

7. The settlement between Mr Eisele and Louis David KG dated 14 November 1973 and the restrictions it contains are not such as to result in improvements within the meaning of Article 85 (3).

8. Since the agreements described in section I. D. do not satisfy all of the cumulative tests of Article 85 (3), they cannot be exempted from the prohibition in Article 85 (1).

The undertakings concerned are, in accordance with Article 3 of Regulation No 17, required to bring to an end all the infringements found in this Decision,

HAS ADOPTED THIS DECISION :

Article 1

The content and application of the following clauses of (a) the contract of 14 and 16 December 1960 by which INRA assigned to Mr Kurt Eisele the breeder's rights in Germany, (b) the exclusive propagation and sales contract for INRA maize seeds of 5 October 1965 between INRA and Mr Kurt Eisele and (c) the settlement reached on 14 November 1973 between Mr Kurt Eisele and Louis David KG to prevent unauthorized imports and sales of INRA seeds by Louis 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 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 producing or selling the relevant seeds in Germany through other licensees ;

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

— 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.

Article 3

The parties concerned, INRA, FRASEMA, Mr Kurt Eisele and L. C. Nungesser KG, shall forthwith bring to an end the infringements found in Article 1. In particular they shall immediately refrain from taking any legal or other steps having the object or effect of preventing or impeding imports or exports between the Member States of the Community of seed that has been officially certified.

Article 4

This Decision is addressed to :

1. Institut national de la recherche agronomique (INRA)
   149, rue de Grenelle
   F-75341 Paris ;

2. Société anonyme Française des Semences de Maïs (FRASEMA)
   15, rue du Louvre
   F-75001 Paris ;

3. Mr Kurt Eisele
   Bismarckstraße 59
   D-6100 Darmstadt ;

4. L. C. Nungesser KG
Postfach 110846
D-6100 Darmstadt 11 ;

5. Firma Louis David KG
Postfach 27
D-6554 Meisenheim / Glan.

Done at Brussels, 21 September 1978.

For the Commission

Raymond VOUEL

Member of the Commission