

JUDGMENT OF THE COURT (Fifth Chamber)  
19 April 1988 \*

In Case 27/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal de commerce (Commercial Court), Liège, for a preliminary ruling in the proceedings pending before that court between

**Louis Erauw-Jacquery SPRL**, whose registered office is in Peruwelz,

and

**La Hesbignonne**, a cooperative, whose registered office is in Hannut,

on the compatibility with Article 85 of the EEC Treaty of an agreement concerning plant breeders "rights in respect of certain varieties of seed,

THE COURT (Fifth Chamber)

composed of: G. Bosco, President of Chamber, J. C. Moitinho de Almeida, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: J. Mischo  
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

Louis Erauw-Jacquery SPRL, the plaintiff in the main proceedings, by G. Dehousse, of the Brussels Bar, in the oral procedure,

La Hesbignonne, the defendant in the main proceedings, by Jan-J. Bossuyt and Philippe Evrard, of the Brussels Bar,

\* Language of the Case: French.

the Commission of the European Communities, represented by Marie Wolfcarius, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 28 October 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 9 December 1987,

gives the following

### Judgment

- 1 By judgment of 23 January 1987, received at the Court Registry on 29 January 1987, the tribunal de commerce (Commercial Court), Liège, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of Article 85 (1) of the Treaty with a view to the assessment of the compatibility with that provision of the Treaty of certain provisions of an agreement granting a licence to propagate and sell certain varieties of cereal seed protected by plant breeders' rights.
- 2 That question was raised in proceedings relating to certain provisions of an agreement whereby the company Louis Erauw-Jacquery, which is the owner, or the licensee from the owners, of certain plant breeders' rights (hereinafter referred to as 'the breeder'), authorized La Hesbignonne, a cooperative, (hereinafter referred to as 'the licensee') to propagate basic seed and to sell seed of the first or second generation produced from that basic seed and intended for cereal production (hereinafter referred to as 'seed for propagation').
- 3 Under the agreement, the licensee, undertook, in particular, (Article 2):
  - (a) to propagate in Belgium all of the E2 basic seed or equivalent supplied by the breeder, to submit it for inspection to the ONDAH (the official body responsible for certification in Belgium) pursuant to the rules in force, and not

to sell or assign E2 basic seed or equivalent seed of the varieties in question to growers or to any other person with the exception of the propagator, and not to export it to any country;

...

- (f) not to export, directly or indirectly, without the prior authorization in writing of the breeder, seed of varieties in respect of which the breeder is the holder or the agent of the holder of the plant breeders' rights, irrespective of the class of the seed;

...

- (i) not to sell certified seed of any species, varieties and classes in respect of which the breeder is the holder or the agent of the holder of the plant breeders' rights below the minimum selling prices to be stipulated by the breeder.

- 4 In a circular letter dated 8 August 1983, addressed to all the growers including the licensee, the breeder notified the minimum prices at which the protected varieties were to be sold. As regards E3 seed of Gerbel multi-row winter barley, for which Erauw-Jacquery is the sole agent in Belgium of Florimont-Desprez of Templeneuve, France, the minimum price was fixed at BFR 1 825 per 100 kilograms. The licensee did not abide by that price and, in September 1983, it offered that seed for sale at the price of BFR 1 750 per 100 kilograms. In Belgium, although E3 seed is basic seed it is sold almost entirely to farmers for the production of cereals for consumption.
- 5 In the breeder's view, that sale obliged the other growers to lower their prices, thereby causing them to incur loss for which they are claiming compensation. In the main proceedings the breeder wishes to pass on that claim, which is estimated at BFR 15 000 000, to the licensee.

- 6 The tribunal de commerce, Liège, took the view that there was no doubt that the disputed provision of the agreement directly fixed the selling price of seed of the second generation and limited the market therefor. However, it questioned whether that provision was capable of having an appreciable effect on trade between Member States of the Community or of appreciably distorting competition within the common market, and thus fell within the scope of Article 85 (1) of the Treaty. In order to clarify that point, the tribunal de commerce referred the following question to the Court:

‘Do paragraphs (a) and (i) of Article 2 of the agreement at issue fall within the scope of Article 85 of the Treaty establishing the European Economic Community or any other provision of that Treaty?’

- 7 Reference is made to the Report for the Hearing for fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

**Compatibility with Article 85 (1) of the Treaty of the provision prohibiting the sale and exportation of E2 basic seed**

- 8 In the first place the national court seeks to ascertain whether the provision prohibiting the holder of the licence for propagating basic seed from selling, assigning or exporting that seed falls within Article 85 (1) of the Treaty.
- 9 The Commission and the breeder maintain that the provision prohibiting the sale and exportation of E2 basic seed, which is placed at the disposal of the growers only for the purposes of propagation, is not contrary to Article 85 (1) of the Treaty. Such a provision falls within the ambit of the plant breeder’s rights.
- 10 In this respect, it must be pointed out that, as the Court acknowledged in its judgment of 8 June 1982 (in Case 258/78 *Nungesser v Commission* [1982] ECR 2015), the development of the basic lines may involve considerable financial

commitment. Consequently, a person who has made considerable efforts to develop varieties of basic seed which may be the subject-matter of plant breeders' rights must be allowed to protect himself against any improper handling of those varieties of seed. To that end, the breeder must be entitled to restrict propagation to the growers which he has selected as licensees. To that extent, the provision prohibiting the licensee from selling and exporting basic seed falls outside the prohibition contained in Article 85 (1).

- 11 Therefore, the answer to the first part of the question referred by the national court must be that a provision of an agreement concerning the propagation and sale of seed, in respect of which one of the parties is the holder or the agent of the holder of certain plant breeders' rights, which prohibits the licensee from selling and exporting the basic seed is compatible with Article 85 (1) of the Treaty in so far as it is necessary in order to enable the breeder to select the growers who are to be licensees.

**Compatibility with Article 85 (1) of the Treaty of the provision imposing minimum prices for certified seed of any species**

- 12 Secondly, the national court seeks to establish whether a provision of that same agreement which obliges the grower to comply with minimum prices fixed by the other party falls within the prohibition set out in Article 85 (1) of the Treaty.
- 13 The Commission and the licensee maintain that the clause imposing compliance with minimum prices fixed by a breeder or his agent restricts competition and may affect trade between Member States. The breeder argues that the clause concerns only sales in Belgium and is therefore not capable of affecting trade between Member States.
- 14 It must be noted that Article 85 of the Treaty prohibits as being incompatible with the common market agreements which 'may affect trade between Member States' and which have 'as their object or effect' the impairment of 'competition within the common market'. As the Court has stressed on a number of occasions (most recently in the judgment of 16 June 1981 in Case 126/80 *Salonia v Poidomani and Baglieri* [1981] ECR 1563), this applies to an agreement which makes it possible to

foresee, on the basis of all the objective factors of law or of fact, with a sufficient degree of probability that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between Member States and which has as its object or effect the restriction or distortion of competition within the common market.

- 15 In this connection it must be pointed out that Article 85 (1) of the Treaty expressly mentions as being incompatible with the common market agreements which 'directly or indirectly fix purchase or selling prices or any other trading conditions'. According to the judgment of the national court the plaintiff in the main proceedings concluded with other growers agreements identical to the contested agreement, as a result of which those agreements have the same effects as a price system fixed by a horizontal agreement. In such circumstances the object and effect of such a provision is to restrict competition within the common market.
- 16 It must next be observed that the disputed provision is related to another provision in the same agreement which prohibits the licensee from exporting seed for propagation. Such an agreement may therefore affect trade between Member States.
- 17 However, it must be recalled that an agreement is subject to the prohibition contained in Article 85 only if it appreciably affects trade between Member States.
- 18 In this respect it must be stressed that the impact of the contested agreement on intra-Community trade depends, in particular, on whether it forms part of a cluster of similar agreements concluded between the breeder and other licensees, on the breeder's market share in respect of the seed concerned and on the ability of the producers bound by those agreements to export that seed.

- 19 It is for the national court to decide, on the basis of the relevant information at its disposal and taking into account the economic and legal context of the agreement of 26 February 1982, whether that agreement is capable of affecting trade between Member States to an appreciable degree.
- 20 Therefore, the answer to the second part of the question referred by the national court must be that a provision, in an agreement such as that described above, which obliges the grower to comply with minimum prices fixed by the other party falls within the prohibition set out in Article 85 (1) of the Treaty only if it is found, having regard to the economic and legal context of the agreement containing the provision in question, that the agreement is capable of affecting trade between Member States to an appreciable degree.

### Costs

- 21 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision as to costs is a matter for that court.

On those grounds,

### THE COURT (Fifth Chamber)

in answer to the question referred to it by the tribunal de commerce, Liège, by judgment of 23 January 1987, hereby rules:

- (1) A provision, of an agreement concerning the propagation and sale of seed, in respect of which one of the parties is the holder of certain plant breeders' rights, which prohibits the grower from selling and exporting the basic seed, is compatible with Article 85 (1) of the Treaty in so far as it is necessary in order to enable the breeder to select the growers who are to be licensees.

- (2) A provision in an agreement such as that described in paragraph 1, which obliges the grower to comply with minimum prices fixed by the other party falls within the prohibition set out in Article 85 (1) only if it is found, having regard to the economic and legal context of the agreement containing the provision in question, that the agreement is capable of affecting trade between Member States to an appreciable degree.

Bosco

Moitinho de Almeida

Everling

Galmot

Joliet

Delivered in open court in Luxembourg on 19 April 1988.

J.-G. Giraud

G. Bosco

Registrar

President of the Fifth Chamber