II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 14 December 1998
relating to a proceeding under Article 85 of the EC Treaty
(IV/35.280 — Sicasov)

(notified under document number C(1998) 3452)

(Only the French text is authentic)

(1999/6/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 2, 4 and 8 thereof,

Having regard to the request for negative clearance and the notification submitted on 26 October 1994 by Sicasov (Société coopérative d'intérêt collectif agricole anonyme a capital variable) Paris, France in respect of standard licensing agreements for the production and sale of seeds,

Having regard to the summary of that notification, published [2] pursuant to Article 19(3) of Regulation No 17,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. THE UNDERTAKINGS

(a) **Sicasov**

(1) Sicasov groups together the breeders of plant varieties protected in France. No member of Sicasov may hold more than 10 % of the share capital or 10 % of the voting rights. Sicasov's objects are as follows:

— to take over, under an exclusive or non-exclusive licence, the plant varieties entrusted to it by its members, and all incorporeal rights relating to agriculture and the agri-foodstuffs industry,

— to make new or improved plant material available, under the best technical and economic conditions, to farmers and the agri-foodstuffs industry,

— to grant licences or sub-licences allowing breeders' plant varieties to be produced, multiplied and marketed under its supervision,

[1] OJ 13, 21. 2. 1962, p. 204/62.
[2] OJ C 95, 19. 4. 1995, p. 8.

— to ensure that varieties are maintained (that is, to attend to the protection of technical material of generations preceding the generation intended for sale to the end user) and take the necessary steps to avoid a shortage,

— to arrange for joint research to be carried out into the new genetic material,

— to encourage plant breeding and to promote and attend to the dissemination of plant material.

(2) In particular, Sicasov's role is to manage plant varieties entrusted to it by breeders (or their assignees). Accordingly, breeders (or their assignees) may either:

(a) give Sicasov the right to grant non-exclusive multiplication and sales licences; or

(b) give Sicasov an exclusive production and sales concession allowing Sicasov to grant non-exclusive multiplication and sales sub-licences.

The agreements between breeders and Sicasov are outside the scope of this Decision.

Managing breeders' plant varieties entails in particular concluding seed-production and sales contracts with multipliers under which Sicasov receives fees which it then transfers to the breeders after deducting its administration costs. It is these contracts, which have been notified, which are the subject of this Decision (see points 37 to 42).

(3) Until 1993 the management of plant varieties in France was entrusted to Sicasov and to the Caisse de gestion des licences végétales, hereinafter referred to as 'CGLV'.

On 1 January 1994 Sicasov took over CGLV in a full merger and is now the only company in France which manages breeders' rights; former Sicasov and CGLV members are now all members of Sicasov.

(4) Sicasov manages, on behalf of numerous French and foreign plant breeders, about 2 600 varieties belonging to about 50 genera. Practically every plant variety that can be produced under contract is produced via Sicasov. The management group concludes a total of about 9 500 licensing contracts each year with about 6 000 French and 2 500 foreign firms.

(b) **Plant breeders**

(5) Plant breeders are entities, whether private or public, that conduct research aimed at creating new plant varieties able to meet the criteria giving entitlement to plant variety rights.

Plant breeders consist, in the first instance, of family firms, which have a long-standing tradition of plant-breeding and vary considerably in size, and of a number of agricultural cooperatives. Secondly, there are large firms which, in recent years, have become involved in plant-breeding activities (particularly, undertakings which were already present in the chemicals sector). Finally, mention should also be made of public bodies carrying out agricultural research (such as the Institut national des recherches agronomiques, hereinafter 'INRA', schools of agronomy and universities), both in France and elsewhere.

Each plant breeder has a 'portfolio' of several varieties, one or more of which can be very competitive indeed.

(6) New varieties can be multiplied by the breeders themselves but, since the latter are very often unable to keep pace with demand, they entrust multiplication to a multiplying firm (see point 7) in order to obtain sufficient quantities of seeds which will be sold to farmers for their annual sowings. Being a plant breeder entails certain rights and obligations, which will be examined at points 11 to 36.

(c) **Multipliers**

(7) Seed production is carried out by multipliers, known also as seed producers (hereinafter referred to as 'multipliers'). They must hold a permit to carry on the business, and before they can produce certified seed they must undergo inspection by administrative bodies established for that purpose (see point 32). For multiplication of a new variety they must apply to Sicasov for a licence in respect of that variety.

There are currently about 6 000 multipliers in France.

(8) Multipliers frequently have access to a network of farmers who are given seeds for multiplication. The seed produced is then purchased by the multiplier, who undertakes certification and sale. The relationship between multiplier and multiplying farmer is governed by a standard contract drawn up by the Service officiel de contrôle (hereinafter 'SOC') and approved by the Ministry of Agriculture.

(9) These multiplying farmers must not be confused with farmers who use seed for the purpose of sowing rather than for obtaining additional seed, and who are thus comparable with end-users.

B. THE PRODUCTS

(10) The products relevant to this Decision are seeds and seedlings belonging to the following species or groups of species: cereals, fodder plants, high-protein products, maize, sorghum, vegetables, oil and fibre plants, and potatoes. For the purposes of this case, seed and seedlings will be jointly referred to as 'seed'.

C. THE PROTECTION AFFORDED BY PLANT-BREEDING LAW

(a) **Community provisions**

(11) Most Member States have schemes which give legal protection to plant varieties. These schemes have not, however, been harmonised at Community level and continue to be governed by national laws.

On 27 July 1994, in the light of that situation, the Council adopted Regulation (EC) No 2100/94 on Community plant-variety rights [3], as amended by Regulation (EC) No 2506/95 [4]. The system is without prejudice to the right of Member States to grant national property rights for plant varieties (subject to a ban on cumulative protection). Since 1 April 1995 it has been possible to file applications for Community plant-variety rights.

(12) In order to be eligible for Community plant-variety rights, varieties must be distinct, uniform, stable and new. Holders have exclusive rights in respect of the following: (a) production or reproduction (multiplication); (b) conditioning for the purpose of propagation; (c) offering for sale; (d) selling or other marketing; (e) exporting from the Community; (f) importing into the Community; (g) stocking for any of the purposes referred to in (a) to (f).

(13) Community plant-variety rights last 25 years (30 years in the case of vines and trees).

[3] OJ L 227, 1. 9. 1994, p. 1.
[4] OJ L 258, 28. 10. 1995, p. 3.

(b) **French provisions**

(14) In France the guiding principles for legal protection of new plant varieties are those of the International Convention for the Protection of New Varieties of Plants ('the UPOV Convention'), signed in Paris on 2 December 1961.

Law No 70-489 of 11 June 1970 provides that any new, uniform and stable plant variety may be the subject of a 'new variety certificate' *(certificat d'obtention végétale),* which confers on its holder the exclusive right to produce, to bring into France, to sell or offer for sale any material for the reproduction or vegetative propagation of the variety in question.

(15) The Law states that the exclusive right is to last 20 years from the date of issue of the certificate, or 25 years if the species takes a long time to form its reproductive material. Decree No 71-75 of 9 September 1971 lists the species for which the right lasts, variously, for 20 or 25 years.

(16) On the subject of ownership and transfer of new plant rights, the Law refers to the rules generally applicable to patents. New plant rights (both property and usufruct) can therefore be transferred as freely as those of patent holders.

D. THE REGULATION OF SEED PRODUCTION AND MARKETING

(17) In France, seed production, inspection and certification are covered by detailed rules which correspond to the requirements laid down by the Community.

(a) **Community provisions**

(18) Several Community directives provide for the detailed supervision of the production and marketing of seed within the Community in order to ensure their free movement. The directives are aimed at making the cultivation of the various plant species more productive by requiring that, when choosing varieties that may be marketed, Member States apply rules that are uniform and as strict as possible. Accordingly, the directives establish a unified certification scheme for the

Community, its purpose being to guarantee, by means of official monitoring, the identity and purity of varieties. It covers both sales on domestic markets and trade between the Member States. Seed cannot be marketed unless it has been officially examined and certified by a public agency belonging to one of the Member States.

(19) Directives have thus far been adopted for the marketing of seed of the majority of plant species: cereals, beet, fodder plants, potatoes, oil and fibre plants, etc.

In addition, Council Directive 70/457/EEC ([5]), as last amended by the Act of Accession of Austria, Finland and Sweden, introduced a common catalogue of varieties of agricultural plant species.

(20) The directives lay down, for each plant species, the conditions which seeds must satisfy in order to be marketed. In particular, they specify the minimum conditions of varietal purity and uniformity and the conditions under which they are to be grown. Moreover, Community rules have been introduced regarding packing, sampling, sealing and marking.

(i) *Basic and certified seed*

(21) On the basis of existing international terminology, the Community directives on seed marketing draw a distinction between 'basic seed' and 'certified seed'.

(22) 'Basic seed' is seed which:

— has been produced under the responsibility of the breeder according to well-defined practices for the maintenance of the variety,

— is intended for the production of certified seed,

— satisfies the conditions laid down by the directive as regards cultivation, uniformity and varietal purity,

— has been found by official examination to satisfy the abovementioned conditions.

Thus basic seed is not seed intended for sale (whether direct or via cooperatives or the trade) to farmers, but seed intended solely for producing additional seed of a later generation. It can, as it were, be compared to intermediate industrial machinery. In this connection, however, it should be emphasised that from a legal point of view there is nothing to prevent a breeder from using basic seed for sowing or from selling it to farmers so that they can use it for sowing (or from allowing licence holders to do so). Such an occurrence will be extremely rare, however, given that basic seed is fairly valuable and that its use for sowing would therefore prove uneconomic.

(23) 'Certified seed' is seed which:

— is of direct descent from basic seed,

— is intended for purposes other than the production of seed (that is to say, intended for direct or indirect sale to farmers for sowing),

— satisfies the conditions laid down by the Directive as regards cultivation, uniformity and varietal purity,

— has been found by official examination to satisfy the abovementioned conditions.

Certified seed cannot lawfully be used to produce seed of a later generation. Seed produced from certified seed cannot itself be certified and cannot, therefore, be marketed. Consequently, certified seed must be used only for sowing or for sale (direct or via cooperatives or the trade) to farmers, who in turn will use it for sowing. Certified seed is thus often referred to as 'commercial seed' or 'seed in free circulation' and is to some extent comparable to a finished industrial product covered by a patent.

(24) The situation is, however, more complex in the case of certain species (such as oats, barley, rice, wheat and spelt) where, under Community directives, both first-generation and second-generation certified seed are allowed. Community directives give the following definitions:

(a) 'first-generation certified seed' is seed which:

— has been produced direct from basic seed,

— is intended either for the production of second-generation certified seed or for purposes other than seed production (that is, for direct or indirect sale to farmers for sowing),

([5]) OJ L 225, 12. 10. 1970, p. 1.

— satisfies the conditions laid down by the directive as regards cultivation, uniformity and varietal purity,

— has been found by official examination to satisfy the abovementioned conditions;

(b) 'second generation certified seed' is seed which:

— has been produced direct from first generation certified seed,

— is intended for purposes other than seed production (that is, for direct or indirect sale to farmers for sowing),

— satisfies the conditions laid down by the Directive,

— has been found by official examination to satisfy the abovementioned conditions.

Certain directives allow even third-generation certified seed.

(25) Thus, first-generation certified seed can be used for two purposes, either: (a) production of other certified seed; or (b) sowing. The first purpose is identical to that served by the basic seed referred to at point 22 (thereby making first-generation certified seed comparable to intermediate machinery). The second purpose, however, is to provide commercial seed for crop production (by virtue of which the seed can be compared to a finished industrial product). It is above all for the breeder (or his licence holder) to decide for what purpose first-generation certified seed is to be used. However, a third party who has lawfully obtained such seed (and who is authorised by national bodies to operate as a multiplier) could also produce second-generation seed and have it certified by public bodies.

(26) Regarding the distinctions made in points 21 to 25 it should be pointed out that while the Community directives ensure free movement within the Community of basic and certified seed which satisfies their conditions, they do not oblige Member States to make provision in their legislation for two separate generations (first and second) of certified seed. Thus, even in cases where a number of generations are allowed, some Member States make provision for only one generation. As a result, there are individual species for which some Member States authorise only the first generation whereas others authorise both first and second (and possibly later) generations.

(27) Certified seed originating in a Member State providing for only one generation could thus be exported to Member States that allow two (or more) generations and be multiplied in one of those Member States. Such seed is often referred to in the trade as 'technical seed'. However, this name does not appear in Community instruments but is used in practice to designate a specific group of seeds which could be referred to as follows: certified seed of a commercial nature only (that is, not for producing other seed in the Member State of origin) which can be used as 'basic seed' (to produce new certified seed) in the country of destination.

(ii) *Common catalogue of varieties*

(28) Directive 70/457/EEC called for the drawing-up of a common catalogue of varieties of agricultural plant species on the basis of the Member States' national catalogues. Each Member State draws up one or more catalogues of the varieties officially approved for certification and marketing on its territory.

(29) Seed of a variety which is accepted in the national catalogue may no longer be subject to any marketing restriction in other Member States:

— with effect from 31 December of the second year following that in which the said varieties are entered in the national catalogue,

or

— when all the Member States have manifested to the Standing Committee on Seeds and Propagating Material their intention not to restrict the marketing of seeds of the variety entered in the said national catalogue.

The Commission publishes in the *Official Journal of the European Communities* (under the title 'Common catalogue of varieties of agricultural plant species') a list of all varieties the seed of which are not subject to any marketing restriction.

(30) By virtue of those provisions, seed of varieties entered in the common catalogue may move freely between all Member States of the Community, even where the variety concerned is not recognised in the Member State of destination.

On the other hand, in order to produce certified seed outside the Member State of first certification, the variety in question must be entered in the national catalogue of the Member State where production is to begin. In other words, the Community directive allows seed to be marketed, but not produced, throughout the Community.

(b) **French provisions**

(31) The general technical rules on seed production and marketing in France are to a large extent drawn from Community directives. In order to safeguard product quality these rules require very rigorous enforcement, thus imposing a substantial administrative burden on the public authorities. The central role falls to SOC, which is an arm of the French Ministry of Agriculture and which is managed by the Groupement national interprofessionnel des semences (GNIS).

(32) Certification is the outcome of a control procedure enabling the Service officiel de contrôle to be sure that seed submitted to it meets minimum genetic or varietal purity requirements.

Seeds can be certified only on the premises of multipliers, who must have been approved for the purpose beforehand. Certification is evidenced by attaching certificates, official labels or in some cases seals issued by the SOC to the packaging of certified seed.

Approval for testing is granted by decision of the Minister for Agriculture, following a proposal from the SOC, for one or more species and, for each species, for one or several categories.

(33) France's general technical rules provide for the following categories of seeds:

(a) *Stock material*

The initial material (strains, clones or multiplication stock) thanks to which the variety's maintenance can be resumed or continued each year.

(b) *Pre-basic seed (generations predating basic seed)*

Seed of a generation occurring between the stock material and basic seed.

(c) *Basic seed*

Seed produced according to accepted practices for the maintenance of the variety and normally intended for production of certified seed.

(d) *Certified seed*

Seed of direct descent from the multiplication of basic seed or, in some cases, at the breeder's request and with the approval of the SOC, from pre-basic seed. Certified seed may be subdivided into first-generation certified seed (R1) and second-generation certified seed (R2).

For the purposes of this Decision, the seed described at (a), (b) and (c) above will be collectively referred to as 'basic seed' and that described at (d) will be referred to as 'certified seed'.

(34) The stock material, pre-basic seed and basic seed are produced under the responsibility of the breeder, who is in charge of the production of his varieties.

Special technical rules specify the conditions under which stock material, pre-basic seed, basic seed and certified seed are to be produced.

In France most of the specific technical rules provide for only one generation of certified seed.

(35) The situation is different in other Member States, where two or more generations of certified seed may be allowed (see point 26). French certified seed can, in such cases, be exported there and undergo multiplication ('technical seed') — a procedure which would not be allowed in France.

(36) Accordingly, certified seed can, under French rules, be 'reclassified'. This consists in repacking first-generation seeds by changing the certificate or label, with the result that it will no longer be possible to use the seeds to produce other seeds in the Member State of destination.

E. THE NOTIFIED AGREEMENTS

(37) The notified agreements are standard contracts whereby Sicasov organises the production and sale of seed protected by plant variety rights which breeders have entrusted to its management.

There are two types of agreement.

(a) Where Sicasov acts as the breeder's agent (see point 2(a)), it concludes an agreement with the multiplier known as a *contrat de licence de production et de vente de matériel de reproduction ou de multiplication vegetative de variété végétale.*

(b) Where Sicasov acts as the breeder's concessionaire (see point 2(b)), it concludes an agreement with the multiplier known as a *contrat de sous-concession de production et de vente de matériel de reproduction ou de multiplication vegetative de variété végétale.*

(38) On the basis of the notified agreements, Sicasov grants the licence holder a non-exclusive licence to reproduce and sell a given plant variety (first paragraph of Article 1). The licence is personal and the rights arising therefrom cannot be transmitted, either in whole or in part (second paragraph of Article 1).

Except with the prior agreement of Sicasov, the licence holder may not allow seed production to be carried out by a third party (third paragraph of Article 1).

The notified agreements concern groups of species, which are thus subdivided:

— cereals,

— fodder plants and high-protein products,

— maize/sorghum, vegetables, oil and fibre plants,

— potatoes.

(39) The notified agreements provide that the production and marketing of seed are subject to the following requirements:

(a) the production and reproduction licence for the variety is granted solely for the production and sale of seed within French territory or within another specified territory (Article 2(A)) [6];

(b) the licence holder may neither export nor import basic seed without express approval from Sicasov (first paragraph of Article 2(C));

(c) a licence holder selling basic seed must obtain a commitment from the purchaser that the seed will not be exported either direct or indirectly (second paragraph of Article 2(C));

(d) the licence holder may not export certified seed direct (or through an undertaking belonging to the same group or subject to the same export prohibition) if the variety has been entered in the common catalogue for less than four years (Article 2(D));

(e) the licence holder may not export certified seed of the first generation to Member States that authorise two or more generations or export certified seed of the second generation to Member States that authorise three or more generations. The licence holder undertakes to impose this obligation on all his purchasers (first paragraph of Article 2(E)). However, the breeder undertakes to give his agreement on the reclassification of seed to the national certification authorities as a matter of course, provided that the exporter informs him of his intention and that the certification authorities inform him (or his assignee) of the quantities of seed reclassified and the country of destination (second paragraph of Article 2(E)). Such systematic authorisation is to be granted only for varieties entered in the common catalogue for more than four years (third paragraph of Article 2(E));

[6] Where the variety is protected by a French breeding certificate, the right of production covers all French territory. By contrast, where the variety is protected by a Community breeding right, the right of production is granted in respect of the whole of the Community. The licence holder is therefore entitled to produce and sell seed freely in all the Member States. The clauses relating to the import and export restrictions provided for by Article 2 of the contract will apply only where the variety in question is protected under Community plant-breeding law (except where non-member countries are concerned).

(f) the licence holder may not export certified seed to Member States which do not grant legal protection for new plant varieties. The licence holder undertakes to impose this obligation on all his purchasers (first paragraph of Article 2(E));

(g) the licence holder may not export certified seed to States which are not members of the Community or members of the Union internationale pour la protection des obtentions végétales (UPOV). The licence holder undertakes to impose this obligation on all his purchasers (first paragraph of Article 2(E)).

(40) The management group may subject the licence holder to any check it feels is necessary in order to ensure that the operations for which it is responsible are being properly carried out; it may also require the licence holder to submit to it each year a statement of sales or certifications, broken down by species.

(41) In exchange for the rights granted to him, the licence holder undertakes to pay the management group a membership fee and an amount based on the quantities sold or certified in the autumn or spring. The amount in question is payable by licensed multipliers when they entrust to their multiplying farmers seeds under licence produced or packed by them.

(42) If the subject of the agreement is an annual species the licence is granted only for the harvest resulting from the planting that follows its signing. In the case of a perennial species, the licence is granted for the number of harvests resulting from the planting that follows the signing of the agreement and is specified therein.

II. LEGAL ASSESSMENT

A. ARTICLE 85(1)

(43) Article 85(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices 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.

(44) Sicasov is an 'undertaking' within the meaning of Article 85 of the Treaty since it carries on an economic activity consisting in the management and supervision of plant breeders' rights in France. The licence holders are also undertakings since they carry on an economic activity (the production and marketing of seeds).

(45) From the product standpoint, the notified agreements relate to a very large number of different reference markets. Each plant species constitutes a different market and, within a given species, groups of varieties can very often be identified that are to be regarded as separate markets.

(46) From the geographic standpoint, the abovementioned markets correspond to the territories of the Member States. It should first be borne in mind that the production and marketing of seeds is governed by national rules (as far as France is concerned, see points 31 to 36), although such national rules must comply with the applicable Community directives. Secondly, it should be stressed that seed distribution structures are organised chiefly along national lines. However, the fact that the reference markets are national markets does not detract from the existence of import and export flows, some of which are on a large scale.

(47) The notified agreements are 'agreements between undertakings' within the meaning of Article 85 of the Treaty. It is therefore necessary to examine whether the clauses provided for by the said agreements restrict competition and affect trade between Member States.

(a) General

(48) However, before assessing whether the clauses of the notified agreements are compatible with Article 85(1) of the Treaty, it is advisable to examine the scope of the plant-variety rights in order to define which clauses of the notified agreements arise from the existence of those rights.

(49) In this connection, reference should be made both to Regulation (EC) No 2100/94 and to the UPOV Convention, which has been ratified by most Member States.

Together, they give the breeder the right to subject to his prior authorisation all acts relating to the production, reproduction, conditioning, putting up for sale, marketing, export, import and stocking of seeds of the protected variety.

It therefore follows that any act relating to the production of basic or certified seeds falls within the breeder's exclusive rights and is accordingly covered by plant-variety rights.

(50) Consequently, the breeder is entitled to control the destination of all seeds in respect of which an act of production is still legally possible in the light of the public provisions applicable (see points 21 to 27 and 31 to 36). This means that Article 85(1) will not apply to agreements aimed solely at protecting the breeder's right in regard to seeds which, on the basis of the public rules applicable, can lawfully be used to produce other seeds. Thus, for instance, an agreement prohibiting the licence holder from selling or exporting seeds which do not belong to the last generation that may lawfully be reproduced and which have been made available to him solely for the purpose of multiplication is not covered by Article 85(1) of the Treaty ([7]).

The above points also apply to 'technical' seeds (see point 27). It must be accepted that, in the absence of any Community harmonisation in this field, a breeder may insert whatever contractual clauses are needed to protect his rights. In order to do so, the breeder may stipulate contractual clauses enabling him to subject to his authorisation and control any seed-production act irrespective of the generation concerned (first generation, second generation, etc.). Such clauses will, however, be approved only if they are essential to protecting the breeder's rights and are compatible with the Community rules on competition. Scrutiny of the case will reveal whether those requirements are fully satisfied.

(51) By contrast, the breeder's right of control ceases to apply only after he produces (or authorises the production of) seeds which, by virtue of the public provisions applicable, can no longer be lawfully reproduced and after he puts them (or authorises them to be put) into circulation. The seeds may no longer be used to produce other seeds; they may only be sold (direct or via an intermediary) to farmers for the production of consumption goods. The seeds must in such cases be regarded as goods that are comparable to finished industrial products. Any agreement aimed at restricting the production or marketing of the seeds can be scrutinised in the light of Article 85 of the Treaty.

While it is true that the abovementioned seeds are the subject of numerous checks by the public authorities (see points 31 to 36), the legal position of a breeder does not differ from that of a holder of a patent or trade mark on a product subject to control by the public authorities (such as a pharmaceutical product). There are therefore no grounds for regarding seeds protected by plant-variety rights as having specific characteristics which require them to be treated differently from products protected by other industrial property rights. This does not affect the need to take the specific nature of seeds into consideration for the purposes of applying the competition rules ([8]).

(b) **Clauses not covered by Article 85(1)**

(52) The granting by Sicasov of a non-exclusive right to multiply seeds covered by the agreements in France or on a territory which is the subject of the plant variety rights (which means, in the case of the Community plant-breeding right, the Community as a whole) does not restrict its right to grant licences to all multipliers submitting an application, providing that those multipliers fulfil French legal requirements in terms of seed certification. In this respect, Sicasov's policy has been to grant licences without difficulties to applicants in respect of the selected varieties.

Moreover, the breeder is still free to sell the seeds covered by the contract in France or elsewhere. He may do so direct or via a distributor. Such a clause must therefore be seen as not restricting competition within the meaning of Article 85(1).

(53) The obligation on the licence holder not (except with Sicasov's approval) to entrust basic seeds to a third party with a view to producing certified seeds is one of the options arising from the existence of plant variety rights. In this connection, it should be emphasised that producing basic seeds entails major costs and may carry with it appreciable risks.

([7]) See Case 27/87 Erauw-Jacquery v. La Hesbignonne [1988] ECR, p. 1919, at paragraphs 9 and 10 of the judgment. According to the Court, '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)'.

([8]) See Case 258/78 Nungesser v. Commission [1982] ECR, p. 2015.

Moreover, basic seeds are produced under the responsibility of the breeder. The latter must therefore be allowed to protect himself against any technical mishandling of those seeds. To that end, he must be allowed to restrict the multiplication of basic seed to the growers which Sicasov has selected as licence holders ([9]). This means that the breeder has the right to restrict the movement of basic seed. Accordingly, the obligation on the licence holder not to entrust basic seed to third parties is compatible with Article 85(1) of the Treaty.

(54) The obligation on the licence holder not to export basic seed must also be regarded as the expression of the exercise of one of the rights open to the breeder. The latter (or, as in this case, his assignee) must be recognised as having the right to restrict the destination of basic seed in order to avoid any wrongful handling of the varieties. To that end, he must have the right to prohibit the licence holders he has chosen (or, as in this case, the licence holders his assignee has chosen) from selling and exporting the basic seed ([10]). Clearly, therefore, a breeder who bears the economic and legal risks involved in the production of seeds must be able to control their destination, including their sale abroad. It may accordingly be felt that the prohibition on the export of basic seed is not covered by the prohibition under Article 85(1) of the Treaty.

(55) Similar considerations may be arrived at as regards the prohibition on imports of basic seeds. Plant-protection rights allow the holder to prohibit third parties from importing protected seed. Those rights may be regarded as having expired only when the breeder has put the seeds into free circulation or has given his consent to that end. In the case of basic seed, the breeder arranges for its production and distribution on the basis of a network of multipliers who cannot freely dispose of the seed. It is therefore permissible for the breeder to underpin that system by means of a prohibition on each licence holder from importing basic seed. That clause should accordingly not be regarded as being covered by Article 85(1) of the Treaty.

([9]) See footnote 7; at paragraph 10 of the judgment.
([10]) See footnote 7; at paragraph 10 of the judgment.

(56) The obligation on the licence holder to pass on to the buyer the obligation not to export basic seed must also be regarded as an expression of the rights accruing to the breeder. In that case too, the breeder must be able to control the destination of the basic seed in order to avoid any technical mishandling of the varieties concerned. Such wrongful handling could occur not only when a licence holder exports direct but also when he sells (with Sicasov's approval) to a third party who then exports the basic seed. The breeder must therefore be in a position to control the final destination of the basic seed. It may therefore be felt that the obligation on the part of the licence holder to obtain an undertaking from his buyer that the basic seed will not be exported is not covered by the prohibition under Article 85(1).

(57) The obligation on the licence holder not to export first- or second-generation certified seed if the said seed does not belong to the lowest level of protection afforded by the country of destination ('technical seed') and has not been reclassified beforehand is aimed at ensuring that the breeder is able to control reproduction acts over which he has exclusive rights. In Member States where several generations are allowed, first-generation seed imported into France might be used as basic seed in order to obtain other seed (the same would apply to second-generation seed in the case of Member States that allow three generations or more). Reproduction acts could be carried out therefore by multipliers who have not been selected by the breeder and are outside his control ([11]).

It should be emphasised that reclassification lowers neither the intrinsic value nor the commercial value of the seed. The sole effect of reclassification is to make seed non-reproducible (from the legal point of view). Account must be taken of the fact that it would be almost impossible for the holder to use contractual means alone to prevent reproduction acts from taking place without his agreement in a Member State that allows several generations. In those Member States, reproduction acts towards subsequent generations are quite legal and the national authorities are under no obligation whatsoever to ask the breeder for his authorisation or to communicate to him seed certifications of generations occurring after the first.

([11]) See footnote 7; at paragraph 10 of the judgment.

Admittedly, the authorisation to reclassify is not granted by the breeder until four years after entry in the common catalogue; meanwhile, licence holders will therefore be unable to export direct to certain Member States. In the absence of Community harmonisation, it must be concluded that such a measure is justified and does not restrict competition.

Accordingly, an obligation on the licence holder to reclassify first-generation seeds (or, where applicable, second-generation seeds) prior to exporting them to Member States that allow two or more other generations does not restrict competition within the meaning of Article 85(1) of the Treaty.

(58) The obligation on the licence holder to pass on the prohibition on exports of the abovementioned seed is aimed at preventing an adverse effect, through one or more third-party buyers, on the breeders' rights in the Member State of destination which would have the consequences described in point 57. Such an obligation must therefore be regarded as compatible with Article 85(1) of the Treaty.

(59) The obligation on the licence holder not to export certified seeds to Member States that do not afford any legal protection to new plant varieties is aimed at preventing third parties from carrying out, without the breeder's authorisation, reproduction acts in order to obtain later generations of those seeds. In those Member States, anyone may reproduce seeds until the last generation allowed under national legislation in accordance with Community directives. The only possibility the breeder has of exercising control over such acts is to restrict the marketing of seeds. Breeders' rights do not cease to apply in the case of seeds that do not belong to self-reproducing plant species.

Self-reproduction is a phenomenon producing a situation different from that obtaining in the field of patents. After being put onto the market (by the holder or with his consent), a patented industrial product can no longer be used to produce large numbers of similar products (regardless of whether or not there is any protection under patent law). On the other hand, prohibiting exports of seeds to Member States that do not recognise any legal protection for the species concerned is tantamount to prohibiting the licence holder from transmitting to third parties in a Member State that does not grant protection in respect of the patent any intermediate machinery used to manufacture a product protected by a patent in the Member State of origin. This prohibition should not be regarded as restricting competition.

In the light of the above, an obligation on the licence holder not to export seeds to Member States that do not grant any legal protection to the variety in question is not to be regarded as restricting competition under Article 85.

(60) The obligation on the licence holder to pass on to any buyer the obligation referred to in paragraph 59 is also aimed at preventing reproduction acts from taking place outside the breeder's control. That obligation is not, therefore, covered by the prohibition set out in Article 85(1) of the Treaty.

(61) The obligation not to export certified seeds to countries that are not Member States of the Community or members of UPOV is in keeping with the same objectives as are described above (see points 57 to 60).

(c) **The clause covered by Article 85(1)**

(62) The obligation on licence holders not to export certified seeds from France direct (or through undertakings belonging to the same group, or through other licence holders) for a period of four years from registration of the variety in the common catalogue prevents licence holders not only from conducting an active sales policy outside France but also from meeting unsolicited demand from customers in other Member States. It follows that the licence holder may not supply customers established in Member States other than France, even if the sale of the seed takes place on French territory. It should be emphasised, moreover, that the said obligation also applies where the sale is made through a broker (who acts on behalf and for the account of the customer outside France).

The obligation in question therefore prevents any direct exporting and leaves only the possibility of effecting indirect exports (that is, via a third-party undertaking established in France).

It is clear therefore that the said obligation is designed to eliminate licence holders as direct sellers of seeds to undertakings established in Member States other than France. Thus, undertakings outside France can only buy seeds through intermediaries established on French territory. In

general, such purchases are more difficult and less advantageous than those made direct from licence holders. Consequently, the clause in question reduces the degree of competition in the other Member States, since the breeder (or the undertaking which the latter has authorised to produce and/or sell) is faced only with sales to third parties who bought the seed covered by the agreement in France (from licence holders in the management group or from the breeder himself) and subsequently exported them to the State in question.

(63) Accordingly, the obligation mentioned in point 62 is designed to restrict competition within the meaning of Article 85(1) of the Treaty, at least in the case of exports to States which do not give the breeder (or his assignees) the right to prevent imports from other Member States. To this extent, the said obligation enables the breeder to achieve a result which he would not be able to attain by relying exclusively on possible rules relating to plant-breeding rights, adopted by the Member States into which the seeds are imported.

(64) The obligation mentioned in point 62 is likely to eliminate a flow of trade in seeds from France to the other Member States, which might otherwise have expanded. It must therefore be regarded as affecting trade between Member States of the Community.

B. ARTICLE 2 OF REGULATION No 26

(65) Article 2 of Council Regulation No 26 applying certain rules of competition to production of and trade in agricultural products [12], as amended by Regulation No 49 [13], provides that Article 85(1) of the Treaty is not to apply to such of the agreements, decisions and practices which concern the production or sale of agricultural products as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 39 of the Treaty.

(66) Seeds are listed in Annex II to the Treaty and are therefore agricultural products. Consideration should therefore be given to whether the two exceptions provided for by the first sentence of Article 2 of Regulation No 26 apply to the notified agreements.

(67) It should be pointed out first of all that the notified agreements do not form an integral part of a national market organisation for seeds. Such a national organisation exists neither in France nor in any other Member State, since the sector is governed by the provisions of Council Regulation (EEC) No 2358/71 of 26 October 1971 on the common organisation of the market in seeds [14], as last amended by Regulation (EC) No 192/98 [15].

(68) It should be examined subsequently whether the notified agreements are necessary for the attainment of the objectives set out in Article 39 of the Treaty.

It should be emphasised in this respect that, since it is a derogation to the general rule of Article 85(1) of the Treaty which is involved, the said exception is to be interpreted restrictively [16].

In addition, the Community courts have consistently held that the exception in question only applies if an agreement promotes the attainment of all the objectives of Article 39 of the Treaty [17].

Lastly, it must be concluded that agreements which are not included among the means provided by the Regulation on the common organisation for the attainment of the objectives set out in Article 39 of the Treaty are not necessary within the meaning of Article 2(1) of Regulation No 26/62. The common organisation of markets in seeds does not provide for the conclusion of licensing agreements.

(69) Accordingly, an exception under Article 2 of Regulation No 26 must be ruled out in this case and, by the same token, Article 85(1) of the Treaty is applicable.

C. ARTICLE 85(3)

(70) The provisions of Article 85(1) can, by virtue of Article 85(3), be declared inapplicable in the case of any agreement or category of agreements between undertakings 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:

[12] OJ 30, 20. 4. 1962, p. 993/62.
[13] OJ 53, 1. 7. 1962, p. 1571/62.
[14] OJ L 246, 5. 11. 1971, p. 1.
[15] OJ L 20, 27. 1. 1998, p. 16.
[16] See Case C-399/93 Oude Luttikhuis [1995] ECR I, p. 4515, at paragraph 23 *et seq.* of the judgment and Joined Cases T-70/92 and T-71/92 Florimex [1997] ECR II, p. 693, at paragraph 152 of the judgment.
[17] See Case 71/74 Frubo [1975] ECR 563, paragraphs 22 to 27 of the judgment, Oude Luttikhuis, see footnote 16, at paragraph 25 and Florimex, see footnote 16, at paragraph 153.

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

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

(71) The Commission may apply Article 85(3) either by means of an individual decision or by means of a regulation.

(72) Commission Regulation (EC) No 240/96 [18] may be applied to certain categories of technology transfer agreements relating to plant breeders' rights (point (h) of Article 8(1)).

Regulation (EC) No 240/96 cannot, however, be applied to the notified agreements since the prohibition on exporting certified seeds does not correspond to any of the obligations mentioned in Article 1(1) of the Regulation: in particular, the notified agreements do not grant territories to licensees (see points 1, 2, 4, 5 and 6 of Article 1(1)) or reserve certain territories for the licensor (see point 3 of Article 1(1)).

(73) Although Regulation (EC) No 240/96 is not applicable as such, it can nevertheless provide criteria that may be used, in the context of this individual Decision, in assessing the prohibition on exporting certified seeds.

Consequently, with a view to assessing whether the prohibition on exporting certified seeds satisfies the tests of Article 85(3) of the Treaty, account must be taken of the following considerations.

(74) The prohibition on exporting certified seeds contributes to improving production and distribution, and to promoting technical and economic progress.

First, it facilitates the dissemination of new varieties in Member States other than France by encouraging undertakings in those Member States to accept the risks involved in producing and/or marketing new varieties selected by the French breeders. Those firms will be more inclined to undertake the dissemination of new varieties if they can be certain that they will not have to contend with direct exports from France during the launch period. It is therefore appropriate to conclude that, during this period, French breeders should have the right to protect their licence holders and distributors (in Member States other than France) against direct competition from French licence holders by imposing on the latter contractual clauses prohibiting them from exporting certified seeds. Licence holders and distributors in Member States other than France, who will normally have a better knowledge of the respective markets than the French breeders, will be able to market seeds belonging to new varieties in optimum conditions and provide users with regular and adequate supplies.

Secondly, the export prohibition improves the organisation of the production and distribution of seeds in France by encouraging French licence holders to concentrate their efforts on French territory with a view to providing user farmers with regular and adequate supplies.

It should also be stressed that Regulation (EC) No 240/96 exempts obligations on licensees to refrain from both active sales (Article 1(1), point 5) and passive sales (Article 1(1), point 6) since it considers that such prohibitions generally contribute to improving the production of goods and to promoting technical progress.

(75) User farmers, be they in France or in other Member States, will be allowed a fair share of the benefit resulting from the improved supply of seeds referred to in point 74. The protection afforded by the prohibition on exports encourages firms in Member States other than France to conclude production or distribution agreements with French breeders and thereby introduces farmers in those Member States to new varieties that will improve their harvests.

French farmers will also benefit from regular and plentiful supplies, since French licence holders will have to concentrate their efforts above all on the French market.

In order to preserve these beneficial effects, however, parallel exports from French territory must at all times be free. This requirement is met in the case in point since there is no clause in the notified agreements prohibiting licence holders from selling to users and dealers established in French territory, who could then export to other Member States.

[18] OJ L 31, 9. 2. 1996, p. 2.

The foregoing considerations are compatible with Regulation (EC) No 240/96, which states that export prohibitions imposed on licensees, as referred to in Article 1, as a rule allow consumers a fair share of the benefit resulting from the improvement in the supply of goods on the market.

(76) The prohibition on direct exports of seeds is essential for ensuring the dissemination of new varieties in Member States other than France and, therefore, for achieving the objective of promoting technical and economic progress for the benefit of users situated in those Member States. In particular, it does not seem that a protection period of four years, calculated from the entry in the common catalogue, is excessive compared with the aim of promoting the knowledge and dissemination of a new variety on a market. In this respect, it should be noted that Regulation (EC) No 240/96 allows prohibitions on passive exports for a period of five years, calculated from the date on which the product in question is first placed on the market. As regards the date on which the export prohibition is to begin, it should be borne in mind that, on the whole (that is to say, in cases other than that of parallel entry in the national catalogue of the Member State of destination), a variety may not move freely in the Community until it is entered in the common catalogue. It is therefore advisable to choose the time of such entry as the starting point of the protection period.

(77) The obligation on the licence holder not to export seeds direct does not enable breeders to eliminate competition. First of all, new varieties of seeds are mostly in competition with existing varieties which are well known to farmers and which therefore constitute an alternative source of supply. Secondly, parallel imports from France are still unrestricted, with the result that any customers established in other Member States will, albeit indirectly, have access to French varieties, even during the launch phase.

D. ARTICLES 6 AND 8 OF REGULATION No 17

(78) The Commission is required, under Article 6 of Regulation No 17, to indicate the date on which an exemption decision begins to take effect.

(79) By virtue of Article 8(1) of Regulation No 17 exemption is to be granted for a specific period. In view of technical developments in the field of seeds and the economic situation on the market concerned, it would be reasonable to provide for a 10-year exemption, to begin on 26 October 1994, being the date of notification of the agreements,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85(3) of the EC Treaty, Article 85(1) is hereby declared inapplicable to the standard agreements of Sicasov (Société coopérative d'intérêt collectif agricole anonyme à capital variable) covering the production and sale of seeds.

Article 2

The exemption shall apply from 26 October 1994 to 26 October 2004.

Article 3

This Decision is addressed to: Sicasov (Société coopérative d'intérêt collectif agricole anonyme à capital variable) 7, rue Coq-Héron, F-75001 Paris.

Done at Brussels, 14 December 1998.

For the Commission
Karel VAN MIERT
Member of the Commission