OPINION OF ADVOCATE GENERAL GULMANN
delivered on 4 May 1994 *

Mr President,
Members of the Court,

1. The French Cour de Cassation (Court of Cassation) has referred to the Court for a preliminary ruling two questions concerning in particular the interpretation of Articles 90(1), 86 and 30 of the EC Treaty. The questions have arisen in the course of a dispute between two French artificial insemination undertakings, arising out of the special rules on insemination centres contained in the French Law of 28 December 1966 on stock breeding. [1]

2. The questions raised relate in particular to Article 5 of the Law, which provides *inter alia* that the operation of insemination centres shall be subject to *prior authorization* from the Ministry of Agriculture whether the centres both produce semen and carry out insemination or perform only one of those activities.

Article 5 also provides that:

'Each insemination centre shall serve an area in which *only that centre is authorized to operate*. The authorization which applies to it shall define that area.

Breeders within the area assigned to an insemination centre may apply to the centre to *provide them with semen from production centres of their own choice ...; any additional costs* resulting from that choice shall be borne by the users' (my emphases).

3. The parties to the main proceedings are the Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne (hereinafter 'CEIAM', which was approved by the Ministry of Agriculture in 1970 as insemination centre in the Department of Mayenne, and the Société Civile Agricole du Centre d'Insémination de la Crespelle (hereinafter 'the Crespelle Centre'), which has been operating as an insemination undertaking since 1961 in part of Mayenne but has not received the authorization of the Ministry of Agriculture under the 1966 Law.

4. In 1985 CEIAM brought an action against the Crespelle Centre before the Tri-

* Original language: Danish.
1 — JORF of 29 December 1966, p. 11619.

bunal de Grande Instance (Regional Court), Rennes, contending that the Crespelle Centre had infringed its exclusive right to act as an insemination undertaking in the Department of Mayenne and claiming that the Crespelle Centre should be ordered to pay damages for the loss CEIAM had suffered as a result of that infringement and to cease its unlawful activity. The Tribunal de Grande Instance upheld CEIAM's claim and ordered the Crespelle Centre, which did not deny that it had infringed the exclusive right, to pay considerable damages and imposed fines on the undertaking in the event of future infringements. The judgment was confirmed by the Cour d'Appel (Court of Appeal), Rennes, which rejected *inter alia* the Crespelle Centre's contention that the French rules on geographical monopolies for insemination centres were contrary to Community law. [2]

The Crespelle Centre appealed to the Cour de Cassation against the judgment of the Cour d'Appel, claiming that the judgment was based on an erroneous conception of the significance of the Community rules relied upon.

2 — The Crespelle Centre claimed that the geographical monopoly was contrary to Articles 3, 5, 85, 30 and 59 of the EEC Treaty. The Cour d'Appel rejected that claim, stating:
— first, that Article 85 of the Treaty was inapplicable because any measures likely to distort competition were not contained in an agreement but in a law;
— secondly, neither Article 85 nor Article 3 or 5 is applicable as the Law contains no provisions encouraging the conclusion of agreements between undertakings contrary to Article 85;
— thirdly, Article 30 is inapplicable because the French legislation does not preclude the importation of bovine semen but merely prescribes that importation shall take place through an insemination centre and that requirement complies with the Community directives on the subject;
— fourthly, Article 59 is inapplicable as the case concerns purely internal conditions and there is thus no transfrontier factor.

5. The Cour de Cassation referred the following questions to the Court:

'1. Is it contrary to Articles 5, 86 and 90(1) of the Treaty establishing the European Economic Community for domestic legislation such as that at issue in this case to establish insemination centres which alone are authorized to operate in a defined area and do those provisions grant them the right to charge for additional costs where breeders in the area within which the centre has exclusive rights request the supply of semen from approved production centres of their choice?

2. Are domestic rules, such as those at issue in this case, which require economic operators who import semen from a Member State of the Community to deliver it to an approved insemination or production centre contrary to Articles 30 and 36 of the EEC Treaty, to Article 2 of Council Directive 77/504/EEC of 25 July 1977 on pure-bred breeding animals of the bovine species [3] and to Article 4 of Council Directive 87/328/EEC of 18 June 1987 on the acceptance for breeding purposes of pure-bred breeding animals of the bovine species?' [4]

3 — OJ 1977 L 206, p. 8.
4 — OJ 1987 L167, p. 54.

6. Observations were submitted to the Court by both parties to the main proceedings, by the French Government and by the Commission.

7. It emerges both from the questions and from the observations in this case that a distinction should be drawn between those aspects of the French system concerning the provision of actual insemination services and those concerning the provision and storage of the product — bovine semen — used in connection with the provision of services.

The background, content and practical application of the French legislation

8. The object of the 1966 Law on stock breeding, according to Article 1 thereof, is to improve the quality of cattle. According to the preparatory studies for the Law, [5] the purpose of the Law was, *inter alia*, to improve French stock breeding and hence the competitive capacity of French agriculture in advance of the implementation of the common agricultural policy envisaged in the EEC Treaty. [6]

9. The basic rule for the improvement of stock breeding is, as I have mentioned, that this must take place within centres, whether production centres or insemination centres, approved by the Ministry of Agriculture. It appears from Article 5(3) of the Law that such approval is given in consideration above all 'of equipment already existing, of the relevant centre's ability to make a contribution to the genetic improvement of the cattle population and the guarantees which the centre offers in particular as regards both qualified staff and working material and breeding animals ...'

10. It may be seen from Article 2 of Decree No 69/258 of 22 March 1969 on artificial insemination [7] that the production centres are 'to maintain a stock of male animals which are approved for reproduction or for which progeny-testing is authorized, in

5 — See the committee report submitted at the time of consideration of the draft Law in the Assemblée Nationale — Documents de l'Assemblée Nationale, Première Session Ordinaire de 1966-1967, Document No 2168, p. 909.

6 — The development of stock breeding has led in all countries to a quite remarkable improvement of productivity as regards both milking cows and beef cattle. Insemination, which was fully developed only after the Second World War, has made a considerable contribution to the success of stock breeding. It is of particular importance that bovine semen can be frozen and stored for long periods, and this makes it possible to use semen from one single bull for insemination in numerous cases — in practice already more than 10 000 inseminations per annum.

7 — JORF of 23 March 1969, p. 2948.

order to carry out progeny-testing in accordance with a programme approved by the Minister for Agriculture, and to collect, treat, store and distribute semen from breeding animals approved or being tested'.

11. It appears from the same provision that the operations of insemination centres consist in 'insemination of female animals of the species described in Article 1 of the Law of 28 December 1966' and that 'the insemination centres may be authorized to maintain stocks of animals approved for reproduction supplied by production centres; in that case the insemination centres themselves shall undertake the collection, treatment and storage of the semen from the relevant stock of animals'.

12. The French Government has stated in its answers to questions from the Court that there are in all 23 production centres, some of which are approved for the breeding of a single breed of cattle, whereas others are approved for the breeding of several breeds. There are in all 54 insemination centres. The centres are run by agricultural co-operatives or groups of such co-operatives. All but seven of them are members of a country-wide union, the Union Nationale des Coopératives Agricoles d'Elevage et d'Insemination Artificielle (UNCEIA). The French Government has stated that the co-operatives are non-profit-making. [8]

13. The insemination centres have the exclusive right to effect insemination within a given geographical area. It may be seen from the preparatory studies for the Law [9] that such an exclusive right was regarded as necessary *inter alia* to avoid price competition, which might be damaging to the centres carrying out a valuable breeding programme. The French Government has also given the following explanation of the background to the exclusive right:

'The monopoly, which attracts the membership of professionals and is the result of a permanent collaboration between managements and the profession, pursues a *twofold aim*, first to *guarantee a constant supply of semen* to the breeders of the area, *but above all to promote*, in the general interest, *genetic progress* by evaluating genetic value precisely within the programmes of selection according to progeny. *Testing* is in fact a long and costly activity necessitating stable operations capable of paying for themselves. In fact the

8 — The government has stated that 'the approved insemination centres are exclusively agricultural co-operative societies governed by the Law of 10 September 1947 ... In accordance with Article L 521.1 of the Rural Code they are special groups, either general or commercial societies whose object is the joint use by farmers of all means appropriate for facilitating or developing their operations. Their objective is therefore not to make a profit but to offer their members advantageous conditions of supply and marketing.'

9 — See the report of the committee on economic affairs submitted at the time of the consideration of the draft Law in the Senate — Documents de l'Assemblée Nationale, Sénat, Première Session Ordinaire de 1966-1967, Document No 63, p. 33.

operation of testing a number of bulls does not guarantee that one or more bulls capable of bringing about an improvement will be found. Moreover this type of genetic testing, which lasts from five to ten years, costs nearly 300 000 francs per bull tested, whereas one bull in four will be approved by milk producers and one in ten will be widely used by breeders. In these circumstances *the exclusive character of the area allocated to the insemination centre makes it possible to plan for and guarantee technically a potential stock of animals for carrying out artificial inseminations for testing and distribution.* The abolition of the geographical monopoly might increase the number of operators in a single region and would thus split up the potential stock for testing and therefore the extent of each programme and consequently the probability of selecting breeding animals capable of bringing about an improvement' (my emphases).

14. The exclusive right is thus based partly on guaranteeing supply within the area concerned, partly, and above all on the wish to ensure a sufficiently large number of cattle on which tests may be carried out. In addition there is a financial aspect, which is dealt with in greater detail in Annex 3 to the observations of the French Government, which states *inter alia* the following:

'Thus by means of the price for the artificial insemination effected, which takes into account the cost of the selection programme, this arrangement makes it possible to share out the high cost of the selection programmes over a large number of breeders, regard being had to the cooperative character of the centres and the contracts concluded between them.

Those responsible for the programmes therefore have the necessary stability of resources for this type of operation, the results of which are apparent only in the long term.'

15. The exclusive right of the insemination centres is thus scarcely based on any need to use only inseminators from the centre within that area. The actual act of insemination, according to the information available, is not difficult. Individual breeders can if appropriate perform it themselves under the guidance of the insemination centre. [10]

16. The insemination centres generally obtain the semen for insemination from the production centres with which they have concluded contracts. The insemination centres have a duty to enter into such contracts so as to ensure that there is at all times an adequate supply of semen. Moreover such

10 — It is stated in Annex 3 to the French Government's observations that 'although in practice the great majority of artificial inseminations are carried out by inseminators employed by the approved cooperative, the rules allow the breeders themselves on their own holdings (decree of 1 June 1978, amended by the decree of 31 May 1983) and veterinary surgeons (decree of 21 November 1991) to practise insemination subject to a contractual agreement with the insemination centre of the area concerned. The rules make it possible to ensure that the head of the insemination centre may at all times carry out (zootechnical and sanitary) supervision of insemination within a given area.'

contracts also lay down the obligations of the insemination centres to take part in the genetic development work.

17. There is no doubt that the breeders accept that the insemination centres in the great majority of cases use semen from the production centres with which they have firm contracts. One reason for that may be that high costs are involved in purchasing semen in small quantities. [11]

18. However, the duty to ensure the supply of semen by contract does not preclude the possibility of supply from other sources. The French legislation does not prevent individual breeders or insemination centres from applying to foreign producers direct for the purchase of semen.

The rules on this are to be found *inter alia* in Article 5 of the 1966 Law, already mentioned, according to which

— breeders may apply to their local insemination centre to provide them with semen from production centres selected by the breeders themselves;

— the relevant centre has a duty to inseminate with the semen thus obtained; and

— the additional costs incurred as a result of that free choice are borne by the breeders.

19. These rules were made more explicit and supplemented in Article 10 of the decree of the Ministry of Agriculture of 17 April 1969 [12] on authorization for the operation of insemination centres, as amended by decree of 24 January 1989. [13] That amendment was occasioned by a reasoned opinion sent by the Commission to the French Government. It is not stated whether the opinion dealt with other matters of complaint. In the version at present in force Article 10 is worded as follows:

'The insemination centres shall normally be supplied with breeding animals or with

11 — See the French Government's explanation of this, as mentioned in paragraph 12 of Case 161/82 *Commission* v *France*, discussed *infra*.

12 — JORF of 30 April 1969, p. 4349.

13 — Article 2 of the decree of 24 January 1989, JORF of 31 January 1989, p. 1469.

semen by the centre or centres approved for production and established on the territory of one of the Member States of the European Economic Community with which they have concluded a contract in accordance with the provisions of Article 12. [14]

They may, on their own initiative or at the individual written request of breeders in their area, supplement the supply resulting from the application of the abovementioned contracts by application to other production centres.

Any other economic operator importing semen originating in another Member State of the European Economic Community shall deliver it to an approved insemination or production centre of his choice.'

20. The French Government has stated that no import licence is required for the importation of semen from other Member States.

Case-law regarding the French monopoly system

21. According to the information supplied, some sectors of the French farming community are dissatisfied with the monopoly system. That is presumably, *inter alia*, because artificial insemination is the main method of inseminating cattle used by farmers [15] and that the cost of a single insemination is not inconsiderable — it is stated to be in any case not less than FF 100 and normally substantially more. Apparently there are considerable differences in price in certain cases. It has been stated for example that CEIAM's prices in 1987 were some 30% higher than those of the Crespelle Centre. The monopoly system has given rise to actions before the French courts originating in the operation of unauthorized insemination centres or in inseminations effected by inseminators or veterinary surgeons without the necessary permission from the local centre.

14 — Article 12 of the decree provides that:
'Each insemination centre shall conclude contracts with one or more production centres.
Such contracts shall guarantee regular supplies of semen in the area concerned, regard being had to the requirements arising, and for sufficiently long periods to conclude testing activities successfully.
Such contracts shall include an undertaking on the part of the insemination centre to take part in testing programmes implemented by the production centres to which it is linked. That undertaking shall take into account the possibilities available within the area for the implementation of test programmes and an estimate of the medium-term requirements of approved breeding animals within the area.'

15 — It may be seen from the expert report used for calculating damages in the main proceedings that in 1987 CEIAM effected more than a quarter of a million inseminations and that in the same year the Crespelle Centre effected some 100 000 in the department of Mayenne alone.

22. One of these cases has given rise to the questions referred to the Court for a preliminary ruling by the Tribunal de Grande Instance, Bergerac, in Case C-17/94, which is still pending. The questions have arisen in connection with the prosecution of French veterinary surgeons charged with infringing the local centre's exclusive right and concern the significance of the rules of the Treaty with regard to freedom to provide services as regards the restrictions which might arise for veterinary surgeons carrying out insemination independently of the insemination centres.

23. The Court has previously had occasion in two cases to decide as to the legality of various aspects of the French system as regards Article 37 of the Treaty on State monopolies of a commercial character and certain of the Council directives on breeding animals. One — Case 161/82 *Commission* v *France* — concerned a failure to fulfil Treaty obligations, and the other — Case 271/81 *Société Coopérative d'Amélioration de l'Elevage et d'Insémination Artificielle du Béarn* v *Mialocq and Others* — was a reference for a preliminary ruling; the Court gave judgment in both cases on 28 June 1983. [16]

24. In the case first mentioned the Court found in favour of France and dismissed the Commission's claim that Article 37 had been infringed in connection with restrictions on the importation of semen. The Court referred to the fact that no national monopoly had been set up in France for the marketing and importation of semen and that moreover the Commission had not succeeded in establishing 'the existence of a body through which the French State, in law or in fact, controls, directs or appreciably influences imports of semen from other Member States' (paragraph 14 in conjunction with paragraph 19).

25. In the reference for a preliminary ruling two inseminators, prosecuted for infringement of an insemination centre's exclusive right, claimed that the monopoly system was contrary to Article 37 of the Treaty. The court of reference stated that the breeders were required to have the insemination performed by the insemination centre for their locality and to buy the semen of their choice there, and on those grounds requested a preliminary ruling as to whether the provision of services was 'of a commercial character' within the meaning of Article 37, since it was required to be provided by a State monopoly and since the State was thus enabled to direct a branch of the national economy. The Court declared that Article 37 referred to trade in goods and could not relate to a monopoly

16 — [1983] ECR 2079 and 2057 respectively.

over the provision of services such as that in question. The Court continued by emphasizing that:

'However, the possibility cannot be ruled out that a monopoly over the provision of services may have an indirect influence on trade in goods between Member States. Thus an undertaking or group of undertakings which exercises a monopoly over the provision of certain services may contravene the principle of the free movement of goods if, for example, such a monopoly leads to discrimination against imported products as opposed to products of domestic origin' (paragraph 10).

However, the Court did not find that in that specific case such evidence had been adduced as to indicate that the monopoly was being carried on in a manner contrary to the rules of the Treaty on the free movement of goods. The Court declared in paragraphs 11 and 12:

'The circumstances referred to in the judgment making the reference and those which have come to light in the course of the proceedings before the Court are not, however, sufficient to support the view that legislation of the kind which in France governs the artificial insemination of cattle indirectly establishes a monopoly hindering the free movement of goods.

In fact, it is clear from those circumstances that, under the legislation applicable in France, any individual breeder is free to request the insemination centre for his area to supply him with semen from a production centre of his choice, whether situated in France or abroad. The French Government has stated that there is nothing in its legislation to prevent an insemination centre or even an individual breeder either from approaching a foreign centre directly with a view to purchasing semen from it or from obtaining the necessary import licence.'

General considerations with regard to the questions referred to the Court

26. It should be remembered that the questions from the Cour de Cassation concern three aspects of the French system. The Court is first asked whether the exclusive right granted to insemination centres within a defined geographical area is in itself contrary to Community law. Next the question is raised of the significance of Community law for two more specific aspects of the French system, namely on the one hand the duty of every operator to have the bovine semen stored at approved insemination centres and on the other hand the right of insemination centres to require breeders to pay for additional expenses in connection with the purchase and storage of semen from suppliers other than the centre's normal suppliers.

27. The Cour de Cassation asks in particular for an interpretation of Article 90(1) of the Treaty in conjunction with Article 86 in order to determine whether the aspects of the system which have been mentioned might lead to conduct such as to distort competition contrary to the Treaty and for an interpretation of Article 30 in order to determine whether the aspects mentioned may lead to illegal obstacles to trade between the Member States.

28. In my view there is no reason in this case for the Court to decide as to any significance of other provisions of the Treaty or to extend its interpretation of the provisions I have mentioned to other aspects of the French system.

29. It is also important to remember, in answering the questions, that the Crespelle Centre is relying on Community law in order to obtain a declaration that the exclusive right granted to CEIAM in pursuance of French legislation, on which CEIAM's claim is based, is contrary to Community law and cannot therefore be a lawful basis for the claim. CEIAM is in my view right in stressing that the questions raised must be understood and considered against that background. It is the monopoly system as such which is under attack. Only if the actual geographical monopoly introduced by the 1966 Law or if essential aspects of the system, as interpreted and applied, are contrary to Community law will Community law have any significance for the settlement of the dispute. It is not the Court's task in this case to interpret Community law so as to determine the limits which it, and particularly its competition rules, lay down for the insemination centres' performance of their duties.

During the proceedings before the Court specific examples were quoted of the insemination centres' having misused their exclusive right to demand unreasonable prices from the breeders or in addition to restrict their freedom of action unreasonably. In connection with this case such examples are of interest only if they may be regarded as evidence that the system itself — as a whole or as regards sufficiently important aspects of it — is contrary to Community law.

The question whether the insemination centres' exclusive right conflicts with Article 90 of the Treaty in conjunction with Article 86

30. The first question raised by the Cour de Cassation concerns the interpretation of Articles 90(1), 86 and 5 of the Treaty in order to determine whether it is contrary to

those articles for a national system to be introduced giving the insemination centres the exclusive right to perform inseminations and the opportunity to charge breeders the additional costs which may be involved in ordering semen from other than the centres' normal suppliers.

31. Article 90(1) of the Treaty prohibits the Member States, in the case of undertakings to which they grant exclusive rights from enacting or maintaining in force measures contrary to the other rules of the Treaty, in particular the prohibition in Article 86 thereof of abuse of their dominant position in a substantial part of the common market in so far as it may affect trade. [17]

32. In recent years the case-law of the Court has shown the importance of Article 90(1) as a limitation of the Member States' opportunities to adopt measures which, by means of the grant of exclusive rights, may invalidate the effectiveness of the Treaty rules on competition. [18]

33. The point of departure is still in conformity with the wording of Article 90(1), that is, that the grant of exclusive rights is not in itself contrary to Community law. Thus in the two judgments which are of most importance in this case — Case C-41/90 *Höfner and Elser* and Case C-179/90 *Merci Convenzionali Porto di Genova* [19] — the Court has declared that 'the simple fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not as such incompatible with Article 86'.

34. But that point of departure is essentially restricted, as the Court emphasized that the effectiveness of the competition rules of the Treaty would be invalidated unless Article 90(1) is interpreted to the effect that it is contrary to the Treaty:

— '[to maintain] in force a statutory provision that creates a situation in which a public employment agency cannot avoid infringing Article 86' (paragraph 27 of the *Höfner and Elser* judgment), and to create a situation such that:

— '[an] undertaking ... merely by exercising the exclusive rights granted to it, cannot avoid abusing its dominant position ... or

17 — In relation to the application of Article 90(1), Article 5 of the Treaty has no independent significance.

18 — See *inter alia* the judgment in Case C-320/91 *Corbeau* [1993] ECR I-2533.

19 — [1991] ECR I-1979 and I-5889 respectively.

when such rights are liable to create a situation in which that undertaking is induced to commit such abuses' (paragraph 17 of the *Merci Convenzionali Porto di Genova* judgment).

35. It is common ground that the insemination centres are granted exclusive rights within the meaning of Article 90(1).

The question in this case is therefore whether the actual grant of the exclusive right to manage the work of insemination, or essential aspects of that exclusive right, imply that the centres are induced to abuse their dominant position in relation to their suppliers or their customers, or both, in particular, as mentioned in Article 86, by imposing upon them unfair prices or other unfair trading conditions, by limiting markets or by applying dissimilar conditions to equivalent transactions with other trading parties.

36. In my view there are not, as far as appears in this case, any features of *the actual exclusive right enjoyed by the centres to manage the work of insemination within geographical areas* which imply an infringement of Article 90(1) in conjunction with Article 86. The dominant position of course puts the insemination centres in a position to commit abuses in connection with price-fixing and possibly also with regard to restricting the opportunities which according to the existing rules there might be for others, for example the breeders themselves or veterinary surgeons, to carry out inseminations. Possibilities of abuse presumably exist also in other respects. But the monopoly system itself does not — as postulated in the case-law I have just quoted — induce the undertakings to commit such abuses, and moreover in both French law and Community law there are provisions making it possible where appropriate to penalize such forms of specific abuse.

37. That is also the view taken by CEIAM, the French Government and the Commission.

38. However, the Commission contends that the monopoly system, when considered in conjunction with other aspects of the French system, may conflict with Article 90 in conjunction with Article 86. In this respect the Commission stresses *the rules applicable to the procurement of the semen* used for the inseminations.

The Commission expresses its point of view as follows: 'In this case the insemination cen-

tres enjoy two exclusive rights: to perform the insemination and to market the semen. In fact to obtain a given type of semen it is necessary to apply to the centres. Moreover the State measure authorizes them to make a charge for the extra costs of supplying semen from another centre. That series of measures might unfairly restrict the breeders' freedom to use the semen of their choice.'

39. The Commission's view is linked to its assessment of the opportunities for breeders and others to purchase semen through the centres and the centres' right in that connection to demand payment to cover additional expenses. The Commission refers particularly to the fact that a breeder who requires semen other than that provided by the centre's regular supplier or suppliers are to make an individual written application for it and to pay the extra costs.

The Commission mentions that the breeder has two choices, namely either to enter into an agreement direct himself with a supplier of his choice or to apply to the insemination centre to purchase semen from his chosen supplier.

The Commission contends that in the first case there would be no reason for the insemination centre to demand that the breeder pay additional expenses and that the Law does not specify whether in that case payment for extra costs may be demanded.

In the Commission's opinion it is contrary to Community law for payment to be demanded for expenses which the insemination centre has not really incurred. In addition the requirement of an individual written application to the centre, if it is to make the purchase, is a disproportionate burden and unreasonably restricts breeders' chances of procuring semen from other than the centre's regular suppliers.

40. On the other hand the Commission, like CEIAM and the French Government, thinks that *the requirement to store all semen purchased* with approved production or insemination centres is sufficiently well founded on zootechnical and sanitary grounds. Reference is made to the fact that Article 4 of Directive 87/328 supplementing Directive 77/504 with a view to a gradual liberalization of intra-Community trade as regards pure-bred breeding animals of the bovine species provides that 'Member States shall ensure that,

for intra-Community trade, the semen referred to in Article 2 is collected, treated and stored in an officially approved artificial insemination centre'.

41. I think it may be taken as established that the requirement of storing semen in approved centres is sufficiently justified from the zootechnical and hygienic point of view.

42. However, during the oral procedure the Commission expressed doubts as to whether the storage requirement under Article 10 of the 1969 decree, already quoted, was intended to apply only to imported semen. The French Government and CEIAM have claimed that the storage requirement was applicable generally. The information provided by the French Government on this point may be regarded as correct.

43. The centres' right to require the breeders to pay for additional expenses in connection with the delivery of semen from other than the centres' regular suppliers is not in itself of such a nature as to induce the centres to commit abuses contrary to Article 86. It is undeniable that such special deliveries involve certain expenses which it is acceptable that the breeders should bear. It is clear that the right would be abused if the centres acted in the manner described by the Commission, that is, if they demanded payment for additional expenses which they had not really incurred. But that risk of abuse is not such that the right to demand payment for additional expenses is in itself contrary to Article 90(1) in conjunction with Article 86. There is nothing in the French rules to induce the centres to act in that way.

44. It is difficult to see that the requirement of an individual written application from a breeder who wishes the local centre to purchase semen from other than its regular supplier or suppliers should bring the French system into conflict with the Treaty. The requirement does not seem to be particularly burdensome and, according to the Commission's own statements, applies only if the breeder requires the centre's assistance and does not undertake the purchase himself — where appropriate through the commercial undertakings which, according to the information provided, do in fact exist in France and which import semen from other countries.

45. In these circumstances my view is that, according to the evidence produced in the case, it cannot be assumed that the aspects of the system discussed here lead to an abuse of the centres' dominant position which would

constitute an infringement of Article 90(1) of the Treaty in conjunction with Article 86. [20]

The question whether the rule on storage of semen is contrary to Article 30 of the Treaty

46. The second of the questions referred to the Court is whether Article 30 of the Treaty, in conjunction with Article 36 and certain provisions of directives, must be interpreted as meaning that it prohibits a domestic rule 'which requires economic operators who import semen from a Member State of the Community to deliver it to an approved insemination or production centre' for storage at the centre.

47. The question thus undoubtedly has its roots in the importer's obligation resulting from the provisions of Article 10 of the 1969 decree, as amended in 1989, which was quoted in section 19.

48. The provisions of the directive referred to in the question are Article 2 of Council Directive 77/504 of 25 July 1977 on pure-bred breeding animals of the bovine species, which provides *inter alia* that the Member States shall ensure that trade in the semen of pure-bred animals of the bovine species shall not be prohibited, restricted or impeded on zootechnical grounds, and Article 4 of Council Directive 87/328 of 18 June 1987 on the acceptance for breeding purposes of pure-bred breeding animals of the bovine species which, as I have mentioned, provides that Member States shall ensure that, for intra-Community trade, the semen is collected, treated and stored in an officially approved artificial insemination centre.

49. In the foregoing discussion I have accepted that the purpose of the requirement at issue is to ensure proper storage of imported semen in approved centres and that its counterpart is a corresponding requirement as regards semen produced and marketed in France. That is moreover a requirement which is supported by Article 4 of Directive 87/328, to which I have just referred. In those circumstances it cannot be accepted that the requirement is contrary to the relevant provisions of the directive.

50. Likewise it cannot be accepted that the requirement is contrary to Article 30 of the Treaty.

51. A requirement of storage such as that at issue here is not of such a nature as to be

20 — This makes it unnecessary to consider whether the centres have a dominant position in a substantial part of the common market and whether any abuse affects trade between Member States. In case the Court were to come to a conclusion other than that which I suggest, it may be mentioned that an individual insemination centre can hardly have a dominant position in a substantial part of the common market but that the centres considered together undoubtedly have and that — if the French system is regarded as leading to abuse — it would be appropriate to consider the comprehensive effect of the centres' exclusive rights, for which purpose the condition of Article 86 on this point would be met. If the Court finds that the system leads to abuse the reason will undoubtedly be *inter alia* the system's restrictive effect on breeders' opportunities to obtain semen from alternative sources, for which purpose the condition of Article 86 with regard to trade will also be met.

capable of hindering, directly or indirectly, actually or potentially, intra-Community trade within the meaning of the judgment in Case 8/74 *Dassonville* [1974] ECR 837, provided that it applies to all persons concerned operating undertakings within the country and that it affects the marketing of national products and those from other Member States in the same way in law and in fact. [21]

52. The obligation applies, according to the information supplied, to all operators concerned and there is no evidence to indicate that the requirement affects marketing of semen from other Member States differently from the marketing of domestically-produced semen. Moreover it cannot be excluded that the requirement — even if it were possible to point to differing factual effects — may be based on zootechnical and hygienic considerations which, as has been mentioned, are the background to the requirement. [22]

Conclusion

53. On the basis of the foregoing considerations I shall suggest that the Court should reply as follows to the questions from the Cour de Cassation:

Article 90(1) of the EC Treaty, in conjunction with Article 86, must be interpreted as meaning that it does not preclude national legislation from setting up centres to

21 — That requirement must therefore in my view be regarded as one of the requirements which, according to the Court's judgment in Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097, may be regarded as impeding trade in the manner referred to in Article 30 only if the abovementioned conditions are not met. It is not a question of one of the requirements covered by the 'Cassis de Dijon' case-law, according to which 'in the absence of harmonization of legislation, measures of equivalent effect prohibited by Article 30 include obstacles to the free movement of goods where they are the consequence of applying rules that lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling and packaging) to goods from other Member States where they are lawfully manufactured and marketed, even if those rules apply without distinction to all products unless their application can be justified by an objective of public interest taking precedence over the free movement of goods' (paragraph 15).

22 — The Commission has contended that the requirement of an individual written application to the centre if breeders wish for an alternative supplier and the right to demand additional payment for extra costs may constitute an infringement of Article 30 of the Treaty. The Commission has not provided any information indicating that this creates obstacles to trade contrary to Article 30. For the reasons already stated I do not think, on the basis of the information available on the interpretation and application of the rules that the French rules on this matter conflict with Article 30.

which the exclusive right is granted to perform inseminations in a given geographical area and which authorizes them to invoice amounts for additional expenses in cases in which breeders residing in the area in which the centre has an exclusive right apply for the delivery of semen from production centres of their own choice.

Article 30 of the Treaty, Article 2 of Council Directive 77/504/EEC of 25 July 1977 and Article 4 of Council Directive 87/328/EEC of 18 June 1987 must be interpreted as meaning that they do not preclude national provisions such as those referred to in the proceedings, which require operators who import semen from one of the Member States of the Community to deliver it to an approved insemination or production centre with a view to its storage at the centre.