OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 16 June 1998 *

1. This case concerns restrictions on the keeping of bees other than brown bees on the small and remote Danish island of Læsø, situated 22 km from the mainland. It raises, in particular, the questions whether such restrictions come within the scope of application of Article 30 of the Treaty regarding measures equivalent to a quantitative restriction on imports, and, if so, whether they are justified.

2. The Danish Minister for Agriculture and Fisheries, pursuant to his power under the relevant Danish legislation [1] to adopt measures designed to ensure the proper keeping of bees, issued Decision No 528 of 24 June 1993 on the keeping of bees on the island of Læsø (Bekendtgørelse om biavl på Læsø, hereinafter 'the Decision'). The Decision prohibits the keeping of nectar-gathering bees on the island other than those of 'the subspecies *Apis mellifera mellifera* (brown bee of Læsø)'. [2] Existing swarms were to be destroyed or removed from the island by 15 August 1993, unless the queen was replaced by an inseminated queen of the specified brown bee subspecies. [3] All losses resulting from the destruction of a swarm pursuant to the Decision benefit from full compensation by the Danish State. [4] It is also forbidden to introduce onto the island any living domestic bees, any reproductive material for domestic bees or any used apicultural equipment which has not been cleaned. [5] Failure to comply with the Decision is subject to a fine. [6]

3. Mr Ditlev Bluhme (hereinafter 'the defendant') was accused before the Kriminalretten i Frederikshavn (hereinafter 'the national court') of continuing to keep a swarm of bees on the island of a subspecies other than *Apis mellifera mellifera* (brown bee of Læsø) after the entry into force of the Decision, without having substituted an inseminated queen of that subspecies. The defendant argued that the Decision constituted a measure having an effect equivalent to a quantitative restriction on imports, contrary to Article 30 of the Treaty establishing the European Community (hereinafter 'the Treaty'). He contended, furthermore, that the brown bee in question was not a pure-bred subspecies which was unique to the island and threatened with extinction, but was, in fact, to be found throughout the world, so that Article 36 of the Treaty could not be relied upon to justify the restriction.

* Original language: English.

1 — Law No 267 of 6 May 1993 on bee-keeping (Lov om biavl), now codified by Law No 585 of 6 July 1995.

2 — Article 1 of the Decision.

3 — Article 2 of the Decision.

4 — Article 7 of the Decision.

5 — Article 6 of the Decision.

6 — Article 9 of the Decision.

The public prosecutor argued that Article 30 was not applicable because the effects of the Decision were entirely internal to Denmark and were not restrictive of imports.

4. The national court also examined the possible relevance of Council Directive 91/174/EEC of 25 March 1991 laying down zootechnical and pedigree requirements for the marketing of pure-bred animals and amending Directives 77/504/EEC and 90/425/EEC. [7] Article 1 of Directive 91/174 defines as a 'pure-bred animal' 'any animal for breeding covered by Annex II to the Treaty the trade in which has not yet been the subject of more specific Community zootechnical legislation and which is entered or registered in a register or pedigree record kept by a recognised breeders' organisation or association'. Under Article 2 of the Directive, Member States are required to ensure that 'the marketing of pure-bred animals and of the semen, ova and embryos thereof is not prohibited, restricted or impeded on zootechnical or pedigree grounds' and that criteria governing such matters as approval of breeders' organisations, registration in pedigree registers, and approval for reproduction for pure-bred animals and for the use of their semen, ova and embryos are established in a non-discriminatory manner. However, '[p]ending the implementation of detailed rules for application as provided for in Article 6 [of the Directive], national laws shall remain applicable with due regard for the general provisions of the Treaty'.

7 — OJ 1991 L 85, p. 37.

5. The national court decided to refer the following questions to the Court for a preliminary ruling pursuant to Article 177 of the Treaty:

'I. Concerning the interpretation of Article 30 of the EC Treaty:

(1) Can Article 30 be interpreted as meaning that a Member State may, under certain circumstances, introduce rules prohibiting the keeping — and consequently the importation — of all bees other than bees belonging to the species *Apis mellifera mellifera* (brown Læsø bee) with regard to a specific island in the country in question, for example, an island of 114 km^2, one half of which consists of country villages and small ports, and is used for purposes of tourism or agriculture, while the other half consists of uncultivated land, that is to say, plantations, moorland, meadows, tidal meadows, beaches and dunes, which had on 1 January 1997 a population of 2 365, and which is an island on which opportunities for gainful activity are in general limited but where beekeeping constitutes one of the few forms of gainful activity by reason of the island's special flora and high proportion of uncultivated and extensively used land?

(2) If a Member State can introduce such rules, the Court is requested to describe in general the conditions governing those rules and in particular to answer the following questions:

(a) Can a Member State introduce such rules as described in (1) on the ground that the rules concern solely such an island as described and that the effect of the rules is therefore geographically limited?

(b) Can a Member State introduce such rules as described in (1) if the reason for those rules lies in the desire to protect the bee strain *Apis mellifera mellifera* against eradication, an objective which, in the Member State's opinion, can be attained by excluding all other bee strains from the island in question?

In the criminal proceedings underlying this order for reference, the accused:

(i) disputes that there is at all any such bee strain as *Apis mellifera mellifera* and submits that the bees at present to be found on Læsø are a mixture of different bee strains;

(ii) submits that the brown bees to be found on Læsø are not unique but are found in many parts of the world; and

(iii) submits that those bees are not threatened with eradication.

In its response, the Court is therefore requested to indicate whether it is sufficient that the Member State in question considers it appropriate or necessary to introduce the rules as a step in preserving the bee population in question, or whether it must be regarded as a further condition that the bee strain exists, and/or that it is unique, and/or that it is threatened with eradication if the import ban is not valid or cannot be enforced.

(c) If the grounds set out in (a) or in (b) cannot make it lawful to introduce such rules, can a combination of those grounds make it so lawful?

II. Concerning Council Directive 91/174/EEC of 25 March 1991 laying down zootechnical and pedigree requirements for the marketing of pure-bred animals and amending Directives 77/504/EEC and 90/425/EEC:

(1) Under what circumstances can a bee be a pure-bred animal within the meaning attached to those words by Article 2 of Directive 91/174? Is a golden bee, for example, a pure-bred animal?

(2) What constitutes a zootechnical ground (Article 2)?

(3) What constitutes a pedigree ground (Article 2)?

(4) Must Directive 91/174 be understood as meaning that a Member State may, notwithstanding the Directive, ban the importation onto an island such as that described in Question (1) of Part I and the existence there of all bees other than bees belonging to the strain *Apis mellifera mellifera*? If a Member State can do so under certain conditions, the Court is requested to set out those conditions.'

Observations

6. Written and oral observations have been submitted by the defendant, the Kingdom of Denmark, the Italian Republic and the Commission of the European Communities. The Kingdom of Norway submitted written observations.

7. The defendant argues that intra-community trade in bees should be presumed to exist, as it is expressly regulated by Article 8 of Council Directive 92/65/EEC of 13 July 1992. [8] Furthermore, Article 3 of that Directive provides that trade is not to be restricted on animal health grounds other than those set out therein or in other Community legislation. The defendant also contends that even restrictions on the marketing of goods which operate internally, or in only part of a Member State's territory, are subject to the prohibition in Article 30 of the Treaty of measures equivalent to quantitative restrictions on imports, whether

8 — Council Directive 92/65/EEC of 13 July 1992 laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A(I) to Directive 90/425/EEC, OJ 1992 L 268, p. 54.

actual or potential, direct or indirect. [9] The case is not purely internal because the defendant is himself licensed to import and export bees, and the greater productivity and resistance to illness of golden bees means that switching to brown bees would seriously affect his livelihood. The restriction is not required by Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [10] even though Læsø is a designated habitat, because the brown bee is not listed in the annexes and is, in any event, a domestic animal.

8. The defendant argues that the Court cannot consider the possible justification of the restriction under Article 36 of the Treaty, as this provision was not invoked by the national court. If it is to be applied, Denmark bears the burden of proof. There is no question of the health of bees on the island being threatened by disease. The defendant submits evidence that the brown bee is not a threatened subspecies: far from being restricted to small parts of the United Kingdom, Sweden, Norway and Læsø, it can be found in large numbers in South Africa, Tasmania and South America. Furthermore, surveys of the brown bee population of Læsø have shown it to be a hybrid rather than a pure example of *Apis mellifera mellifera*. Even if Community law could countenance measures by Denmark to preserve the brown bee of Læsø, the restriction imposed by the Decision is disproportionate, both because it is a compulsory rather than a voluntary scheme (as in Norway) and because it excludes even the introduction of genetically identical brown bees from places other than Læsø, thereby giving rise to discrimination.

9. The defendant contends that Directive 91/174 does not apply to bees and that the choice by farmers of the animals which they wish to breed, whether cattle or bees, should not be subject to restrictions.

10. Denmark argues that Directive 91/174 does not apply to the present case, as the national rules in question are not restrictions on the marketing or reproduction of pure-bred animals. Moreover, as no detailed rules have been adopted regarding bees, the case falls to be decided under the general provisions of the Treaty. Denmark contends that the effects of the Decision, whereby a person may be sanctioned for keeping a particular subspecies of bees on a particular island which constitutes just 0.3% of national territory, are

9 — Joined Cases 177/82 and 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR 1797, hereinafter '*Van de Haar*'; Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, hereinafter '*Oosthoek's*'; Case 21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889.

10 — OJ 1992 L 206, p. 7.

entirely internal. [11] Denmark requests the Court not to follow its judgment in *Pistre and Others* [12] in so far as it permits the application of Article 30 to such purely internal situations. The restriction is non-discriminatory. As it only affects the keeping of bees rather than their import, and can, thus, be likened to a marketing rule, Article 30 of the Treaty does not apply, by virtue of the Court's judgment in *Keck and Mithouard*. [13] In the alternative, the effects of the Decision on intra-community trade are too indirect and uncertain, [14] as there is no evidence that imports of other subspecies would rise if the restrictions regarding bee-keeping in Læsø were lifted, and only a very small number of professional bee-keepers is affected. In any event, any non-discriminatory restriction of intra-community trade arising from the application of the Decision would be justified by reference to the public interest in biological diversity, as evidenced by the adoption of Directive 92/43/EEC and by the Council's decision to conclude the Rio Convention on biological diversity of 5 June 1992. [15] The restrictions imposed by the Decision are consistent with the Rio Convention principle of conservation in situ. According to a series of studies between 1986 and 1996, the brown bee of Læsø remains a very pure example of the subspecies *Apis mellifera mellifera*, with a distinct DNA pattern. However, it is becoming increasingly rare on the island, and the purity of its genetic make-up is under threat due to the recessive character of its genes relative to those of the more common golden bee. The Decision is proportionate, as the option of replacing queens with inseminated brown queens is less restrictive than requiring the removal of all swarms other than those of the brown bee of Læsø.

11. Italy and Norway generally support the arguments of Denmark. Norway states that establishment of zones of pure stock within a Member State to prevent inter-breeding is non-discriminatory and does not affect the general freedom to trade [16] except in an indirect and uncertain fashion. [17] Should Article 30 be applicable, the Decision is justified by reference to both Article 36 and the mandatory requirement of environmental protection. The European dark honey bee *Apis mellifera mellifera* is in danger of extinction, its numbers having fallen by two-thirds in Norway between 1980 and 1997. The steps taken are no more restrictive than necessary, and are similar to those taken in Norway, where a 35 000 km^2 breeding zone for the brown bee has been established on a voluntary basis. This

11 — *Oosthoek's*, loc. cit.; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case C-415/93 *Bosman and Others* [1995] ECR I-4921.

12 — Joined Cases C-321/94 to C-324/94 [1997] ECR I-2343, hereinafter '*Pistre*'.

13 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

14 — Case C-379/92 *Peralta* [1994] ECR I-3453; Joined Cases C-140/94 to C-142/94 *DIP and Others* v *Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257, hereinafter '*DIP*'.

15 — Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity, OJ 1993 L 309, p. 1. The Convention is referred to hereinafter as 'the Rio Convention'.

16 — Case 75/81 *Blesgen* v *Belgium* [1982] ECR 1211.

17 — *Peralta*, loc. cit., and *DIP*, loc. cit.

is consistent with Article 8 of the Rio Convention.

12. The Commission argues that restrictions confined to only part of a Member State's territory may be contrary to Article 30 of the Treaty. [18] The restriction in question is, to use the terms of the *Keck and Mithouard* judgment, a product rule rather than a marketing rule, and affects the competition between keepers of brown bees and keepers of golden bees on the island. Thus, the effects of the Decision on intra-community trade are more than merely hypothetical. [19] Furthermore, the application of Article 30 does not depend upon the degree to which trade is affected. [20] The reference in Article 36 of the Treaty to the health and life of animals should be understood as extending to the protection of whole species or subspecies, or of subgroups within a species or subspecies, from extinction, or for scientific or breeding purposes. Even if the Commission believes that the brown bee of Læsø is not a genetically distinct subspecies, it is for the Member States to determine the degree of protection of species, subspecies or subgroups. [21] In order to benefit from the application of Article 36 of the Treaty, it is for a Member State to prove [22] that a national measure is effective in attaining its protective objective and that there is no less restrictive means of achieving one of the objectives specified therein. The national measure in question is discriminatory and unjustifiable, however, to the extent that it excludes the import of genetically similar brown bees from outside Læsø.

13. The Commission states that, although bees come within the scope of Directive 91/174, which applies to 'any animal for breeding covered by Annex II to the Treaty', [23] since no measures have been adopted regarding bees under Article 6 of the Directive, the matter must be judged by reference to the general rules, already discussed, in Articles 30 and 36 of the Treaty.

Analysis

Part II of the national court's questions

14. In responding to Part II of the questions referred, it is not necessary to determine

18 — *Du Pont de Nemours Italiana*, loc. cit.; Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior et Publivía* [1991] ECR I-4151, hereinafter '*Aragonesa*'; Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621, hereinafter '*Ligur Carni*'.

19 — *Peralta*, loc. cit.; *DIP*, loc. cit.; Case C-69/88 *Krantz* [1990] ECR I-583; Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009.

20 — *Van de Haar*, loc. cit.; Case C-412/93 *Leclerc-Siplec* v *TFI Publicité and M6 Publicité* [1995] ECR I-179.

21 — Case 178/84 *Commission* v *Germany* [1987] ECR 1227.

22 — Case 251/78 *Denkavit Futtermittel v Minister für Ernährung Landwirtschaft und Forsten* [1979] ECR 3369, paragraph 24.

23 — Article 1 of Directive 91/174.

whether bees are pure-bred animals for the purposes of Directive 91/174. Since, as the Commission says, no detailed rules in respect of bees have been adopted pursuant to Article 6 of the Directive, the final sentence of Article 2 applies and 'national laws ... remain applicable with due regard for the general provisions of the Treaty'. Accordingly, even if bees fall within the scope of application of Directive 91/174, the questions referred by the national court regarding that Directive should be interpreted as raising the same issues as the questions raised in Part I: firstly, the question of whether the Danish rules come within the scope of Article 30 of the Treaty and, secondly, whether they may be justified either by reference to Article 36 or as mandatory requirements of national law pursuing a public-interest objective.

Part I of the national court's questions

(i) Article 30 of the Treaty

15. The Court has consistently confirmed, since its judgment in *Procureur du Roi* v *Dassonville*, [24] that '[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions'. The Court has described a prohibition on imports as 'the most extreme form of restriction'. [25] It has also been established by the case-law following *'Cassis de Dijon'* [26] that, 'in the absence of harmonisation of legislation, obstacles to free movement of goods which are the consequence of applying to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling and packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods'. [27]

16. Before considering whether the Decision constitutes a measure having an effect equivalent to a quantitative restriction on imports, and, in particular, whether it constitutes a discriminatory or an indistinctly applicable

24 — Case 8/74 [1974] ECR 837, paragraph 5.

25 — Case 34/79 *Regina* v *Henn and Darby* [1979] ECR 3795, paragraph 12.

26 — Case 120/78 *REWE-Zentral* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, *'Cassis de Dijon'*.

27 — See, for example, *Keck and Mithouard*, loc. cit., paragraph 15.

restriction, it is necessary for me to deal with a number of preliminary objections to the application of Article 30 of the Treaty in this case. These relate to the Decision's limited territorial scope, its slight effect, in volume terms, on trade and the allegedly uncertain and indirect character of any effect on trade, the application of the decision in *Keck and Mithouard*, and the allegedly internal character of the present case.

17. The Court has indicated that a national rule which has limited territorial scope, because it applies only to a municipality or to a part of the national territory, 'cannot escape being characterised as discriminatory or protective for the purposes of the rules on the free movement of goods on the ground that it affects both the sale of products from other parts of the national territory and the sale of products imported from other Member States'. [28] Thus, the fact that the Decision restricts the import and keeping of bees only in respect of the island of Læsø does not, in principle, prevent its examination in the light of the requirements of Article 30 of the Treaty. I agree with the statement made at the oral hearing by the agent for the Commission that the correct approach to a restriction in part of a Member State is to consider what the position would be if the restriction applied to the whole national territory.

18. It is also clear that the slight effect of the Decision, in volume terms, on trade cannot, in itself, prevent the application of Article 30 of the Treaty. As the Court stated in *Van de Haar*, 'Article 30 of the Treaty does not distinguish between measures having an effect equivalent to quantitative restrictions according to *the degree* to which trade between Member States is affected'. [29] Article 30 prohibits national measures capable of hindering imports 'even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways'. [30] A legislative measure of general application which affects the conduct of an economic activity by all persons and undertakings in a defined part of the national territory will always, in my view, be capable of hindering trade.

19. It has also been argued, in the light of the decisions in *Peralta* and other cases, that 'the

28 — *Aragonesa*, loc. cit., paragraph 24; see also *Ligur Carni*, loc. cit., paragraph 37. This is also implicit in the judgment in Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431, hereinafter '*Walloon Waste*'.

29 — Loc. cit., paragraph 13, emphasis added.

30 — Ibid.

restrictive effects which [the Decision] might have on the free movement of goods are too uncertain and indirect for the obligation which it lays down to be regarded as being of a nature to hinder trade between Member States'. [31] This argument should not be accepted, as it confuses scale with remoteness. The rules at issue in *Peralta* were argued to affect all Italian sea-borne trade in goods; in *DIP* to hinder retail sales generally throughout Italy; in *Krantz* to affect the supply of all goods in the Netherlands on the basis of instalment payments; and in *CMC Motorradcenter* to undermine all parallel trade in goods subject to guarantees which were not honoured by authorised dealers in the country of destination. However, the causal link between these measures and any effect on intra-Community trade was a matter of pure chance; in other words, it was too remote. The Court was simply not prepared to accept that national rules on discharges from ships into the sea, on planning authorisation and licensing of shops, on the seizure of goods in the possession of tax defaulters and on the provision of information in good faith when concluding contracts were liable to have a discernible effect on trade. On the other hand, the impact on trade of the Decision at issue in the present case is direct and immediate. The import of bees from other Member States to a part of Danish territory is directly prohibited. In such a case, the scale of the effect on intra-Community trade is, as already stated, irrelevant. [32]

20. It has also been contended that the Decision is merely akin to a national rule on selling arrangements, and that, therefore, by virtue of the judgment in *Keck and Mithouard*, it falls outside the scope of Article 30 of the Treaty. This contention seems to be founded on the fact that the Decision does not restrict the import of bees into Danish territory in general, but simply limits their distribution in a part of that territory. In this regard, an analogy has been proposed by Italy with the decision of the Court in *Blesgen* v *Belgium* that restrictions on the marketing of certain alcoholic beverages on premises open to the public, which did not affect other forms of marketing of the same drinks, [33] were not contrary to Article 30. In my view, this argument should be rejected. Although the restriction only affects a small part of Danish territory, it has the effect, in its area of application, of a total prohibition on marketing of bees other than the brown bee of the island itself. Although a prohibition on marketing may be

31 — *Peralta*, loc. cit., paragraph 24; see also *DIP*, loc. cit., paragraph 29; *Krantz*, loc. cit., paragraph 11; *CMC Motorradcenter*, loc. cit., paragraph 12.

32 — Furthermore, the national rules which are deemed to have too indirect and uncertain an effect on trade are invariably indistinctly applicable; see *Peralta*, loc. cit., paragraph 24; *DIP*, loc. cit., paragraph 29; *Krantz*, loc. cit., paragraph 10; *CMC Motorradcenter*, loc. cit., paragraph 10. As will be seen below, it can be argued that the Decision is at least partially discriminatory.

33 — Case 75/81, loc. cit., paragraph 9.

described, in literal terms, as a rule 'restricting or prohibiting certain selling arrangements', it is equally well described in this case as a product rule. Only products — bees — of a certain colour, wing-span and origin can be marketed or kept in Læsø. For the avoidance of doubt, one need only look to the overriding criterion which determined the Court's landmark decision in *Keck and Mithouard*, that of market access. [34] Such access is clearly blocked in the case of the Læsø market; no alternative means of marketing non-Læsø bees is permitted on the island. [35]

21. Finally, it has been submitted that the Court should not answer the questions referred by the national court because the case concerns an entirely internal situation. I do not agree. It is true that Article 30 of the Treaty cannot affect the application of the Decision to the marketing or keeping on Læsø of bees from other parts of Denmark. [36] However, it appears from the pleadings that the defendant possesses a licence granted by the Danish authorities for the import and export of bees. Thus, it cannot be excluded that the Decision prevents him from importing bees from outside Denmark for use in his Læsø bee-keeping undertaking, or that the existing queens or swarms which he is required to replace were themselves imported. In any event, it should by now be clear, I think, that the Decision is capable of affecting the marketing in Denmark of products from other Member States. In these circumstances, it is settled law that it is for the national court, within the system established by Article 177 of the Treaty, to weigh the relevance of the questions referred by it to the Court, in the light of the facts of the case before it. [37] The continued validity of this approach to the relationship between the Court and the national court is demonstrated by the decision in *Giloy* v *Hauptzollamt Frankfurt am Main-Ost*, in which the Court confirmed its willingness to deal with references where Community-law provisions are employed in national law 'to determine the rules applicable to a situation which is purely internal to that State'. [38]

22. It is possible to argue that the Decision imposes a discriminatory restriction on trade, if it is analysed with regard to the marketing of bees of the bee species *Apis mellifera* taken as a whole. The Decision favours the keeping of bees on Læsø drawn from the Danish population — that of Læsø — of a particular subspecies of bee, the brown bee *Apis mellifera mellifera*, by excluding all bees, whether brown or golden, imported onto the island from other parts of Denmark, other Member

34 — Loc. cit., paragraph 17.

35 — It can also be argued that the Decision does not 'affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States', as is required if restrictions on selling arrangements are to escape the reach of Article 30 of the Treaty; ibid., paragraph 16. See the discussion below of whether the Decision is discriminatory in character.

36 — *Oosthoek's*, loc. cit., paragraph 9; Joined Cases 314/81 to 316/81 and 83/82 *Procureur de la République* v *Waterkeyn* [1982] ECR 4337, paragraphs 11 and 12; Case 98/86 *Ministère Public* v *Mathot* [1987] ECR 809, paragraph 9.

37 — Case 298/87 *Smanor* [1988] ECR 4489, paragraphs 8 and 9.

38 — Case C-130/95 [1997] ECR I-4291. Advocate General Jacobs recommended that the Court refuse to address questions regarding the application of Article 30 in the context of a purely internal situation, in *Pistre*, loc. cit., paragraph 40 of his Opinion, in part because he had advocated a different approach in his Opinion in *Giloy* to that ultimately adopted by the Court in that case, which had not yet been decided. The interpretation of Article 30 may be relevant to a case which is internal to one Member State if, for example, national rules prohibit reverse discrimination: see the Opinion of Advocate General Jacobs in *Pistre*, ibid., paragraph 35.

States or other Contracting Parties to the EEA Agreement. It is immaterial, on this approach, that the Decision excludes from Læsø Danish golden bees, including those originally kept and bred on Læsø itself, as well as such Danish brown bees as may exist outside Læsø. There is ample support in the Court's case-law for this approach. The existence of discrimination 'is not affected by the fact that the restrictive effects of a preferential system of the kind at issue are borne in the same measure both by products manufactured by undertakings from the Member State in question which are not situated in the region covered by the preferential system and by products manufactured by undertakings established in other Member States'. [39] '[T]he fact remains that all the products benefiting by the preferential system are domestic products ...'. [40] 'For such a measure to be characterised as discriminatory or protective, it is not necessary for it to have the effect of favouring national products as a whole or of placing only imported products at a disadvantage and not national products'. [41]

23. In the alternative, one can argue on at least two grounds that the Decision is not discriminatory, at least in so far as it affects the defendant, but constitutes, instead, an indistinctly applicable restriction on imports. This is important because only indistinctly applicable restrictions can be justified by reference to mandatory requirements in the public interest, such as environmental protection. [42] Discriminatory measures, in contrast, benefit only from derogations under Article 36 of the Treaty. First, if the effect of the Decision on trade in each of the various subspecies of bee is analysed separately, it appears that it discriminates in favour of Danish — in particular, Læsø — production of the brown bee *Apis mellifera mellifera* relative to non-Danish production of brown bees, but is indistinctly applicable in respect of the golden bee (chiefly *Apis mellifera ligustica*). Golden bees are prohibited from Læsø irrespective of their origin, including origin in Læsø itself. Although the Decision does not distinguish expressly between subspecies in prohibiting the introduction of all bees on Læsø from outside the island, the factors affecting the applicability of the Decision, in the light of Article 30 of the Treaty, differ in respect of brown bees and golden bees. As regards the former, some justification for excluding bees of the same subspecies as the brown bee of Læsø must be established on the basis of special characteristics of the Læsø brown bee which have not, as yet, resulted in a distinct taxonomic classification. On the other hand, golden bees, as members of a separate subspecies, can more readily be recognised as materially different in character, so that rules

39 — *Du Pont de Nemours Italiana*, loc. cit., paragraph 12.

40 — Ibid., paragraph 13.

41 — *Aragonesa*, loc. cit., paragraph 24. See also Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 9; Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 25; Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401, paragraphs 8 and 9.

42 — See Case 113/80 *Commission* v *Ireland* [1981] ECR 1625; *Du Pont de Nemours Italiana*, loc. cit., paragraph 14; *Pistre*, loc. cit., paragraph 52; *Aragonesa*, loc. cit., paragraph 13; *Walloon Waste*, loc. cit., paragraph 9.

favouring one subspecies over the other need not, if they serve a legitimate public-interest objective related to that distinction, be regarded as discriminatory.

24. A further argument can be drawn from the Court's judgment in *Walloon Waste*. [43] That case concerned Belgian regional rules prohibiting the import of waste from other regions of Belgium or from abroad. The rules in question would, I think, normally have been deemed to be directly discriminatory. However, the Court drew attention in its judgment to special factors which may apply in respect of national environmental rules:

'[I]n assessing whether the barrier in question is discriminatory, account must be taken of the particular nature of waste. The principle that environmental damage should as a matter of priority be remedied at source, laid down by Article 130r(2) of the Treaty as the basis for action by the Community relating to the environment, entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste ... . It follows that having regard to the differences between waste produced in different places and to the connection of the waste with its place of production, the contested measures cannot be regarded as discriminatory.' [44]

25. In the present case, the Decision seeks to protect a particular population of the subspecies *Apis mellifera mellifera* in its native geographical area, where it has allegedly developed a number of distinctive morphological characteristics. It seeks to do so by way of preventive action against inter-breeding with the golden bee and even with brown bees from non-local populations. This can be taken to be an attempt to rectify at source the environmental damage arising from such inter-breeding and to preserve local biological diversity. In the light of these legislative objectives, it can be argued that there are relevant differences between the Læsø brown bee population and other populations of bees, both brown and golden. Acceptance of the existence of such material differences between Læsø brown bees and other bees excluded from Læsø pursuant to the Decision would imply that the exclusion of the latter was not discriminatory in character. As I have said, such material differences are more readily established in the case of the golden bee, which is excluded from Læsø regardless of its

43 — Loc. cit.

44 — Ibid., paragraphs 34 and 36.

origin. Such an exclusion would still, of course, constitute an indistinctly applicable restriction on trade in non-Læsø bees. Although it is uncertain whether the Læsø brown bee population is sufficiently distinctive to merit protection against inter-breeding with *all* other bee populations, both brown and golden, I think that the Decision can be treated, for the purposes of an analysis of its effect on trade in golden bees, as an indistinctly applicable measure.

26. I conclude, therefore, that the Decision constitutes a measure equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty, which, in so far as it affects trade in golden bees, is indistinctly applicable in character.

(ii) Justification

27. Irrespective of whether the Decision is indistinctly applicable or discriminatory, the possibility of a derogation under Article 36 of the Treaty must be considered before the possibility of justification by reference to a mandatory requirement in the public interest. [45] The central question regarding the compatibility of the Decision with the Treaty is, thus, whether it can benefit from the derogation in Article 36 of the Treaty in respect of 'prohibitions or restrictions on imports ... justified on grounds of ... the protection of health and life of ... animals'. In my view, this derogation extends to the protection, in the sense of conservation, of a particular distinctive population of animals, be it a species, subspecies or other subgroup. Thus, for example, national measures to prevent the eradication of such a population through disease or hunting could benefit, if necessary, from the derogation permitted by Article 36. The threat that a distinctive population will disappear through inter-breeding and the consequent loss of its distinct character raises rather different considerations. This is a slower, probably painless process. It will not necessarily endanger the life of any individual member of the population in question, although this will depend on how effectively the surviving members of the original group and the members of the inter-bred group compete for territory and scarce resources. None the less, I think that national measures to safeguard the distinctive character of certain animal populations should also fall within the scope of Article 36 of the Treaty, if the other, normal conditions for the invocation of a derogation are satisfied. The public interest in the protection of the health and life of animals and plants is as ill served when species or other subgroups in an animal population gradually disappear or are irrevocably altered through an uncontrolled breeding process as when the actual living members of that species or other subgroup die or suffer illness or injury in a more immediate fashion. The existence of such a public interest under Article 36 in the protection of the continued existence of different animal populations as such is

45 — *Aragonesa*, loc. cit., paragraph 13.

reinforced by the Community objective, under Article 130r of the Treaty, of 'prudent and rational utilisation of natural resources'.

28. Should the Court not accept such an interpretation of Article 36, it would, I think, be possible to justify an indistinctly applicable restrictive measure imposed to protect a distinct animal population by reference to the mandatory requirement of environmental protection. [46] Support for such a justification can be found in the Rio Convention. The Contracting Parties affirm 'that the conservation of biological diversity is a common concern of humankind'. Article 2 of the Rio Convention confirms that it also applies to 'domestic or cultivated species', which are 'species in which the evolutionary process has been influenced by humans to meet their needs'.

29. The fact that the Community has concluded the Rio Convention, regarding such subject-matter of the Convention as lies within its competence, does not mean that any and every restrictive measure adopted by a Member State pursuant to the Convention is justified, whether by reference to Article 36 or to the general interest in environmental protection. Regarding the issue of justification in this particular case, the national court draws attention in particular to the limited geographical scope of the Decision, as well as to the defendant's contentions regarding the degree of inter-breeding which has already occurred on Læsø, the allegedly non-unique character of the brown bee of Læsø and the alleged absence of any danger of eradication of the brown bee world-wide.

30. The Court has stated that, in the absence of harmonised standards, it is for the Member States to decide the degree of protection of human health under Article 36 as well as the way in which such protection is to be achieved, subject to the limits imposed by the Treaty, including the principle of proportionality. [47] This means that restrictions must meet 'a genuine need of health policy' and 'must be restricted to what is actually necessary to secure the protection of public health', with due account being taken of the scientific evidence available. [48]

31. I am satisfied that the Member States should also enjoy some margin of appreciation regarding the protection of animal life, and that the protection of a distinctive animal population even below the level of a subspecies is a legitimate aim for the purposes of Article 36 of the Treaty or, as the case may

46 — On the existence of this mandatory requirement, see, for example, Case 302/86 *Commission* v *Denmark* [1988] ECR 4607; *Walloon Waste*, loc. cit.

47 — *Aragonesa*, loc. cit., paragraph 16; *Commission* v *Germany*, loc. cit., paragraph 41; Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 16.

48 — *Commission* v *Germany*, loc. cit., paragraphs 42 and 44.

be, the mandatory requirement of environmental protection. Article 2 of the Rio Convention defines 'biological diversity' as 'variability among living organisms from all sources', including 'diversity within species'. The Convention avoids confining its protection to species or subspecies, preferring to use more general descriptions of the diverse types of organisms to which it relates. Thus, it defines 'genetic resources' merely as 'genetic material of actual or potential value', [49] without reference to established taxonomic distinctions between species and subspecies, and refers simply to the 'distinctive properties' developed by domesticated or cultivated species. [50] This is consistent with the approach of a number of other international instruments on the protection of wildlife. Article I(a) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed in Washington on 3 March 1973 defines 'species', for its purposes, as 'any species, subspecies or geographically separate population thereof'. Article I of the Bonn Convention on the Conservation of Migratory Species of Wild Animals defines 'migratory species' as 'the entire population or any geographically separate part of the population of any species or lower taxon of wild animals'.

32. It is, therefore, permissible for the Danish authorities to seek to conserve the brown bee of Læsø even if it is not a distinct subspecies but merely a geographically and morphologically distinctive population of the subspecies *Apis mellifera mellifera*, which subspecies, it has been argued, is found in a number of countries. For the purposes of the present case, the brown bee of Læsø *Apis mellifera mellifera* is clearly distinct from the golden bee favoured by the defendant, provided it is established that the brown bee population has been maintained in a relatively pure state. The degree of distinctiveness *within* subspecies would be material to the outcome only if the defendant sought to import or keep brown bees from outside Læsø. Furthermore, the relevant framework for analysis must, in my view, be the Danish population of the brown bee, so that the Danish authorities are entitled to respond to threats to the continued existence of that population even if brown bees survive and thrive in a relatively pure state elsewhere in the Community or in the world. The population in question need not be in immediate danger of eradication, although Denmark appears to take the view that such a danger exists in the present case. The Community's own environmental policy emphasises, in Article 130r of the Treaty, the precautionary principle and the principle that preventive action should be taken. Moreover, the Contracting Parties to the Rio Convention note 'that it is vital to *anticipate, prevent and attack* the causes of significant reduction or loss of biological diversity at source', [51] indicating that preemptive steps should, if necessary, be taken. This is for the national court to determine, in the light of the evidence of the general dominance of the golden bee and relevant scientific evidence concerning the genetic character of the brown bee, in

49 — Article 2 of the Rio Convention.

50 — See the definition of 'in situ conditions' in Article 2 of the Rio Convention.

51 — Preamble to the Rio Convention, emphasis added.

particular its recessive genes, as well as of whether there is a sufficient threat to the continued existence of a distinctive Læsø brown bee population to justify the Decision.

33. Article 8 of the Rio Convention also casts light on the sorts of measures which are appropriate to achieve the objective of the conservation of biological diversity through in situ conservation. It provides that '[e]ach Contracting Party shall, as far as possible and as appropriate, (a) establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity' and '(h) prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species'. Thus, measures to exclude certain animal types from an area which threaten the existence of another animal type are, in principle, within the scope of the Convention and, therefore, reflect internationally recommended practice in this field.

34. The *effectiveness* and *appropriateness* of the measures adopted by Denmark in the Decision must still be determined in the context of the present case. Thus, it is for the national court to establish whether the brown bee of Læsø still survives in a relatively pure state. If the brown bee population of Læsø has already been substantially corrupted by inter-breeding with golden bees, the national court may form the view that the Decision is not effective to achieve its stated objective, because the situation has already deteriorated beyond repair. In that case, the continued restriction on the keeping of golden bees on the island could be considered to be disproportionate. If, on the other hand, the Læsø population is relatively pure, but is not morphologically distinguishable from other populations of *Apis mellifera mellifera*, the restriction on the introduction of other brown bees on the island will not be justifiable. Furthermore, if, as Denmark has indicated, the brown bee of Læsø is morphologically distinctive from other populations of *Apis mellifera mellifera*, but shares its distinctive features with other Scandinavian brown bees, the exclusion of these bees must be seen as overly restrictive. However, the latter two points only concern trade in brown bees, and need not, in themselves, affect the continued restriction of the import or keeping of golden bees, which is the immediate subject-matter of the present case.

35. In assessing the proportionality of the Decision, the national court should also bear in mind its limited geographical scope. The restriction on the exercise of Community-law rights in Denmark is correspondingly reduced. The fact that the Decision imposes obligations, rather than proceeding on a voluntary basis, does not establish that it is disproportionate. It is clear that full compliance by beekeepers with the efforts to exclude alien bees

from the island is necessary if the objective of preventing inter-breeding is to be achieved. The fact that compensation is to be provided for losses resulting from the application of the Decision is also a factor to be taken into account in assessing whether the Decision is no more restrictive than necessary of Community-law rights.

Conclusion

36. In the light of the foregoing I recommend that the Court answer the questions referred by the national court as follows:

(1) National rules prohibiting the keeping and importation of bees other than bees belonging to the population, of a particular subspecies, found in the defined part of the national territory which is subject to those rules constitute a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty;

(2) In so far as bees of another subspecies are excluded from a defined part of national territory by such national rules, those rules may be justified on grounds of protection of the health and life of animals pursuant to Article 36 of the Treaty where they are intended to protect a distinctive and relatively pure population of the specified subspecies which is found in that part of national territory, even if bees of that subspecies are also found elsewhere in the Community or the world. Such rules may be justified as preventive measures even in the absence of an immediate threat of eradication of the protected population.