OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 1 JUNE 1983

My Lords,

This is an application by the Commission under Article 169 of the EEC Treaty for a declaration that the Republic of France has infringed Article 37 (1) of the Treaty and Article 2 of Council Directive No 77/504/CEE of 25 July 1977 (Official Journal L 206, 12. 8. 1977) in two respects, First it is claimed that France has confined access to the importation of semen intended for artificial insemination to a limited category of operators; and secondly that it has made it possible for insemination centres to carry on discriminatory practices in regard to imported semen.

So far as Article 37 is concerned, it is more particularly contended (a) that there is here a State monopoly of a commercial character, either consisting of a body through which France in fact (though not in law) "either directly or indirectly supervises, determines or appreciably influences" imports from Member States into France, or of bodies other than the State to which the monopoly is delegated; (b) that there exists discrimination regarding the conditions under which goods from other Member States are procured and marketed.

In relation to the Directive, it is contended that France has not ensured that "intra-Community trade in the semen . . . of pure-bred breeding animals of the bovine species" "shall not be prohibited, restricted or impeded on zootechnical grounds" as Article 2 obliged it to do.

From the time shortly after the second world war, when the artificial insemination of cows was developed on a commercial scale, the French Government imposed controls on its practice. Those controls have been amended from time to time. The principal features of the relevant provisions in force for present purposes seem to be the following.

By Articles 4 and 5 of Law No 66/1005 of 28 December 1966, the object of which was said to be, inter alia, the improvement of the quality of bovine cattle, the operations of collecting and inserting the semen could only be carried out by or under the control of those holding a licence as head of an insemination centre. Such a centre might carry out both or only one of the two operations. A licence is granted by the Minister of Agriculture having regard, amongst other factors, to the facilities already existing. Each licence defines a limited zone within which the centre has a monopoly to administer the semen, but the breeder can require such a centre to obtain the semen from other production centres satisfying the regulations, the cost of doing so being for the breeder's account. In cases where a cooperative obtains a licence it is obliged to supply

other breeders in the area who do not belong to the cooperative.

Further details of the system of control were given in Decree No 69-258 of 22 March 1969 and in an order of the Minister of Agriculture of 17 April 1969. By Article 1 of the latter, in the absence of a reciprocal arrangement with certain other countries, the licence holder had to be a French national or a legal persona having a majority of French members. By Article 10 it is provided that the activities of production centres normally correspond with the zones of the insemination centres with which they have contracts; by Article 12 that insemination centres must enter into contracts with one or more production centres which guarantee regular and sufficient quantities of semen; by Article 13 that although insemination centres will normally take their supplies from production centres with which they have contracts, they may, on the written demand of a breeder, obtain the semen from "other centres". Semen held by an insemination centre is normally to be used only in the zone defined in the licence and, if not used, can only be returned to the production centre from which it was obtained. In addition, by the order, the Minister had power to limit or bar temporarily the taking of the semen from a particular animal and the production centres could delegate certain tasks to inseminating centres with which they were contractually bound.

By an order of 12 November 1969, the earlier requirement that a licence-holder be a French national was extended to include the nationals of other Member States.

Special provisions exist with regard to the importation of semen from other countries, in particular in an order of 22 October 1949 (JORF of 20. 10. 1949, p. 10800) and a Decree No 70-137 of 16 February 1970 (JORF of 19. 2. 1970, p. 1766) and various notices issued to importers. In substance the effect of these is that each importation of semen requires a separate licence from the Ministry of Agriculture. To obtain a licence the applicant must supply various documents showing not only the number of doses to be imported but a certificate from a laboratory approved in the country of origin. Licences are only to be issued for approved breeds of cattle and for animals which satisfy the standards laid down by the French Minister of Agriculture.

The Commission's basic case is that imports can only be obtained by or for the account of a body which is authorized by the French legislation to use the semen and that operators or breeders outside the system cannot themselves obtain semen from other Member States. The Commission as part of its case, relies on the fact that in the 1949 Order there is a reference to cooperatives or other bodies approved by the Minister of Agriculture as being potential importers. Moreover it contends that centres are limited to obtaining semen from

elsewhere only on the written demand of a breeder and cannot do so of their own initiative or to hold as stock. Everything is geared to maintaining the supply and use of semen from French cattle which in itself is a quantitative restriction within Article 30 of the Treaty. The Commission accepts that the semen once obtained can only be used by an inseminator approved in accordance with the French legislation, but contends that the limitations imposed, including the difficulties arising from the need to obtain licences which involve delay and cost, makes it impossible for the individual breeder to import semen for his own use. Leaving aside the questions whether the French import licensing system, as such, whether the requirements that French zootechnical rules be observed and whether the limitation of breeds imposed violate Community law, the Commission contends that the position described above is in breach of Article 37 of the Treaty and Article 2 of the Directive.

The French Government replies that the importation of semen is free, is not subject to any quantitative restriction and that there is no limitation as to the persons who may import. Whilst accepting that there is a monopoly in respect of the act of insemination — a service not the supply of goods — it argues (a) that the licensing system adopted does no more than to ensure that French standards are met, and, (b) that the requirement of contracts between supplier and inseminator is incidental to the good administration of the system and the improvement of quality in the cattle. In the first place a breeder can obtain a temporary licence to inseminate. Secondly, the production centres have no particular rights which amount to a monopoly and they are independent of the State. They can direct their businesses as they will. Nothing in the legislation prohibits a breeder from applying to a centre abroad for the semen he needs even though it must be administered in accordance with the regulations. Once he satisfies the zootechnic and health requirements, a licence is granted automatically.

There is, on the facts, no doubt that the inseminating centres have a virtual monopoly in the areas assigned to them, and even where other persons are granted "special and temporary" licences, these are limited to the insemination of their own cattle, require the agreement of, and result in broad control by, the insemination centre for the relevant zone (Article 10 of Decree No 69-258 of 22. 3. 1969). There seems to be a dispute as to how many centres carry out both production and insemination. This does not seem to me to matter since the centres which carry out insemination are normally to obtain their supplies from production centres under on-going contracts. On the other hand the prohibition on insemination centres against obtaining supplies from other than their normal suppliers, except on a breeder's written request, and the conditions laid down before importations are allowed, may merit further consideration but they do not call for examination in these proceedings.

It does not seem to me on the evidence before the Court that the Commission has established that there is a breach of Article 37 in that (a) France limits the right to import semen to a particular category of traders or (b) that the category relied on in any event constitutes a State monopoly.

The statistics put before the Court by the French Government show that in 1980 and 1981 licences were granted for 101 392 and 91 895 doses of semen to be imported. Between 2% and 3% of these were for individual insemination centres: over 70% were for the Union Nationale des Cooperatives d'Elevage et d'Insémination Artificielle (UNCEIA), or its subsidiary, which is the national union to which many of the agricultural cooperatives licensed to carry insemination belong: approximately 25% were for a company known as BOVEC, apparently the subsidiary of an American company, which obtains semen mainly, if not exclusively, from the United States and sells it to the centres or to breeders for use at centres in France.

Even if BOVEC must trade and does trade exclusively with the centres or with breeders who must take semen to the insemination centres, I can see no way on the evidence presently before the Court in which this company could be regarded as part of a State monopoly.

Moreover, despite the close working relationship between UNCEIA and the Ministry of Agriculture, and despite the control exercised over standards by the Ministry and by a standards committee with which UNCEIA is connected, and by the legislation, I am not satisfied on the evidence produced by the Commission that UNCEIA and the cooperatives alone would constitute a State monopoly for the purposes of Article 37 even for the importation of semen other than from the United States. Whatever the rights of the centres within their zones, they seem on present evidence to be entitled to conduct their enterprises economically as they will, subject to compliance with the technical requirements laid down by the Ministry. I am not satisfied that they buy their imported semen through UNCEIA because they are obliged to do so or because they are part of a State monopoly: they do so because economically and administratively it is in their interests to do so. Such a conclusion reflects in no way on the different question as to whether UNCEIA's own rules as shown to the Court violate other provisions of the EEC Treaty.

It is surprising that the annual percentage of imported doses is so small; about 100 000 out of 12 million doses available in France come from outside France, and it is no less surprising that the imports between other Member States, other than perhaps the Netherlands and Germany, are so small.

Nonetheless on the material produced, and even if in truth there is a monopoly in respect of the service of administering the semen, I do not consider that the Commission has established that France is in breach of Article 37 in that it has de facto created a system by which it will only grant import licences to a limited class of traders which constitutes a State monopoly.

If it is right that there is no State trading monopoly in imported semen, the allegations of discrimination do not fall for consideration under Article 37 either in relation to the importation of semen or in relation to trade in imported semen.

The claim under the Directive (which is limited to bovines), raises different considerations.

The relevant provisions of Articles 2 and 3 are as follows:

"Article 2

The Member States shall ensure that the following shall not be prohibited, restricted or impeded on zootechnical grounds:

— intra-Community trade in pure-bred breeding animals of the bovine species,

— intra-Community trade in the semen and embryos of pure-bred animals of the bovine species,

— subject to Article 3, intra-Community trade in bulls used for artificial insemination.

Article 3

The Council, acting on a proposal from the Commission, shall, before 1 July 1980, adopt Community provisions for the approval of purebred breeding animals of the bovine species for breeding.

Until the entry into force of such provisions, approval of pure-bred breeding animals of the bovine species for breeding and approval of bulls to be used for artificial insemination as well as the use of semen and embryos shall remain subject to national law, on the understanding that that law may not be more restrictive than that applicable to pure-bred breeding animals of the bovine species, semen and embryos in the Member State of destination."

The Council has not yet adopted such provisions.

The effect of these two Articles is not immediately clear. On the one hand it is said that the obligation under Article 2 is immediate, save in respect of intra-Community trade in bulls used for artificial insemination, so that only in respect of the latter, by virtue of Article 3, can national rules be relied on so long as they are not applied more restrictively than to pure-bred breeding animals in the Member State of destination. On the other hand it is argued that until the entry into force of the Community provisions, "the use of semen ... shall remain subject to national law" so long as the rules are not more restrictive than those applicable to semen in the Member State of destination. Reading the two Articles together, it seems to me that despite the limited reference to Article 3 in Article 2, the correct interpretation is that a Member State must ensure that the importation of semen is not prohibited, restricted or impeded on zootechnical grounds, save that pending the adoption of Community provisions a Member State may apply its national law on the use of semen provided that that law is not more restrictive than that applicable to the Member State of destination.

Read literally "use" may appear to refer merely to the act of storing and administering the semen once obtained, rather than to include the act of importation. I would not so read it. It seems to me that the "use of semen" should be read as including the acquisition and importation of semen so that national rules may be applied so

long as the law is not more restrictive than that applicable to semen in France. If it were not so, then it does not seem that any safeguards may be relied upon by the importing State even those which are applied to its own national production.

If this is the correct reading of the word "use" then I do not consider that the law in force has been shown in this case to be "more restrictive" in respect of imported than of domestically-obtained bovine semen, and the Commission's case fails.

If this interpretation is wrong and "use" in Article 3 does not include importation, the question is whether intra-Community trade in the semen of pure-bred breeding animals is prohibited, restricted or impeded "on zootechnical grounds".

The French authorities in a letter dated 12 December 1977 to a Mr Lancien, said that a licence to import semen from the United Kingdom would only be given to UNCEIA and that it was not possible to authorise individuals prepared to import goods whose transport, preservation and use imposed difficult conditions. This was said to be a principle from which no exception was contemplated. In addition, in answer to the letter from the Commission inviting France's observations pursuant to Article 169 of the Treaty, it was stated that France was prepared to permit imports by breeders holding "special" inseminators' licences and would adopt the provisions necessary for this purpose. It further stated in that letter that it was prepared to adopt provisions permitting breeders to import semen for the insemination of their cows by insemination centres. However, it declared that the latter provisions would only become applicable if (i) all the other Member States reciprocated, and (ii) all the other Member States abolished all monopolies or "quasi-monopolies" over semen exports.

The latter was subsequently said to have been written by mistake and it is alleged that it is open to any breeder to apply for a licence, and that so long as French standards are complied with and the semen will go to an authorized insemination centre, a licence will be granted automatically.

Even accepting the retraction of the letter to the Commission by the French Government, the earlier letter of 1977 raises considerable doubt as to the French practice on zootechnical grounds. In view, however, of its date, even though it is just after the date of the Council Directive, and the lack of concrete evidence of refusals later in date, I would, for my part, not grant the declaration asked on the basis that there is insufficient evidence of the practice claimed at the relevant period. That would not, as I see it, preclude the Commission from bringing further proceedings on the basis of other and more recent evidence.

Other matters relied on seem to me to establish clearly restrictions on insemination centres. Thus it seems to me that they are precluded from holding stocks of imported semen (Article 5 (5) of Law No 66/1005 and Article 13 (1) of the Decree of 17 April 1969) despite the French Government's argument that the provisions in question merely require a centre to acquire semen on the written demand of a breeder, and that in any

event such supply is not necessary unless specifically requested.

Such a prohibition seems likely to deter breeders from purchasing imported semen since nationally produced semen will always be immediately available, whereas imported semen will have to be specially acquired with all the inconvenience and delay and cost which that involves.

Moreover, Article 5 (5) of Law 66/1005 imposes a further restriction since it provides that the additional costs involved in obtaining imported semen must be borne by the breeder. Consequently, the insemination centres are debarred from absorbing those additional costs themselves as traders are normally entitled to do. Sales of imported semen to breeders may thus be rendered more costly than might otherwise be the case.

However, in so far as the French Government seeks to justify these restrictions, it relies on arguments of an economic and not of a zootechnical nature, so that the restrictions do not, it seems to me, fall under Article 2 of the Directive since that provision only applies to restrictions based on zootechnical grounds.

Accordingly, in my opinion, the Commission's application that France is in breach of Article 37 of the EEC Treaty and of Article 2 of Council Directive No 77/504 should be dismissed and the Commission should pay the costs of these proceedings.