In Case 271/81

REFERENCE to the Court of Justice under Article 177 of the EEC Treaty by the Tribunal de Grande Instance [Regional Court], Pau, for a preliminary ruling in the proceedings pending before that court between

SOCIÉTÉ COOPÉRATIVE D'AMÉLIORATION DE L'ÉLEVAGE ET D'INSÉMINATION ARTIFICIELLE DU BÉARN, Billère,

and

LUCIEN JEAN-MARIE MIALOCQ,

HENRI SAPHORE, and

SOCIÉTÉ AGRI-SEM, Idron,

on the interpretation of Article 37 of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, A. O'Keeffe and U. Everling (Presidents of Chambers), Lord Mackenzie Stuart, G. Bosco, T. Koopmans, O. Due, K. Bahlmann, Y. Galmot, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The judgment making the reference, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. According to the judgment making the reference, under French Law No 66-1005 of 28 December 1966 on animal rearing, the Société Coopérative d'Amélioration de l'Élevage et d'Insémination Artificielle du Béarn [hereinafter referred to as "the Société Coopérative"] was granted exclusive authorization by Decree of the Minister for Agriculture of 1 March 1972 to carry out inseminations with bovine semen within a specified area including, in particular, part of the department of Pyrénées Atlantiques. Under the legislation in force, any breeder wishing to carry out artificial insemination of his own cattle must request the cooperative for his area to perform the operation.

Mr Mialocq and Mr Saphore, who are both inseminators, carried out artificial insemination on behalf of the Société Agri-Sem [hereinafter referred to as "Agri-Sem"] within the area assigned to the Société Coopérative. The Société Coopérative, the plaintiff in the main proceedings, summoned the two inseminators and Agri-Sem before the Tribunal Correctionnel [Criminal Court] for committing the offence of carrying out artificial inseminations in an area not assigned to them for that purpose and sought to have them made jointly and severally liable for damages in the sum of FF 50 000.

2. The relevant French legislation may be summarized as follows:

The artificial insemination of animals is governed by Law No 66-1005 of 28 December 1966 on animal rearing (Journal Officiel de la République Française of 29 December 1966, p. 11619), supplemented by a series of implementing measures.

In Law No 66-1005, Article 4 of Title I, which is headed "Genetic improvement of cattle", provides as follows:

"The extraction and packaging of semen may be caried out only by the holder of a licence designating him as head of an insemination centre or under the supervision of such a person.

The insemination may be carried out only by the holder of a licence designating him as head of an insemination centre or as an inseminator."

Article 5 of the Law provides that insemination centres, irrespective of whether they are engaged in the production of semen or in the carrying out of insemination or both, may operate only if prior authorization has been granted by the Minister for Agriculture.

Article 5 also provides that:

"Each insemination centre shall have an exclusive concession in respect of a specific area. The authorization granted to it shall define that area.

Breeders within an area assigned to an insemination centre may request the latter to provide them with semen from production centres of their own choice ... The insemination centre shall then carry out the inseminations on behalf of the breeders concerned, who shall bear any additional costs resulting from the selection of a production centre of their choice.

Where an area is assigned to an artificial insemination cooperative, the latter shall extend its facilities to non-member breeders."

Article 2 of Decree No 69-258 of 22 March 1969 on artificial insemination (Journal Officiel de la République Française of 23 March 1969, p. 2948) provides as follows:

"Artificial insemination centres may be authorized to engage in the activities falling within either or both of the following categories:

1. Production, consisting of the stocking of male breeding animals which have been approved or are authorized to undergo a test as to pedigree, the supervision of tests to determine pedigree in accordance with a programme approved by the Minister for Agriculture and the extraction, packaging, preservation and sale of the semen of breeding animals which have been approved or tested;

2. Insemination, consisting in the insemination of female animals belonging to the species listed in Article 1 of the Law of 28 December 1966 with semen procured from stocks supplied by production centres.

   Insemination centres may be authorized to maintain stocks of approved breeding animals supplied by production centres. In that case, they shall themselves extract, package and preserve semen from the animals kept in stock."

Article 9 of the Decree of the Minister for Agriculture of 17 April 1969 on the authorization of artificial insemination centres (Journal Officiel de la République Française of 30 April 1969, p. 4349) provides that those in charge of *production centres* are to conduct the tests to determine pedigree in accordance with programmes approved by the Minister for Agriculture. They may entrust the performance of certain tasks to insemination centres with which they have a contractual agreement to that effect.

Article 10 of the above-mentioned decree provides that a production centre may operate throughout the areas assigned to the insemination centres with which it has concluded contracts for the testing or the supply of breeding animals or for the supply of semen. Such contracts are to be notified to the Minister for Agriculture on submission of the request for authorization and, subsequently, whenever they are amended or whenever new contracts are concluded.

As far as *insemination centres* are concerned, Article 12 of that decree provides as follows:

"Each insemination centre shall conclude contracts with one or more production centres.

Those contracts shall guarantee regular supplies of semen to the area concerned, regard being had to the requirements of the area, and shall be concluded for periods of sufficient duration to enable tests to be conducted successfully.

Those contracts shall contain an undertaking by the insemination centre to take

part in any testing programmes conducted by the production centre with which the contracts are concluded. The undertaking shall take account of the possibilities offered by the area for the application of testing programmes and of the area's estimated medium-term requirements as regards approved breeding animals."

Article 13 of the decree provides as follows:

"Insemination centres shall normally procure breeding animals or semen from the production centre or centres with which they have concluded a contract. They may obtain supplies from other centres pursuant to a request in writing by individual breeders in their area, in accordance with the provisions of Article 5 (5) of the above-mentioned Law of 28 December 1966.

Semen stored in the depot or depots maintained by an insemination centre shall normally be used for insemination of animals in the area assigned to it.

An insemination centre may resell semen only to the production centre from which it takes supplies."

According to Articles 17 and 18 of the same decree, copies of supply and testing contracts must be attached to requests for authorization submitted by production centres and by insemination centres.

As regards the *importation of semen* into France, the Decree of the Minister for Agriculture of 22 October 1949 on the conditions for importation free of duty of pure-bred breeding horses, cattle, sheep and pigs (Journal Officiel de la République Française of 29 October 1949, p. 10600) provides that "any breeders' association or similar body approved by the Ministry of Agriculture which seeks to import free of customs duty pure-bred breeding animals shall submit a request for authorization in four copies ...". The technical conditions which must be met if the Minister for Agriculture is to give a favourable decision are published in a "notice to importers".

Furthermore, Article 3 of Decree No 70-137 of 16 February 1970 on imports and exports of live animals and of the semen of breeding animals (Journal Officiel de la République Française of 19 February 1970, p. 1766) provides as follows:

"Doses of animal semen from the species referred to in Article 1 of the Law of 28 December 1966 which are submitted to the customs authorities for importation or exportation shall be accompanied by a certificate of origin issued by the official authorities of the exporting country and shall come from a breeding animal which has successfully undergone a test to determine its pedigree in accordance with a programme approved by the Minister for Agriculture, in the case of exports, or recognized by the minister as equivalent to an approved programme in the case of imports."

3. In its judgment making the reference, the Tribunal de Grande Instance, Pau, considers in the first place that the existing arrangements governing artificial insemination in France have led to the creation of a territorial monopoly in favour of centres for the insemination of cattle. It takes the view that the arrangements in question constitute a State monopoly because, through the procedure involving the approval of the Minister for Agriculture, the State exercises direct control over semen production centres and indirect control over insemination centres, over the quality and quantity of semen imported and exported and over the prices at which semen is to be sold. Breeders are obliged to deal with the centre for their

area in order to obtain the semen of their choice, produced by an approved centre. Those centres are not exposed to competition by virtue of the fact that all imports of foreign semen must be accompanied by a licence issued by the Minister for Agriculture and granted exclusively to approved centres which benefit from the monopoly.

The national court points out, however, that the case-law in France is inconsistent on the question whether the State monopoly is of a commercial character within the meaning of Article 37 of the EEC Treaty. Certain decisions given by the courts in similar cases were based on the fact that the restriction imposed on breeders and the exclusive rights conferred by the legislation in question were concerned not with procurement of a product (semen) but with the provision of a service (insemination) and thus fell outside the scope of Article 37 of the EEC Treaty. In that regard, the national court finds that the legislation in question is concerned with the provision of two separate services, namely the insemination and the transaction concluded at the breeder's request for the purchase of semen, sometimes from another centre. According to a consistent line of French cases, undertakings which provide services are commercial in character.

Having found that a State monopoly over artificial insemination may affect trade in semen between the Member States, the national court decided to refer the matter to the Court of Justice.

If the provision of the above-mentioned services is of a commercial character, the further question arises whether, as regards the right of foreign breeders to set up insemination or semen production centres, a system under which the grant of the requisite authorization is within the discretion of the monopoly leads to discrimination within the meaning of Article 37 of the Treaty.

In its judgment of 22 April 1981, the national court stayed the proceedings and referred to the Court of Justice, pursuant to Article 177 of the Treaty, the following questions for a preliminary ruling:

"1. Does the provision of services have a commercial character within the meaning of Article 37 of the Treaty of Rome if, because it is the subject of a national monopoly, the State is enabled to direct a branch of the national economy?

2. If that question is answered in the affirmative, can a system under which authorizations are issued by the State for the provision of such services involve discrimination within the meaning of the same article?

3. More particularly still, can the discrimination referred to apply exclusively to persons and not to products?"

4. The judgment making the reference was received at the Court Registry on 7 October 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the following: the Société Coopérative, the plaintiff in the main proceedings, represented by Claude Paulmier, Advocate at the Cour d'Appel, Paris; Mr Mialocq, Mr Saphore and Agri-Sem, the defendants in the main proceedings, represented by François Cathala, of the Paris Bar; the French Government, represented by Maryse

Aulagnon, Legal Adviser at the Secretariat General of the Inter-ministerial Committee for Questions of European Economic Cooperation, acting as Agent; and the Commission of the European Communities, represented by its Legal Adviser, René-Christian Béraud, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission to reply to the following question:

"As regards the importation of bovine semen into France, the defendants observe in their statement of defence that foreign producers of bovine semen have made several complaints to the Commission to the effect that they had been — in the terms used by the defendants — systematically obstructed by the French authorities. Is the Commission able to confirm this information and, if so, state what action it has taken in relation to those complaints?"

Furthermore, the Court invited the parties to put forward their views at the hearing on the observations submitted by the Commission in its statement regarding the application of Article 59 of the EEC Treaty.

II — Summary of the written observations submitted to the Court

The *Société Coopérative,* the *plaintiff in the main proceedings,* points out *in limine* that the considerations which led the national court to refer certain questions to the Court of Justice for a preliminary ruling were not the subject of adversary proceedings before that court since the defendants failed to enter an appearance. In the light of certain decisions of the French supreme courts holding, on the basis of the decisions of the Court of Justice, that Article 37 of the Treaty is inapplicable to the French arrangements governing artificial insemination, the national court would not have been moved to refer the matter to the Court of Justice if adversary proceedings had taken place.

As regards the first question raised by the national court, the plaintiff in the main proceedings argues in the first place that Article 37 of the Treaty is not concerned with the provision of services even if they are of a commercial character.

According to the Court's judgment of 30 April 1974 in Case 155/73 *(Sacchi* [1974] ECR 409), Article 37 refers only to transactions involving trade in goods and cannot relate to a monopoly over the provision of services. The fact that services are of a commercial character in no way alters the fact that they are services. In fact, Article 60 of the Treaty provides that services are to include, in particular, activities of a commercial character.

However, that is not the case with regard to artificial insemination which is an activitiy of an agricultural character. In that respect, the court making the reference has regrettably confused the concept of "the provision of services of a commercial character" with the concept of "goods or products".

Although insemination necessarily involves the sale of a dose of semen, that sale is never dissociated financially or physically from the rest of the operation, which undoubtedly constitutes a pro-

vision of services. What is important is the service provided for the breeder, viewed in its entirety. Moreover, no semen is sold directly to breeders apart from that which is used for insemination.

The plaintiff considers, in addition, that the commercial character of the provision of services depends solely on the actual nature of the operations which form the subject-matter of the services. The existence of a monopoly cannot have the effect of endowing the provision of such services with a commercial character.

The plaintiff's second argument is that there can be no question in the present case of a *State* monopoly, within the meaning of Article 37 of the Treaty, enabling the State to direct a branch of the national economy. It disagrees with the national court's observations to that effect. The Minister for Agriculture issues the requisite authorization and does not thereafter interfere with the functioning of artificial insemination centres. The State does not dictate policy to them ad they are entirely free to arrange their financing arrangements as they see fit, their sole obligation being to comply with the legislation governing the type of association in which they are legally constituted, in this case an agricultural cooperative.

Furthermore, the sole purpose of the system of import licences for semen, referred to by the national court, is to ensure compliance with the legislation on health safeguards contained in Decree No 70-137 of 16 December 1970 on imports and exports of live animals and the semen of breeding animals. Semen which satisfies the conditions prescribed by that decree may be imported, at the request of breeders, by any approved centre.

If there is a monopoly, it is not restricted to French nationals. By Decrees of the Minister for Agriculture of 12 and 17 November 1969, the authorization to set up or to operate an artificial insemination centre and the licences of head of centre and inseminator may also be granted to nationals of other Member States of the European Economic Community.

Finally, the plaintiff relies on the Court's jugdments of 15 July 1964 in Case 6/64 *(Costa* v *ENEL* [1964] ECR 585) and of 5 February 1976 in Case 58/75 *(Pubblico Ministero* v *Manghera* [1976] ECR 91) in support of its contention that Article 37 of the Treaty does not prohibit State monopolies of a commercial character such as, for example, the French tobacco and match monopoly (SEITA), but merely prohibits discrimination between nationals of the State in question and nationals of other Member States.

As regards the second and third questions, the plaintiff reiterates that in its opinion the French arrangements governing artificial insemination do not lead to any discrimination as regards either the right of nationals of other Member States to carry on the activities in question or the procurement of products from other Member States.

Mr Mialocq, Mr Saphore and *Agri-Sem,* the *defendants in the main proceedings,* point out in the first place that, as far as artificial insemination is concerned, the French Law of 28 December 1966 on animal rearing is based on two principles.

First, regional insemination centres for bovine semen possess a territorial monopoly over the provision of the service in question, namely insemination, and, secondly, those centres have the exclusive right to distribute and to market the product used, whether it be of French or of foreign origin. In that regard, the defendants point out that the insemination centres obtain the semen either from the production centres with which they have concluded a contract or, at the request of the breeder concerned, from another approved production centre. The semen used is invoiced at the same time as the price of the insemination service.

If a breeder wishes to obtain semen from abroad, he must do so through an insemination centre. In practice, applications for import licences are processed centrally by the Union Nationale des Coopératives d'Elevage et d'Insémination Artificielle (UNCEIA) [National Union of Breeding and Artificial Insemination Cooperatives, hereinafter referred to as "the National Union of Cooperatives"], in Paris, a grouping which comprises approved insemination and production centres. That body deals with the importation procedure and the cost is borne by the breeder concerned. Moreover, the technical conditions which the foreign product must satisfy if an import licence is to be granted in respect of it are determined after consultation of the Commission Nationale D'Amélioration Génétique [National Committee for Genetic Improvement], which is composed of officials of the Ministry of Agriculture and representatives of the National Union of Cooperatives, that is to say of the production and insemination centres which possess exclusive marketing rights and a monopoly over insemination.

In those circumstances, the importation of semen is such a lengthy process that it may discourage the breeder from importing the product.

As far as the first question is concerned, the defendants consider that the intention of the French legislature in 1966 as regards the artificial insemination of cattle was undoubtedly to take over responsibility for directing that branch of economic activity. In the defendants' opinion, the provisions of the Law of 28 December 1966 in conjunction with the implementing measures and practices constitute a system enabling the State, through the centres which it authorizes and through the National Union of Cooperatives, to monitor and to influence imports of bovine semen.

Accordingly, all the insemination centres fall within the category of State monopolies referred to in Article 37 (1) of the EEC Treaty. Those centres, as is moreover the case with production centres, are authorized and controlled by the State. Article 37 (1) applies both to a monopoly operated by a State body and to an activity entrusted by the State to bodies established or controlled by it. Furthermore, that provision concerns not only bodies whose activities extend throughout the territory of the State but also bodies made up of several units, each pursuing the same activities in part of the territory of the State, if those bodies as a whole constitute a monopoly (see the Opinion of Advocate General Roemer in Case 82/71, *Pubblico Ministero* v *SAIL*, [1972] ECR 119, at p. 143.

A monopoly of a commercial character may come into being not only as a result of the organization of insemination centres but also as a result of their activities. Those activities consist in the procurement of semen from production centres or from abroad in order to resell

it to the breeders concerned. It follows from the fact that a breeder may not himself obtain the semen of his choice for insemination that those centres have a monopoly over the distribution and marketing of the product. In view of modern methods of conservation and transport, semen is in fact a commercial product capable of being the subject of competition and trade between Member States (cf. the Court's jugdment of 15 July 1964 in Case 6/64, *Costa* v *ENEL*, [1964] ECR 585, at p. 598).

Accordingly, there is a body, within the meaning of the second subparagraph of Article 37 (1), through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States.

In conclusion, the defendants in the main proceedings propose that the answer to the first question should be that the provision of services which cannot be dissociated from the supply of a product is of a commercial character, within the meaning of Article 37 of the Treaty, if it is subject to a State monopoly over the provision and distribution of that product and thus enables the State to direct a branch of the national economy both domestically and in connection with intra-Community trade.

As regards the second question, the defendants submit that, even if nationals of other Member States of the Community may, by law, be granted authorization to set up insemination centres, the right to take up that activity is meaningless in practice since all the available areas have long been allocated to existing centres. However, the defendants consider that the prohibition of discrimination between nationals of Member States, laid down by Article 37 (1), does not relate to nationals as individuals but refers to products manufactured or marketed by them.

In the present case, there is discrimination because the imported product is more expensive as a result of the high fees charged by the National Union of Cooperatives, the health inspection charges and the considerable time which elapses before delivery, which bears no relation to the exigencies of that type of trade. Furthermore, several complaints in that connection have been made to the Commission of the European Communities by foreign producers who claimed that they had been systematically obstructed by the Ministry of Agriculture and by the National Union of Cooperatives.

The Court held in its judgment of 3 February 1976 in Case 59/75 *(Pubblico Ministero* v *Manghera* [1976] ECR 91) that, as from the expiry of the transitional period, every State monopoly of a commercial character should have been adjusted so as to eliminate the exclusive right to import from other Member States.

The defendants in the main proceedings therefore propose that the answer to the second question should be that a system under which authorizations are issued by a Member State for the provision of services which are subject to a State monopoly is incompatible with Article 37 of the Treaty in so far as the conditions governing the exercise of the activity in question create discrimination within the meaning of the Treaty, in particular with regard to imports.

It follows, as regards the third question raised, that such discrimination cannot

be directed exclusively against persons. On the contrary, it inevitably affects the products in question solely by virtue of the fact that the service is linked to the exclusive right to import and market the product which forms the subject-matter of the service.

The defendants in the main proceedings contend, further, that under Article 37 State monopolies should have been adjusted even in the agricultural products sector either under a common organization of the market or under a national system complying with the provisions of the Treaty, in particular those relating to the free movement of goods (see the judgment of 10 December 1974 in Case 48/74, *Charmasson* v *Minister for Economic Affairs and Finance,* [1974] ECR 1383). In addition, Article 37 (4) concerning monopolies which have rules relating to agricultural products does not derogate from the other provisions of that article (see the judgment of 17 February 1976 in Case 91/75, *Hauptzollamt Göttingen* v *Miritz,* [1976] ECR 217).

Finally, as regards the contention that Article 36 of the Treaty precludes the application of Article 37, the defendants argue that the restrictions in imports of Community semen are not based on grounds of the protection of health and life of animals but have as their purpose merely to maintain the genetic quality of cattle at a specific level.

The *French Government* observes first of all that the monopoly enjoyed by artificial insemination centres relates only to the carrying out of insemination. The service is provided with semen which is imported under licence or comes from production centres which do not possess any kind of monopoly in that regard. Thus, by virtue of their designation and their powers, artificial insemination centres enjoy a monopoly over the provision of services, that is to say a monopoly of the kind which the Court clearly excluded from the scope of Article 37 of the Treaty in its aforesaid judgment of 30 April 1974 in Case 155/73 *(Sacchi).*

As regards the operation of artificial insemination centres, the French Government points out that every breeder is free to obtain the semen of the breed of his choice, provided that it meets the standards prescribed for the breed in question, that it comes from an approved production centre or that it has been imported for use at an approved centre. Semen produced in France is obtained by the insemination centre on behalf of the breeder. Any additional costs incurred as a result of individual requirements are borne by the breeders concerned, which shows that the insemination centre acts not as a trader but as a provider of services. Moreover, the obligation incumbent on a breeder belonging to a cooperative authorized to carry out insemination to avail himself of the services provided by his centre derives not from the law on animal rearing but from the undertaking to cooperate which he has given of his own free will.

As regards imported semen, the issuing of import licences is not restricted to insemination centres. In order to comply with the legislation on insemination, the authorities must simply ensure that the imported semen is actually used by authorized centres.

The reason for the important role played by the National Union of Cooperatives is

that the organization of insemination centres in the form of cooperatives has led to the establishment of a pyramidal structure. The undertaking given by those centres to procure their semen from the National Union of Cooperatives, to which they all belong, is merely the consideration for the benefits conferred upon the agricultural cooperatives. However, the role played by the cooperative movement does not give rise to a *de facto* monopoly since there are other approved bodies carrying out artificial insemination which are not organized in the form of cooperatives.

Thus, artifical insemination centres are not, as regards the exclusive rights conferred upon them by the Ministry of Agriculture, the services which they provide or their structure, of a commercial character within the meaning of Article 37 of the EEC Treaty.

The French Government considers that the monopoly delegated to insemination centres as an adjunct to the licensing system enables the State to provide a public service aimed at protecting and improving the health of cattle. However, the choice of suitable breeds and breeding animals, which in practice determines the breeding policy to be pursued, is ultimately a matter for the breeders themselves. Although the monopoly in question makes it possible to pursue a policy of health protection, it cannot enable the State to direct a branch of the national economy.

To sum up, the French Government considers that the answer to the first question should be that the monopoly enjoyed by the insemination centres is strictly limited by law to the provision of certain services, namely the insemination of female animals, and has no commercial character within the meaning of Article 37 of the Treaty.

The French Government maintains in the alternative that the licensing system does not lead to any discrimination. Any Community national may be authorized to become an inseminator and to carry out artificial insemination. Furthermore, every artificial insemination cooperative to which an insemination area has been allocated is under an obligation to extend its facilities to all breeders, including non-members, on pain of having its authorization revoked if it refuses to provide the service in question.

Finally, the issue of import licences is automatic and is not subject to any quantitative limit, provided that the technical standards prescribed for semen of the breed in question are complied with. Those standards are applicable without distinction to semen from breeding animals stocked in French production centres and to semen imported from abroad. Furthermore, the French Government points out that, although Article 2 of Council Directive 77/504/EEC of 25 July 1977 on pure-bred breeding animals of the bovine species (Official Journal 1977, L 206, p. 8) provides that intra-Community trade in semen and embryos must not be restricted "on zootechnical grounds", Article 3 provides that the relevant national laws are to remain applicable until the entry into force of Community provisions. Since no such provisions have been adopted, France cannot be reproached for continuing to apply its own national rules.

The *Commission of the European Communities* observes that a clear distinction must be drawn between the activities of insemination centres concerning the supply of goods, on the one hand, and insemination as such, on the other. The Commission considers that, in accordance with the above-mentioned jugdment of 30 April 1974

(Case 155/73, *Sacchi),* the exclusive right to carry out insemination constitutes a monopoly over the provision of that service and comes within Article 59 *et seq.* of the Treaty rather than within Article 37.

It considers, also in the light of that judgment, that the granting by Member States of special or exclusive rights to public or private undertakings is not in itself incompatible with Article 86 of the Treaty. However, there would be an abuse of a dominant position, within the meaning of that article, if the undertakings in which an exclusive right is vested, in this case the cooperatives belonging to the National Union of Cooperatives, were to impose inequitable or discriminatory conditions on those who availed themselves of their services. The Commission has in fact received a complaint against the National Union of Cooperatives based on Articles 85 and 86 of the Treaty. The internal rules of that body, which are binding on all its members, include restrictions on the importation and testing of semen originating abroad and involve the fixing of prohibitive prices for the processing of applications to import semen.

The Commission considers, however, that the activities of insemination centres concerning the supply of semen fall within the Community rules relating to the free movement of goods. The system is incompatible with Community law in so far as the contractual obligation on insemination centres to procure their semen production centres amounts to a preference in favour of domestic production.

In reply to a question put to it by the Court, the Commission confirms that it has received several complaints concerning the restrictions imposed by the French authorities on imports of bovine semen. The Commission has considered those complaints and come to the conclusion that France has failed to fulfil its obligations under Article 37 of the Treaty and under Directive 77/504. That opinion is based on the consideration that in practice import licences are issued exclusively to traders who are able to use the semen in a manner which accords with the French legislation or who act on behalf of a body which satisfies that requirement. Furthermore, the fact that the product may be imported and marketed only by bodies which produce and market their own semen constitutes *a fortiori* discrimination within the meaning of Article 37. In those circumstances, the Commission has initiated the procedure for failure to fulfil an obligation provided for in Article 169 of the Treaty.

However, the Commission takes the view that those considerations do not call in question the monopoly over the provisions of the insemination services as such. It therefore proposes that the answer to the first question should be that the exclusive right to carry out insemination does not fall within Article 37 of the Treaty.

According to the Commission, the second and third questions must be considered in the light of Article 52 *et seq.* on the right of establishment and of Article 59 *et seq.* on the provision of services.

As far as the right of establishment is concerned, the Commission observes that under Article 5 of the French Law of 28 December 1966, the Minister for Agriculture must take into account the existing facilities when considering whether to authorize the establishment of an insemination centre. That con-

dition discriminates against nationals of other Member States seeking access to the French market, in relation to French nationals already established in France.

As far as freedom to provide services is concerned, an administrative practice which precludes the provision of services by inseminators established in other Member States who offer the same professional guarantees as those required by national legislation is incompatible with Article 59 of the Treaty. However, a system involving the grant of exclusive authorization, such as the monopoly over insemination with bovine semen, is compatible with Article 59 in so far as it is justified on grounds of the existence of a general interest which merits protection such as, in the present case, the improvement of the quality of cattle and of the conditions in which they are bred.

As far as the third question is concerned, the Commission adds that measures which are incompatible with provisions of the Treaty on the right of establishment and on freedom to provide services are, by their very nature, concerned exclusively with persons.

III — Oral procedure

At the sitting on 26 April 1983, oral argument was presented by the following: Claude Paulmier, Avocat at the Cour d'Appel, Paris, for the Société Coopérative, the plaintiff in the main proceedings; François Cathala, Avocat at the Paris Bar, for Mr Mialocq, Mr Saphore and Agri-Sem, the defendants in the main proceedings; Gilbert Guillaume, Director of Legal Affairs at the Ministry of Foreign Relations, assisted by Alexandre Carnelutti, Secretary for Foreign Affairs, acting as Agents, for the French Government; and René-Christian Béraud, acting as Agent, for the Commission of the European Communities.

The Advocate General delivered his Opinion at the sitting on 1 June 1983.

Decision

1 By jugdment of 22 April 1981, which was received at the Court on 7 October 1981, the Tribunal de Grande Instance, Pau, referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 37 of the EEC Treaty.

2 Those questions were raised in a dispute concerning the infringement of French legislation on the artificial insemination of cattle by two breeders who carried out artificial insemination within an area in which the Société

Coopérative d'Amélioration de l'Élevage et d'Insémination Artificielle du Béarn had an exclusive concession to carry out such operations.

3 According to the information provided by the French Government and by the Commission, the artificial insemination of cattle in France is governed, in particular, by Law No 66-1005 of 28 December 1966 on animal rearing (Journal Officiel de la République Française of 29 December 1966, p. 11619). The first paragraph of Article 5 of that Law provides that insemination centres may operate only subject to prior authorization. That provision distinguishes between centres which are responsible for the production of semen and centres which carry out insemination, but it does not preclude a centre of either kind from carrying on both of those activities at the same time. Production involves the stocking and testing of male breeding animals and the extraction, packaging, preservation and sale of their semen. Insemination involves the insemination of female animals or the supervision of insemination where it is carried out by duly authorized breeders.

4 The above-mentioned Law of 1966 also provides that each insemination centre is to have an exclusive concession in respect of a specific area (fourth paragraph of Article 5); where such an area is assigned to an agricultural cooperative, the latter must extend its facilities to non-members. Breeders within an area assigned to an insemination centre may request it to provide them with semen from production centres of their own choice (fifth paragraph of Article 5); the breeder is to bear any additional costs resulting from such a choice. Insemination centres which are not at the same time production centres normally procure breeding animals or semen from the production centre or centres with which they have concluded a contract for the supply of animals or semen.

5 The judgment making the reference finds, on the basis of that legislation, that there is at present a territorial monopoly in France in favour of centres for the insemination of cattle. According to that judgment, the grant to a cooperative of an exclusive concession in respect of a specific area may be contrary to the provisions of Article 37 of the EEC Treaty relating to State monopolies of a commercial character.

6 In that regard, the national court considers it to be undeniable that the insemination centres in question are in the nature of monopolies which have a national character inasmuch as the centres as a whole are not exposed to competition since breeders are compelled to deal with the centre for their area in order to have their cattle artificially inseminated and even in order to obtain the semen of their choice. The national court, however, wishes to ascertain whether those centres are of a commercial character.

7 In order to seek guidance on that point, the national court requested the Court of Justice to give a preliminary ruling on three questions, the first of which is as follows:

"Does the provision of services have a commercial character within the meaning of Article 37 of the Treaty of Rome if, because it is the subject of a national monopoly, the State is enabled to direct a branch of the national economy?"

8 In the first place, it must be remembered that, as the Court has already held in its judgment of 30 April 1974 in Case 155/73 (*Sacchi* [1974] ECR 409), it follows both from the place occupied by Article 37 in the chapter of the EEC Treaty on the elimination of quantitative restrictions and from the wording used in that provision that it refers to trade in goods and cannot relate to a monopoly over the provision of services.

9 Accordingly, the mere fact that a State monopoly over the provision of services enables the authorities of the Member State concerned to direct, in the terms used in the question, a branch of the national economy is not sufficient to support the conclusion that such a monopoly comes within the provisions of Article 37.

10 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.

11 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.

12 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.

13 The answer to the first question must therefore be that Article 37, properly construed, does not apply to a monopoly over the provision of services, even if such a monopoly enables the Member States concerned to direct a branch of the national economy, provided that it does not contravene the principle of the free movement of goods by discriminating against imported products to the advantage of products of domestic origin.

14 In the light of that answer, the second and third questions, which concern only the effects of a monopoly over the provision of services, are devoid of purpose.

Costs

15 The costs incurred by the French Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal de Grande Instance, Pau, by judgment of 22 April 1981, hereby rules:

Article 37 of the EEC Treaty does not apply to a monopoly over the provision of services, even if such a monopoly enables the Member State concerned to direct a branch of the national economy, provided that it does not contravene the principle of the free movement of goods by discriminating against imported products to the advantage of products of domestic origin.

Mertens de Wilmars O'Keeffe Everling Mackenzie Stuart

Bosco Koopmans Due Bahlmann Galmot

Delivered in open court in Luxembourg on 28 June 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

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

My Lords,

The Société Coopérative d'Amélioration de l'Élevage et d'Insémination Artificielle du Béarn conducts an artificial insemination centre approved by the French Minister for Agriculture with an exclusive right to operate in the zone allotted to it. Mr Mialocq and Mr Saphore are apparently qualified artificial inseminators. They are charged by the Société Coopérative with the criminal offence of carrying out artificial insemination in an area not allotted to them for that purpose, namely the area allotted to the Société Coopérative. A claim is also made that they and their employers, the Société Agri-Sem are