JUDGMENT OF THE COURT

5 October 1994 *

In Case C-323/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the French Cour de Cassation (Court of Cassation) (Commercial Chamber) for a preliminary ruling in the proceedings pending before that court between

Société Civile Agricole du Centre d'Insémination de la Crespelle

and

Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne

on the interpretation of Articles 5, 86, 90(1), 30 and 36 of the EEC Treaty, Article 2 of Council Directive 77/504/EEC of 25 July 1977 on pure-bred breeding animals of the bovine species (OJ 1977 L 206, p. 8) and Article 4 of Council Directive 87/328/EEC of 18 June 1987 on the acceptance for breeding purposes of pure-bred breeding animals of the bovine species (OJ 1987 L 167, p. 54),

* Language of the case: French.

THE COURT,

composed of: J. C. Moitinho de Almeida, President of Chambers, acting as President, M. Diez de Velasco (Rapporteur) and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris, F. A. Schockweiler, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: C. Gulmann,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the Société Civile Agricole du Centre d'Insémination de la Crespelle, by J. Rouvière and R. Cathala, of the Paris Bar,

— the Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne, by G. Lesourd and D. Baudin, of the Paris Bar,

— the French Government, by H. Duchêne, Secretary for Foreign Affairs in the Legal Department of the Ministry of Foreign Affairs, and C. de Salins, Adviser on Foreign Affairs in the Legal Department of that Ministry, acting as Agents,

— the Commission of the European Communities, by G. Marenco, Legal Adviser, and V. Melgar, a national official on secondment to the Commission's Legal Service, acting as Agents,

having regard to the Report for the Hearing,

oídas las observaciones orales de la société civile agricole du Centre d'insémination de la Crespelle; de la Coopérative d'élevage et d'insémination artificielle du département de la Mayenne, representada por M^e^ Daniel Baudin, asistido por M^e^ Claude Paulmier, Abogado de París; del Gobierno francés, y de la Comisión, expuestas en la vista de 23 de marzo de 1994;

oídas las conclusiones del Abogado General, presentadas en audiencia pública el 4 de mayo de 1994;

dicta la siguiente

Sentencia

1 Mediante resolución de 15 de junio de 1993, recibida en el Tribunal de Justicia el 24 de junio siguiente, la Cour de cassation francesa (Sala de lo Mercantil) planteó, con arreglo al artículo 177 del Tratado CEE, dos cuestiones prejudiciales sobre la interpretación de los artículos 5, 86 y 90, apartado 1, así como de los artículos 30 y 36 del Tratado CEE, y de las Directivas 77/504/CEE del Consejo, de 25 de julio de 1977, referente a animales de la especie bovina de raza selecta para reproducción (DO L 206, p. 8; EE 03/13, p. 24), y 87/328/CEE del Consejo, de 18 de junio de 1987, relativa a la admisión para la reproducción de bovinos reproductores de raza selecta (DO L 167, p. 54).

2 Dichas cuestiones se suscitaron en el marco de un litigio entre la société civile agricole du Centre d'insémination de la Crespelle (en lo sucesivo, «Centre de la Crespelle») y la Coopérative d'élevage et d'insémination artificielle du département de la Mayenne (en lo sucesivo, «Coopérative de la Mayenne»).

3 En Francia, la inseminación artificial de los animales está regulada esencialmente por la Ley n° 66-1005, de 28 de diciembre de 1966, de ganadería (JORF 1966, p. 11619). En virtud del párrafo primero del artículo 5 de dicha Ley, la explotación

vides that the operation of insemination centres is subject to authorization. That provision draws a distinction between centres responsible for the production of semen and those responsible for insemination, but does not exclude the possibility that one centre may engage in the two types of activity at the same time. Production activities consist in the maintenance of a stock of male breeding animals, the activation of those breeding animals, and in the collection, processing, conservation and sale of the semen. Insemination activities involve insemination of females or supervision of insemination when carried out by authorized breeders.

4 The 1966 Law also provides that each insemination centre is to serve an area in which that centre alone is authorized to operate (fourth paragraph of Article 5). If such an area is allocated to an agricultural cooperative, it is required to accept, as users, breeders who are not members of it (sixth paragraph of Article 5).

5 According to the same Law, insemination centres which are not also production centres are normally supplied with breeding animals or semen by the production centre or centres with which they have concluded a contract of supply. Breeders within the area covered by an insemination centre may request that centre to supply them with semen from production centres of their choice (fifth paragraph of Article 5) but the additional costs resulting from such a choice must be borne by the users.

6 Within the territory of Metropolitan France there are at present 51 approved insemination centres and 23 approved production centres, only three of the latter being also authorized to operate as insemination centres. All insemination centres in France take the form of agricultural cooperatives. Furthermore, all except four have become associate members of UNCEIA (National Union of Agricultural

Cooperatives for Stockbreeding and Artificial Insemination), which is the only body embracing production and insemination centres throughout France. Article 7 of its Rules provides that members of UNCEIA undertake to use its facilities exclusively. Moreover, Article 29 of those Rules provides that the General Assembly of UNCEIA may adopt decisions binding on all associate members, even those who are absent or who dissent.

Importation of bovine semen into France is governed by a decree of the Minister of Agriculture of 17 April 1969 (JORF, 30 April 1969, p. 4349), as amended by another decree, of 24 January 1989, on authorization for the operation of artificial insemination centres (JORF, 31 January 1989, p. 1469). Under Article 2 of the latter decree, a national of a Member State may freely import semen provided that it comes from production centres selected by the Ministry of Agriculture and is taken from bulls that satisfy the zootechnical and health conditions laid down in French and Community legislation. Finally, Article 2 of that decree provides that any private economic operator who imports semen from another Member State of the Community must deliver it to an approved insemination or production centre. Private economic operators may build up a stock of imported semen in a centre of their choice.

In Community law, Article 2, second indent, of Directive 77/504 and Article 2(1), second indent, of Directive 87/328 require Member States to ensure that intra-Community trade in the semen and embryos of pure-bred breeding animals of the bovine species is not prohibited, restricted or impeded on zootechnical grounds. Article 3 of Directive 77/504 required the Council to adopt, before 1 July 1980, Community provisions for the approval of pure-bred breeding animals of the bovine species for breeding, including the use of their semen. This was done in Directive 87/328.

Article 4 of Directive 87/328 requires Member States to ensure that, for intra-Community trade, the semen of pure-bred bulls is collected, treated and stored in

an officially approved artificial insemination centre. According to the fourth and seventh recitals in the preamble to that directive, it is appropriate, in order to avoid any impairment of pedigree, to require that semen must come from officially approved centres responsible for artificial insemination in the other Member States.

10 These rules were supplemented by 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 (OJ 1991 L 85, p. 37).

11 Finally, Article 3 of Council Directive 88/407/EEC of 14 June 1988 laying down the animal health requirements applicable to intra-Community trade in and imports of deep-frozen semen of domestic animals of the bovine species (OJ 1988 L 194, p. 10) sets out the health conditions which must be satisfied by consignments of semen released into intra-Community trade. That directive was amended by Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29).

12 According to the documents before the Court, the Crespelle Centre has operated bovine semen storage units and carried out insemination in part of the Mayenne Department since 1961. The Mayenne Cooperative, which has enjoyed exclusive rights in that area since 1970, brought proceedings before the Tribunal de Grande Instance (Regional Court), Rennes, against the Crespelle Centre for breach of those rights. That court ruled against the Centre by judgment of 25 June 1991. Following a ruling by the Cour d'Appel (Court of Appeal), Rennes, upholding the judgment of the lower court, the Crespelle Centre appealed in cassation on the ground that the French system governing the operation of insemination centres was contrary to a number of provisions of the Treaty.

13 Not knowing how to interpret the relevant Community law, the Cour de Cassation referred the following questions to the Court for a preliminary ruling:

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

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

The first question

14 The national court's first question raises in substance two separate points. It asks first whether Articles 5, 86 and 90(1) of the Treaty must be interpreted as precluding a Member State from granting approved bovine insemination centres certain exclusive rights within a defined area. Secondly, it asks whether, in the event that breeders established in the area coming under the exclusive competence of an approved centre request the centre to supply semen from a production centre of their choice, those provisions prevent the centre from charging those breeders for the additional costs which that choice may entail.

The first part of the first question

15 So far as concerns the relevant provisions of the Treaty, Article 5 requires Member States to carry out their Community obligations in good faith. However, the Court has consistently held that that provision cannot be applied independently when the situation concerned is governed by a specific provision of the Treaty, as in the present case (see the judgment in Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847, paragraph 19). The question must therefore be considered in the light of Articles 90(1) and 86 of the Treaty.

16 Article 90(1) of the Treaty provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States may neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

17 In this case, by making the operation of the insemination centres subject to authorization and providing that each centre should have the exclusive right to serve a defined area, the national legislation granted those centres exclusive rights. By thus establishing, in favour of those undertakings, a contiguous series of monopolies territorially limited but together covering the entire territory of a Member State, those national provisions create a dominant position, within the meaning of Article 86 of the Treaty, in a substantial part of the common market.

18 The mere creation of such a dominant position by the granting of an exclusive right within the meaning of Article 90(1) is not as such incompatible with Article 86 of the Treaty. A Member State contravenes the prohibitions contained in those two provisions only if, in merely exercising the exclusive right granted to it, the undertaking in question cannot avoid abusing its dominant position (see the judgments in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 29, and, most recently, in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 17).

19 The alleged abuse in the present case consists in the charging of exorbitant prices by the insemination centres.

20 The question to be examined is therefore whether such a practice constituting the alleged abuse is the direct consequence of the national Law. It should be noted in this regard that the Law merely allows insemination centres to require breeders who request the centres to provide them with semen from other production centres to pay the additional costs entailed by that choice.

21 Although it leaves to the insemination centres the task of calculating those costs, such a provision does not lead the centres to charge disproportionate costs and thereby abuse their dominant position.

22 The answer to this part of the question must therefore be that Articles 90(1) and 86 of the Treaty do not preclude a Member State from granting to approved bovine insemination centres certain exclusive rights within a defined area.

The second part of the first question

23 The fifth paragraph of Article 5 of French Law No 66-1005 of 28 December 1966 on stock breeding provides that breeders within the area covered by an insemination centre may request that centre to supply them with semen from production centres of their choice and that the additional costs entailed by that choice must be borne by the users.

24 Article 86 of the Treaty precludes the centres in the independent exercise of their economic activity from abusing their dominant position.

25 As the Court has already held, an undertaking abuses its dominant position where it has an administrative monopoly and charges for its services fees which are disproportionate to the economic value of the service provided (see the judgments in Case 26/75 *General Motors* v *Commission* [1975] ECR 1367, paragraph 12, and Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263, paragraph 27).

26 Likewise, approved centres would be abusing their dominant position if they were to charge to users costs in excess of the additional costs actually incurred in obtaining and conserving until insemination semen imported at the request of a user from another Member State.

27 It follows that Article 86 of the Treaty must be interpreted as not precluding insemination centres which alone are authorized to operate within a defined area from charging additional costs to users who request them to supply semen from production centres in other Member States, provided that those costs were actually incurred by the insemination centres in meeting the requests of those users.

The second question

28 In order to reply to the national court's second question, which concerns the interpretation of Articles 30 and 36 of the Treaty and of Directives 77/504 and 87/328, it should be remembered that the Court has consistently held (see, first of all, the

judgment in Case 8/74 *Dassonville* [1974] ECR 837) that all 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.

29 Rules of a Member State which require private economic operators importing into its territory quantities of bovine semen from another Member State to store it, subject to a charge, in an authorized centre which enjoys an exclusive concession with regard to storage of the semen and insemination constitute such a barrier to imports. Since that requirement applies at the stage immediately following importation and imposes an economic burden on importers, it is liable to restrict the volume of imports.

30 Article 36 of the Treaty provides that the prohibition of restrictions on imports, exports and goods in transit is not to preclude measures of this nature if they are justified on grounds of the protection of health and life of humans and animals (see the judgment in Case 35/76 *Simmenthal* [1976] ECR 1871, paragraph 10).

31 However, the Court has consistently held that where, in application of Article 100 of the EEC Treaty, Community directives provide for the harmonization of the measures necessary to ensure *inter alia* the protection of animal and human health and establish Community procedures to check that they are observed, invoking Article 36 is no longer justified and the appropriate checks must be carried out and protective measures adopted within the framework outlined by the harmonizing directive (see the judgments in Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555, paragraph 15, Case 148/78 *Ratti* [1979] ECR 1629, paragraph 36, Case 251/78 *Denkavit* [1979] ECR 3369, paragraph 14, and Case 190/87 *Moormann* [1988] ECR 4689, paragraph 10).

32 The French Government, relying on that case-law, claims that its rules are justified by the need to improve bovine stock genetically and by considerations of health.

33 As regards the reasons relating to the genetic improvement of bovine stock, it should be borne in mind that Article 2(1) of Directive 87/328, which is designed to remove zootechnical obstacles to intra-Community trade in bovine semen, requires Member States to remove all barriers to entry into, or use within, their territory of bovine semen imported from other Member States in accordance with the conditions laid down in Article 4 of the directive (see paragraph 9 above). Secondly, Article 2 of Directive 91/174 provides that marketing of semen of pure-bred animals may not be prohibited, restricted or impeded on pedigree grounds. It follows from those provisions that zootechnical and pedigree requirements have been fully harmonized at Community level.

34 So far as health considerations are concerned, they are the subject of Directive 88/407, Article 1 of which provides that the directive is to apply to intra-Community trade in, and imports from third countries of, deep-frozen semen of domestic animals of the bovine species. Article 3 of the directive and Annex C, which lay down the general conditions applicable to intra-Community trade in bovine semen, mention only the collection and processing of semen in the Member State of dispatch and transport to the State of destination. Thus, no provision in the directive deals with the storage or use of semen in the State of destination.

35 It follows that health conditions in intra-Community trade in bovine semen have not yet been fully harmonized at Community level in relation to the State for which the semen is destined. Member States may therefore rely on health grounds in impeding the free movement of bovine semen, provided that the restrictions on intra-Community trade are in proportion to the aim in view.

36 In order to ascertain that the restrictive effects on intra-Community trade of the rules at issue do not exceed what is necessary to achieve the aim in view, it must be considered whether those effects are direct, indirect or purely speculative and whether those effects do not impede the marketing of imported products more than the marketing of national products (see the judgment in Case C-169/91 *B & Q* [1992] ECR I-6635, paragraph 15).

37 Article 2(3) of the French Decree of 24 January 1989 imposes an obligation requiring only imported semen to be stored in approved centres. However, according to the explanations provided by the French Government at the hearing and not contested by the other intervening parties, a similar obligation exists in relation to semen produced within France owing to the monopoly held by the insemination centres, since only those centres are authorized to produce and store semen in France.

38 So far as the practical effects of the obligation regarding the storage of semen are concerned, it cannot be ruled out that, even though this restriction applies without distinction to domestic and imported products, the latter may be placed at a disadvantage in relation to domestic production. Since in the present case the national legislation does not lay down provisions governing the conditions of storage and, in particular, the price to be paid by the importer to the approved centre, and since this price is generally fixed on a flat-rate basis, there are no provisions preventing the approved centres from applying unreasonable conditions for storage of semen imported by individuals.

39 The question whether the operation of the approved centres, so far as the conditions for storing semen are concerned, entails in practice discrimination against the imported product is one of fact which the national court must determine.

40 The answer to the second question must therefore be that Articles 30 and 36 of the Treaty, considered together, Article 2 of Council Directive 77/504/EEC of 25 July 1977 on pure-bred breeding animals of the bovine species and Article 4 of Council Directive 87/328/EEC of 18 June 1987 on the acceptance for breeding purposes of pure-bred breeding animals of the bovine species must be interpreted as not precluding national rules that require economic operators who import semen from a Member State of the Community to deliver it to an approved insemination or production centre.

Costs

41 The costs incurred by the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action 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 French Cour de Cassation by judgment of 15 June 1993, hereby rules:

1. Articles 90(1) and 86 of the EEC Treaty do not preclude a Member State from granting to approved bovine insemination centres certain exclusive rights within a defined area.

2. Article 86 of the Treaty must be interpreted as not precluding insemination centres which alone are authorized to operate within a defined area from charging additional costs to users who request them to supply semen from production centres in other Member States, provided that those costs were actually incurred by the insemination centres in meeting the requests of those users.

3. Articles 30 and 36 of the EEC Treaty, considered together, Article 2 of Council Directive 77/504/EEC of 25 July 1977 on pure-bred breeding animals of the bovine species and Article 4 of Council Directive 87/328/EEC of 18 June 1987 on the acceptance for breeding purposes of pure-bred breeding animals of the bovine species must be interpreted as not precluding national rules that require economic operators who import semen from a Member State of the Community to deliver it to an approved insemination or production centre.

Moitinho de Almeida Diez de Velasco Edward

Kakouris Schockweiler Grévisse

Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 5 October 1994.

R. Grass

Registrar

J. C. Moitinho de Almeida,

acting as President

President of the Third and Fifth Chambers