Re Criminal Proceedings against Ditlev Bluhme (Case C-67/97)

Before the Court of Justice of the European Communities (Fifth Chamber)

ECJ (5th Chamber)

(Presiding, Puissochet P.C.; Moitinho de Almeida, Gulmann, Sevón (Rapporteur) and Wathelet JJ.) Mr Nial Fennelly, Advocate General.

3 December 1998

Reference from Denmark by the Kriminalret I Frederikshavn (Criminal Court, Frederikshavn) under Article 177 E.C.

Environment--national law prohibiting introduction or keeping, on a certain island, of bees other than of a stated native subspecies--constituting a measure having an equivalent effect to a quantitative restriction on imports within Article 30 E.C.--nonetheless justifiable under Article 36 E.C. as protecting biodiversity--designation of special protection areas being an appropriate and proportionate means of achieving such a goal.

Article 2 of Directive 91/174 (laying down zootechnical and pedigree requirements for the marketing of pure-bred animals) required that the marketing of such animals and their reproductive material was not to be restricted on zootechnical or pedigree grounds but that, pending implementation of detailed rules pursuant to Article 6 of the Directive, national laws were to remain applicable subject to the general provisions of the E.C. Treaty. Article 6 provided for the adoption of detailed rules but no such rules had been adopted in relation to bees. Danish legislation prohibited the introduction or keeping of bees (or their reproductive material) on the island of Laeso other than of the subspecies *Apis mellifera mellifera* (the Laeso brown bee). Mr Bluhme was prosecuted before the Kriminalret I Frederikshavn for keeping bees other than the Laeso brown bee on the island and, in his defence, he argued that the Danish legislation in question infringed Article 30 E.C. The court referred questions to the Court of Justice as to the interpretation of Directive 91/174 and of Article 30 E.C.

Held:

(1) Directive 91/174.

Since no detailed rules had been adopted for applying the Directive in relation to bees, national law remained applicable, pursuant to *613 Article 2 of the

Directive, subject to the general provisions of the Treaty. The case was, therefore, to be examined in relation to Articles 30 and 36 E.C. [10]-[13]

(2) Articles 30 and 36 E.C.

(a) The Danish law amounted to a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 E.C. since it was capable of hindering intra-Community trade, directly or indirectly, actually or potentially in living bees and their reproductive material. It could not be regarded as being outside the scope of Article 30 E.C. on the grounds that it constituted only a regulation concerned with selling arrangements within the meaning of the judgment in Keck and Mithouard since, in fact, it concerned the intrinsic characteristics of the bees in question. [15]-[23]

Procureur du Roi v. Dassonville (8/74): [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436; Aragonesa de Publicidad and PublivÍa v. Departmento de Sanidad (C 1 & 176/90): [1991] E.C.R. I-4151; [1994] 1 C.M.L.R. 887; Ligur Carni and Others (C 277, 318 & 319/91): [1993] E.C.R. I-6621, followed. Keck and Mithouard (C 267 & 268/91): [1993] E.C.R. I-6097, distinguished; Vereinigte Familiapress Zeitungsverlags-und Vertriebs v. Heinrich Bauer Verlag (C-368/95): [1997] E.C.R. I-3689, followed.

(b) Measures to preserve an indigenous animal population with distinct characteristics contributed to the maintenance of biodiversity by ensuring the survival of the population concerned. Accordingly, they were aimed at protecting the life of those animals and as such were capable of being justified under Article 36 E.C. It was immaterial whether the object of protection was a separate species, a distinct strain within any given species, or merely a local colony, so long as the populations in question had characteristics distinguishing them from others and were therefore judged worthy of protection either against the risk of extinction or, even in the absence of such risk, on account of a scientific or other interest in preserving the pure population at the location concerned. The measure in question was appropriate and proportionate in relation to its objective and was accordingly justified under Article 36 E.C. This was because; (i) the threat of the disappearance of the Laeso brown bee in the event of mating with golden bees was undoubtedly genuine because of the recessive nature of the brown bees' genes; and (ii) because conservation of biodiversity by the establishment of special protection was a method recognised by Article 8a of the Rio Convention, and one which had already been adopted in Community law in the context of Directives 79/409 (on the conservation of wild birds) and 92/43 (on special conservation areas). [24]-[38]

Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon") (120/78): [1979] E.C.R. 649[1979] 3 C.M.L.R. 494 *614 ; E.C. Commission v. United Kingdom (124/81): [1983] E.C.R. 203; [1983] 2 C.M.L.R. 1, followed.

Representation

Uffe Baller, of the Århus Bar, for Mr Bluhme.

Peter Biering, Head of Division in the Ministry of Foreign Affairs, acting as Agent, and Jorgen Molde, Head of Division in the same Ministry, acting as Agent, for the

Danish Government.
Professor Umberto Leanza, head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, assisted by Francesca Quadri, Avvocato dello Stato, for the Italian Government.
Jan Bugge-Mahrt, Deputy Director General in the Ministry of Foreign Affairs, acting as Agent, for the Norwegian Government.
Hans Stovlboek, of the Legal Service of the E.C. Commission, acting as Agent, for the Commission.

Cases referred to in the judgment:
1. Procureur du Roi v. Dassonville (8/74), 11 July 1974: [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436.
2. Aragonesa de Publicidad and PublivÍa v. Departamento de Sanidad (C 1 & 176/90), 25 July 1991: [1991] E.C.R. I-4151; [1994] 1 C.M.L.R. 887.
3. Ligur Carni and Others (C 277, 318 & 319/91), 15 December 1993: [1993] E.C.R. I-6621.
4. Keck and Mithouard (C 267 & 268/91), 24 November 1993: [1993] E.C.R. I-6097.
5. Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag (C-368/95), 26 June 1997: [1997] E.C.R. I-3689.
6. Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein (120/78), 20 February 1979: [1979] E.C.R. 649; [1973] 3 C.M.L.R. 494
7. E.C. Commission v. United Kingdom (124/81), 8 February 1983: [1983] E.C.R. 203; [1983] 2 C.M.L.R. 1.

Further cases referred to by the Advocate General:
8. Van de Haar and Kaveka de Meern (177 & 178/82), 5 April 1984: [1984] E.C.R. 1797; [1985] 2 C.M.L.R. 57.
9. Oosthoek's Uitgeversmaatschappij (286/81), 15 December 1982: [1982] E.C.R. 4574; [1983] 3 C.M.L.R. 428.
10. Du Pont de Nemours Italiana (21/88), 20 March 1990: [1990] E.C.R. I-889; [1991] 3 C.M.L.R. 25.
11. Gebhard v. Consiglio Dell'Ordine degli Avvocati E Procuratori di Milano (C-55/94), 30 November 1995: [1995] E.C.R. I-4165; [1996] 1 C.M.L.R. 603.
12. Union Royale Belge des Societes de Football Association and Others v. Bosman and Others (C-415/93), 15 December 1995: [1995] E.C.R. I-4921; [1996] 1 C.M.L.R. 645.
13. Pistre, Barthes, Milhau and Oberti (C 321 & 324/94), 7 May 1997: [1997] E.C.R. I-2343; [1997] 2 C.M.L.R. 565.
14. Peralta (C-379/92), 14 July 1994: [1994] E.C.R. I-3453 *615 .
15. DIP and Others v. Comune di Bassano del Grappa and Comune di Chioggia (C 140-142/94), 17 October 1995: [1995] E.C.R. I-3257; [1996] 4 C.M.L.R. 157.
16. Blesgen v. Belgium (75/81), 31 March 1982: [1982] E.C.R. 1211; [1983] 1 C.M.L.R. 431.
17. Krantz v. Ontvanger der Directe Belastingen and the Netherlands (C-69/88),

7 March 1990: [1990] E.C.R. I-583.
18. CMC Motorradcenter v. Pelin Baskiciogullari (C-93/92), 13 October 1993: [1993] E.C.R. I-5009.
19. Leclerc-Siplec v. TF1 Publicite and M6 Publicite (C-412/93), 9 February 1995: [1995] E.C.R. I-179; [1995] 3 C.M.L.R. 422.
20. E.C. Commission v. Germany (178/84), 12 March 1987: [1987] E.C.R. 1227; [1998] 1 C.M.L.R. 780.
21. Denkavit Futtermittel v. Minister für Ernährung Landwirtschaft und Forsten des Landes Nordrheinwestfalen (251/78), 8 November 1979: [1979] E.C.R. 3369; [1980] 3 C.M.L.R. 513.
22. Procureur du Roi v Benoit and Gustave Dassonville (8/74), 11 July 1974: [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436.
23. R. v. Henn and Darby (34/79), 14 December 1979: [1979] E.C.R. 3795; [1980] 1 C.M.L.R. 246.
24. E.C. Commission v. Belgium (C-2/90), 9 July 1992: [1992] E.C.R. I-4431; [1993] 1 C.M.L.R. 365.
25. Procureur de la Republique v. Waterkeyn (314-316/81 & 83/82), 14 December 1982: [1982] E.C.R. 4337; [1983] 2 C.M.L.R. 145.
26. Ministere Public v. Mathot (98/86), 18 February 1987: [1987] E.C.R. 809.
27. Smanor (298/87), 14 July 1988: [1988] E.C.R. 4489.
28. Leur-Bloem v. Inspecteur der Belastingdienst (C-130/95), 17 July 1997: [1997] E.C.R. I-4291.
29. E.C. Commission v. Italy (C-3/88), 5 December 1989: [1989] E.C.R. 4035; [1991] 2 C.M.L.R. 115.
30. E.C. Commission v. Netherlands (C-353/89), 25 July 1991: [1991] E.C.R. I-4069.
31. E.C. Commission v. Italy (C-360/89), 3 June 1992: [1992] E.C.R. I- 3401.
32. E.C. Commission v. Ireland (113/80), 17 June 1981: [1981] E.C.R. 1625; [1982] 1 C.M.L.R. 706.
33. E.C. Commission v. Denmark (302/86), 20 September 1988: [1988] E.C.R. 4607.
34. Sandoz (174/82), 14 July 1983: [1983] E.C.R. 2445; [1984] 3 C.M.L.R. 43.

Opinion of Mr Advocate General Fennelly

1. This case concerns restrictions on the keeping of bees other than brown bees on the small and remote Danish island of Laeso, situated *616 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 [FN1] 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 Laeso (Bekendtgorelse om biavl på Laeso, 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 Laeso)". [FN2] 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. [FN3] All losses resulting from the destruction of a swarm pursuant to the Decision benefit from full compensation by the Danish State. [FN4] 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. [FN5] Failure to comply with the Decision is subject to a fine. [FN6]

FN1 Law No. 267 of 6 May 1993 on bee-keeping (*Lov om biavl*), now codified by Law No. 585 of 6 July 1995.

FN2 Article 1 of the Decision.

FN3 Article 2 of the Decision.

FN4 Article 7 of the Decision.

FN5 Article 6 of the Decision.

FN6 Article 9 of the Decision.

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 Laeso) 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. 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 laying down zootechnical and pedigree requirements for the marketing of pure-bred animals and amending Directives 77/504 and 90/425. [FN7] Article 1 of Directive 91/174 defines as a *617 "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".

FN7 [1991] O.J. L85/37.

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 E.C.
(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 Laeso 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 Laeso are a mixture of different bee strains;
(ii) submits that the brown bees to be found on Laeso 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 *618 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 laying down zootechnical and pedigree requirements for the marketing of pure-bred animals *et al*:
(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, Denmark, Italy and the Commission. 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. [FN8] 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 actual or potential, direct or indirect. [FN9] 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 on the conservation of natural habitats and of wild fauna and flora, [FN10] even though Laeso is a designated habitat, because the brown bee is not listed in the annexes and is, in any event, a domestic animal.

FN8 Council Directive 92/65 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, [1992] O.J. L268/54.

FN9 Joined Cases 177 & 178/82, Van de Haar and Kaveka de Meern: [1984] E.C.R. 1797; [1985] 2 C.M.L.R. 57 *619 , hereinafter "van de haar"; Case 286/81, Oosthoek's Uitgeversmaatschappij: [1982] E.C.R. 4575; [1983] 3 C.M.L.R. 428,

hereinafter "oosthoek's"; Case 21/88, Du Pont de Nemours Italiana: [1990] E.C.R. I-889; [1991] 3 C.M.L.R. 25.

FN10 [1992] O.J. L206/7.

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 Laeso, it can be found in large numbers in South Africa, Tasmania and South America. Furthermore, surveys of the brown bee population of Laeso 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 Laeso, 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 Laeso, 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 per cent of national territory, are entirely internal. [FN11] Denmark requests the Court not to follow its judgment in Pistre and Others [FN12] 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. [FN13] In the alternative, the effects of the Decision on intra-community trade are too indirect and uncertain, [FN14] as there is no evidence that imports of other subspecies would rise if the restrictions regarding bee-keeping in Laeso were lifted, and only a very small number of professional bee-keepers is affected. In any event, any non-discriminatory *620 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 and by the Council's decision to conclude the Rio Convention on biological diversity of 5 June 1992. [FN15] 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 Laeso 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 Laeso.

FN11 Oosthoek's, loc. cit.; Case C-55/94, Gebhard v. Consiglio Dell'Ordine degli Avvocati E Procuratori di Milano: [1995] E.C.R. I-4165; [1996] 1 C.M.L.R. 603; Case C-415/93, Bosman and Others; [1995] E.C.R. I-4921; [1996] 1 C.M.L.R. 645.

FN12 Joined Cases C 321 & 324/94: [1997] E.C.R. I-2343; [1997] 2 C.M.L.R. 565, Hereinafter "Pistre";.

FN13 Joined Cases C 267 & 268/91: [1993] E.C.R. I-6097.

FN14 Case C-379/92, Peralta; [1994] E.C.R. I-3453; Joined Cases C 140-142/94, DIP and Others v. Comune di Bassano del Grappa and Comune di Chioggia: [1995] E.C.R. I-3257; [1996] 4 C.M.L.R. 157, hereinafter "dip".

FN15 Council Decision concerning the conclusion of the Convention on Biological Diversity, [1993] O.J. L309/1. The Convention is referred to hereinafter as "the Rio Convention".

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 interbreeding is non-discriminatory and does not affect the general freedom to trade [FN16] except in an indirect and uncertain fashion. [FN17] 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 is consistent with Article 8 of the Rio Convention.

FN16 Case 75/81, Blesgen v. Belgium: [1982] E.C.R. 1211; [1983] 1 C.M.L.R. 431.

FN17 Peralta, loc. cit., and DIP, loc. cit.

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. [FN18] 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. [FN19] Furthermore, the application of **Article 30** does not depend upon the *621 degree to which trade is affected. [FN20] 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 Laeso is not a genetically distinct subspecies, it is for the Member States to determine the degree of protection of species, subspecies or subgroups. [FN21] In order to benefit from the application of **Article 36** of the Treaty, it is for a Member State to prove [FN22] 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 Laeso.

FN18 Du Pont de Nemours Italiana, loc. cit.; Cases C 1 & 176/90, Aragonesa de Publicidad Exterior et PublivÍa: [1991] E.C.R. I-4151; [1994] 1 C.M.L.R. 887, hereinafter "aragonesa"; Cases C 277, 318 & 319/91, Ligur Carni and Others: [1993] E.C.R. I-6621, hereinafter "ligur carni".

FN19 Peralta, loc. cit.; DIP, loc. cit.; Case C-69/88, Krantz: [1990] E.C.R. I-583; Case C-93/92, CMC Motorradcenter: [1993] E.C.R. I-5009.

FN20 Van de Haar, loc. cit.; Case C-412/93, Leclerc-Siplec v. TF1 Publicité and M6 Publicité;; [1995] E.C.R. I-179; [1995] 3 C.M.L.R. 422.

FN21 Case 178/84, E.C. Commission v. Germany: [1987] E.C.R. 1227; [1998] 1 C.M.L.R. 780.

FN22 Case 251/78, Denkavit Futtermittel v. Minister für Ernährung Landwirtschaft und Forsten: [1979] E.C.R. 3369; [1980] 3 C.M.L.R. 513, para. [24].

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", [FN23] 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.

FN23 Article 1 of Directive 91/174.

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 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.

*622 *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, [FN24] 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". [FN25] It has also been established by the case-law following "Cassis de Dijon" [FN26] 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. [FN27]

FN24 Case 8/74: [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436, para. [5].

FN25 Case 34/79, R. v. Henn and Darby: [1979] E.C.R. 3795; [1980] 1 C.M.L.R. 246, para. [12].

FN26 Case 120/78, Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein: [1979] E.C.R. 649; [1979] 3 C.M.L.R. 494, "cassis de dijon".

FN27 See, for example, Keck and Mithouard, loc. cit., para. [15].

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 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". [FN28] Thus, the fact that the Decision restricts the import and keeping of bees only in respect of the island of Laeso does not, in principle, prevent its examination in the *623 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.

FN28 Aragonesa, loc. cit., para. [24]; see also Ligur Carni, loc. cit., para. [37]. This is also implicit in the judgment in Case C-2/90, E.C. Commission v. Belgium: [1992] E.C.R. I-4431; [1993] 1 C.M.L.R. 365, hereinafter "walloon waste".

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". [FN29] **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". [FN30] 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.

FN29 *Loc. cit.,* para. [13], my emphasis.

FN30 *Ibid.*

19. It has also been argued, in the light of the decisions in Peralta and other cases, that "the 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". [FN31] 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 *624 such a case, the scale of the effect on intra-Community trade is, as already stated, irrelevant. [FN32]

FN31 Peralta, loc. cit., para. [24]; see also DIP, loc. cit., para. [29]; Krantz, loc. cit., para. [11]; CMC Motorradcenter, loc. cit., para. [12].

FN32 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., para. [24]; DIP, loc. cit., para. [29]; Krantz, loc. cit., para. [10]; CMC Motorradcenter, loc. cit., para. [10]. As will be seen below, it can be argued that the Decision is at least partially discriminatory.

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, [FN33] 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 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 Laeso. 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. [FN34] Such access is clearly blocked in the case of the Laeso market; no alternative means of marketing non-Laeso bees is permitted on the island.

[FN35]

FN33 Case 75/81, *loc. cit.,* para. [9].

FN34 *Loc. cit.,* para. [17].

FN35 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.,* para. [16]. See the discussion below of whether the Decision is discriminatory in character.

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 Laeso of bees from other parts of Denmark. [FN36] 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 Laeso bee-keeping *625 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. [FN37] 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". [FN38]

FN36 Oosthoek's, loc. cit., para. [9]; Joined Cases 314-316/81 & 83/82, Procureur de la République v. Waterkeyn: [1982] E.C.R. 4337; [1983] 2 C.M.L.R. 145, paras [11] and [12]; Case 98/86, Ministère Public v. Mathot: [1987] E.C.R. 809, para. [9].

FN37 Case 298/87, Smanor: [1988] E.C.R. 4489, paras [8] and [9].

FN38 Case C-130/95: [1997] E.C.R. I-4291. Jacobs A.G. 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., para. 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 Jacobs A.G. in Pistre, ibid., para. 35.

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 Laeso drawn from the Danish population--that of Laeso--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 States or other Contracting Parties to the EEA Agreement. It is immaterial, on this approach, that the Decision excludes from Laeso Danish golden bees, including those originally kept and bred on Laes o itself, as well as such Danish brown bees as may exist outside Laeso. 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". [FN39] "[T]he fact remains that all the products benefiting by the preferential system are domestic products ...". [FN40] "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 *626 placing only imported products at a disadvantage and not national products". [FN41]

FN39 Du Pont de Nemours Italiana, loc. cit., para. [12].

FN40 *Ibid.,* para. [13].

FN41 Aragonesa, loc. cit., para. [24]. See also Case C-3/88, E.C. Commission v. Italy: [1989] E.C.R. 4035; [1991] 2 C.M.L.R. 115, para. [9]; Case C-353/89, E.C. Commission v. Netherlands: [1991] E.C.R. I-4069, para. [25]; Case C-360/89, E.C. Commission v. Italy: [1992] E.C.R. I-3401, paras [8] and [9].

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. [FN42] 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, Laeso--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 Laeso irrespective of their origin,

including origin in Laeso itself. Although the Decision does not distinguish expressly between subspecies in prohibiting the introduction of all bees on Laeso 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 Laeso must be established on the basis of special characteristics of the Laeso 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 favouring one subspecies over the other need not, if they serve a legitimate public-interest objective related to that distinction, be regarded as discriminatory.

FN42 See Case 113/80, E.C. Commission v. Ireland: [1981] E.C.R. 1625; [1982] 1 C.M.L.R. 706; Du Pont de Nemours Italiana, loc. cit., para. [14]; Pistre, loc. cit., para. [52]; Aragonesa, loc. cit., para. [13]; Walloon Waste, loc. cit., para. [9].

24. A further argument can be drawn from the Court's judgment in Walloon Waste. [FN43] 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 *627 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 diferent places and to the connection of the waste with its place of production, the contested measures cannot be regarded as discriminatory. [FN44]

FN43 *Loc. cit.*

FN44 *ibid.,* paras [34] and [36].

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 interbreeding 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 interbreeding and to preserve local biological diversity. In the light of these

legislative objectives, it can be argued that there are relevant differences between the Laeso brown bee population and other populations of bees, both brown and golden. Acceptance of the existence of such material differences between Laeso brown bees and other bees excluded from Laeso 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 Laeso regardless of its origin. Such an exclusion would still, of course, constitute an indistinctly applicable restriction on trade in non-Laeso bees. Although it is uncertain whether the Laeso brown bee population is sufficiently distinctive to merit protection against interbreeding 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.
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. [FN45] The central question regarding the compatibility of the Decision with the *628 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 interbreeding 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 interbred group compete for territory and scarce resources. Nonetheless, 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 reinforced by the Community objective, under

Article 130r of the Treaty, of "prudent and rational utilisation of natural resources".

FN45 Aragonesa, loc. cit., para. [13].

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. [FN46] 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".

FN46 On the existence of this mandatory requirement, see, for example, Case 302/86, E.C. Commission v. Denmark: [1988] E.C.R. 4607; Walloon Waste, loc. cit.

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 *629 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 interbreeding which has already occurred on Laeso, the allegedly non-unique character of the brown bee of Laeso and the alleged absence of any danger of eradication of the brown bee worldwide.
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. [FN47] 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. [FN48]

FN47 Aragonesa, loc. cit., para. [16]; E.C. Commission v. Germany, loc. cit., para. [41]; Case 174/82, Sandoz: [1983] E.C.R. 2445; [1984] 3 C.M.L.R. 43, para. [16].

FN48 E.C. Commission v. Germany, loc. cit., paras [42] and [44].

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 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", [FN49] without reference to established taxonomic distinctions between species and subspecies, and refers simply to the "distinctive properties" developed by domesticated or cultivated species. [FN50] 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".

FN49 Article 2 of the Rio Convention.

FN50 See the definition of "*in situ* conditions" in Article 2 of the Rio Convention.

32. It is, therefore, permissible for the Danish authorities to seek to conserve the brown bee of Laeso even if it is not a distinct subspecies *630 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 Laeso *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 Laeso. 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", [FN51] 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 particular its recessive genes, as well as of whether there is a sufficient threat to the continued existence of a distinctive Laeso brown bee population to justify the Decision.

FN51 Preamble to the Rio Convention, my emphasis.

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 measure 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 Laeso still survives in a relatively pure state. If the brown *631 bee population of Laeso has already been substantially corrupted by interbreeding 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 Laeso 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 Laeso 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 bee-keepers with the efforts to exclude alien bees from the island is necessary if the objective of preventing interbreeding 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 *632 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.

JUDGMENT

[1] By order of 3 July 1995, received at the Court on 17 February 1997, the Kriminalret i Frederikshavn (Criminal Court, Frederikshavn) referred to the Court for a preliminary ruling under **Article 177** E.C. a number of questions on the interpretation of **Article 30** E.C. and Article 2 of Council Directive 91/174 laying down zootechnical and pedigree requirements for the marketing of purebred animals and amending Directives 77/504 and 90/425 (hereinafter "the Directive"). [FN52]

FN52 [1991] O.J. L85/37.

[2] The questions have been raised in criminal proceedings brought against Ditlev Bluhme for infringement of Danish legislation prohibiting the keeping on the island of Laeso of bees other than those of the subspecies *Apis mellifera mellifera* (Laeso brown bee).
[3] Article 1 of the Directive provides:
For the purposes of this Directive 'pure-bred animal' shall mean 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.
[4] Article 2 of the Directive provides:
Member States shall 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,
-- in order to ensure that the requirement provided for in the first indent is

satisfied, the criteria for approval and recognition of breeders' organisations or associations, the criteria for entry or registration in pedigree records or registers, the criteria for approval for reproduction of pure-bred animals and for the use of their semen, ova and embryos, and the certificate to be required for their marketing should be established in a non-discriminatory manner, with due regard for the principles laid down by the organisation or association which maintains the register or pedigree record of the breed in question.
Pending the implementation of detailed rules for application as provided for in Article 6, national laws shall remain applicable with due regard for the general provisions of the Treaty.
[5] Article 6 of the Directive provides that the detailed rules for application of the Directive are to be adopted in accordance with the so-called "committee" procedure. No such rules have been adopted in relation to bees.
[6] In Denmark, Article 14a of Law No. 115 of 31 March 1982 on beekeeping (*lov om biavl*), introduced by Law No. 267 of 6 May 1993, *633 authorises the Minister for Agriculture to enact provisions to protect certain species of bee in certain areas defined by him, and in particular provisions concerning the removal or destruction of swarms of bees regarded as undesirable for protection reasons. Article 1 of Decision No. 528 of 24 June 1993 on the keeping of bees on the island of Laeso (Bekendtgorelse om biavl på Laeso, hereinafter "the Decision"), which was adopted pursuant to that enabling provision, prohibits the keeping on Laeso and certain neighbouring islands of nectar-gathering bees other than those of the subspecies *Apis mellifera mellifera* (Laeso brown bee).
[7] The Decision also provides, in Article 2, for the removal or destruction of those other swarms or the replacement of their queen by one of the Laeso brown bee subspecies. Article 6 prohibits the introduction onto Laeso or neighbouring islands of living domestic bees, whatever their stage of development, or of reproductive material for domestic bees. Finally, Article 7 of the Decision provides for full State compensation in respect of any loss duly proved to have resulted from the destruction of a swarm pursuant to the Decision.
[8] Mr Bluhme, who is being prosecuted for keeping on Laeso bees other than those of the sub-species *Apis mellifera mellifera* (Laeso brown bee), in breach of the Decision, argues inter alia that **Article 30** of the Treaty precludes the national legislation.
[9] Taking the view that resolution of the dispute before it depended on the interpretation of Community law, the Kriminalret decided to stay the proceedings and to refer the following questions to the Court:
I. Concerning the interpretation of **Article 30** E.C.:
(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* (Laeso brown 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?
*634 In the criminal proceedings underlying this order for reference, the accused:
-- 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 Laeso are a mixture of different bee strains;
-- submits that the brown bees to be found on Laeso are not unique but are found in many parts of the world; and
-- 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 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 laying down zootechnical and pedigree requirements for the marketing of pure-bred animals and amending Directives 77/504 and 90/425:
(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 1 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.

Part II of the questions

[10] By its questions the national court is essentially asking the Court to give an interpretation of Article 1 and the first paragraph of Article 2 of the Directive.
[11] It should however be pointed out that, as the Danish Government and the Commission have rightly observed, no detailed rules for applying the Directive in relation to bees have been adopted under the procedure provided for by Article 6 of the Directive.
[12] Therefore, pursuant to the second paragraph of Article 2 of the Directive, national laws remain applicable, subject, however, to due regard for the general provisions of the Treaty.
[13] It is therefore in relation to **Articles 30** and **36** E.C. that legislation such as that at issue in the main proceedings must be examined.

Part I of the questions

[14] By its questions the national court is essentially asking whether national legislation prohibiting the keeping of any species of bee on an island such as Laeso other than the subspecies *Apis mellifera mellifera* (Laeso brown bee) constitutes a measure having equivalent effect to a quantitative restriction within the meaning of **Article 30** of the Treaty and whether, if that is the case, such legislation may be justified on the ground of the protection of the health and life of animals.

*635 *Existence of a measure having equivalent effect*

[15] Mr Bluhme and the Commission consider that a prohibition on the keeping on the island of Laeso of bees other than those belonging to the Laeso brown species involves a prohibition on importation, and thus constitutes a measure having equivalent effect contrary to **Article 30** of the Treaty. Mr Bluhme considers that the legislation at issue in the main proceedings effectively precludes the importation onto the island of Laeso of bees from Member States. The Commission adds in that respect that **Article 30** also applies to measures that concern only part of the territory of a Member State.
[16] The Danish, Italian and Norwegian Governments, on the other hand, maintain that the establishment of pure breeding areas for a given species in a delimited geographical area within a Member State does not affect trade between Member States. The Danish and Norwegian Governments further maintain that the prohibition on importing onto the island of Laeso bees other than Laeso brown bees does not constitute discrimination in respect of bees originating in other Member States, is not intended to regulate trade between Member States, and has effects on trade that are too hypothetical and uncertain to be regarded as a measure likely to obstruct it.
[17] The Danish Government also argues that, since the national legislation does not concern the access of bees as goods to the Danish market, but merely regulates the conditions under which bees may be kept within that Member State, it falls outside the scope of **Article 30** of the Treaty.
[18] On that point, the Court observes that its case-law has long established that

all measures capable of hindering intra-Community trade, whether directly or indirectly, actually or potentially, constitute measures having an effect equivalent to quantitative restrictions (Case 8/74, Procureur du Roi v. Dassonville [FN53]).

FN53 [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436, para. [5].

[19] In so far as Article 6 of the legislative measure at issue in the main proceedings involves a general prohibition on the importation onto Laeso and neighbouring islands of living bees and reproductive material for domestic bees, it also prohibits their importation from other Member States, so that it is capable of hindering intra-Community trade. It therefore constitutes a measure having an effect equivalent to a quantitative restriction.
[20] That conclusion is not altered by the fact that the measure in question applies to only part of the national territory (on this point, see Joined Cases C 1 & 176/90, Aragonesa de Publicidad and PublivÍa *636 nbspv. Departamento de Sanidad; [FN54] Joined Cases C 277, 318 & 319/91, Ligur Carni and Others [FN55]).

FN54 [1991] E.C.R. I-4151; [1994] 1 C.M.L.R. 887; para. [24].

FN55 [1993] E.C.R. I-6621, para. [37].

[21] Moreover, contrary to the Danish Government's argument that the prohibition on keeping certain bees on the island of Laeso must be regarded as a regulation on selling arrangements within the meaning of the judgment in Joined Cases C 267 & 268/91, Keck and Mithouard, [FN56] this Court finds, on the contrary, that the legislation in question concerns the intrinsic characteristics of the bees. In those circumstances, its application to the facts of the case cannot be a matter of a selling arrangement within the meaning of the judgment in Keck and Mithouard (Case C-368/95, Familiapress v. Heinrich Bauer Verlag [FN57]).

FN56 [1993] E.C.R. I-6097, para. [11].

FN57 [1997] E.C.R. I-3689.

[22] Finally, as the Advocate General points out at paragraph 19 of his Opinion, since the Decision prohibits the importation of bees from other Member States onto a part of Danish territory, it has a direct and immediate impact on trade, and not effects too uncertain and too indirect for the obligation which it lays down not to be capable of being regarded as being of such a kind as to hinder trade between Member States.
[23] It follows that a legislative measure prohibiting the keeping on an island such as Laeso of any species of bee other than the subspecies *Apis mellifera mellifera* (Laeso brown bee) constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of **Article 30** of the Treaty.

Justification for legislation such as that at issue in the main proceedings

[24] Mr Bluhme argues that the legislation in question cannot be justified on any ground, especially since, in his submission, there is no subspecies *Apis mellifera mellifera* (Laeso brown bee) that is genetically distinct and unique to the island of Laeso. Moreover, since such legislation does not fall within the scope of health policy, he submits that it cannot be justified under Council Directive 92/65 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. [FN58]

FN58 [1992] O.J. L268/54.

[25] The Danish Government considers that, should the Court regard the prohibition laid down by the Decision as a measure having an effect equivalent to a quantitative restriction, it is a measure applying to bees indiscriminately whatever their State of provenance which is justified by the aim of protecting biological diversity, such aim *637 being recognised, *inter alia*, by Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [FN59] and by the Convention on Biological Diversity signed at Rio de Janeiro on 5 June 1992, approved on behalf of the European Community by Council Decision 93/626 (hereinafter "the Rio Convention"). [FN60] The Danish Government goes on to explain that the subspecies *Apis mellifera mellifera* (Laeso brown bee) is disappearing and can be preserved only on the island of Laeso, so that the measure adopted is necessary to prevent the disappearance of the species and is proportionate to the aim pursued. Moreover, the Decision does not affect the possibility of carrying on bee-keeping on the island but merely regulates the species of bee which may be used.

FN59 [1992] O.J. L206/7.

FN60 [1993] O.J. L309/1.

[26] The Danish Government concludes by referring to numerous scientific studies establishing the particular nature of that subspecies of bee in relation to others.

[27] As its main argument, the Norwegian Government submits that the Danish legislation is justified on environmental protection grounds in accordance with **Article 30** of the Treaty and the judgment in Case 120/78, Rewe-Zentral v.Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon"). [FN61]

FN61 [1979] E.C.R. 649; [1979] 3 C.M.L.R. 494, para. [8].

[28] In the alternative, like the Italian Government and the Commission, it considers that the preservation of a rare and threatened species falls within the

protection of the health and life of animals referred to in **Article 36** of the Treaty.
[29] In the Norwegian Government's submission, the establishment of pure breeding areas is the only means of preserving the Laeso brown bee.
[30] The Commission maintains that the same ground of justification should be upheld if the species were not rare and threatened, but it was desirable on scientific grounds to breed a pure strain.
[31] On the question of the existence of a disappearing subspecies *Apis mellifera mellifera* (Laeso brown bee), the Commission considers that this is an evidential matter which is therefore one for the national court to determine. It maintains that the prohibition should not extend to the keeping of brown bees of the species *Apis mellifera mellifera* from other Member States or from non-member countries in the absence of a valid reason to justify such a restriction, and points out that such a prohibition must not constitute a means of arbitrary discrimination or be aimed at protecting certain occupational interests.
[32] The Italian Government states that there are several subspecies of *Apis mellifera mellifera*, identifiable as strains and within the latter as ecotypes, representing the result of a natural process of adaptation to environmental conditions and various territories.
[33] On this question, the Court considers that measures to preserve *638 an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population concerned. By so doing, they are aimed at protecting the life of those animals and are capable of being justified under **Article 36** of the Treaty.
[34] From the point of view of such conservation of biodiversity, it is immaterial whether the object of protection is a separate subspecies, a distinct strain within any given species or merely a local colony, so long as the populations in question have characteristics distinguishing them from others and are therefore judged worthy of protection either to shelter them from a risk of extinction that is more or less imminent, or, even in the absence of such risk, on account of a scientific or other interest in preserving the pure population at the location concerned.
[35] It does, however, have to be determined whether the national legislation was necessary and proportionate in relation to its aim of protection, or whether it would have been possible to achieve the same result by less stringent measures (Case 124/81, E.C. Commission v. United Kingdom [FN62]).

FN62 [1983] E.C.R. 203; [1983] 2 C.M.L.R. 1, para. [16].

[36] Conservation of biodiversity through the establishment of areas in which a population enjoys special protection, which is a method recognised in the Rio Convention, especially Article 8a thereof, is already put into practice in Community law [in particular, by means of the special protection areas provided for in Council Directive 79/409 on the conservation of wild birds, [FN63] or the special conservation areas provided for in Directive 92/43.

FN63 [1979] O.J. L103/1.

[37] As for the threat of the disappearance of the Laeso brown bee, it is undoubtedly genuine in the event of mating with golden bees by reason of the recessive nature of the genes of the brown bee. The establishment by the national legislation of a protection area within which the keeping of bees other than Laeso brown bees is prohibited, for the purpose of ensuring the survival of the latter, therefore constitutes an appropriate measure in relation to the aim pursued.
[38] The answer to be given must therfore be that a national legislative measure prohibiting the keeping on an island such as Laeso of any species of bee other than the subspecies *Apis mellifera mellifera* (Laeso brown bee) must be regarded as justified, under **Article 36** of the Treaty, on the ground of the protection of the health and life of animals.

Costs

[39] The costs incurred by the Danish, Italian and Norwegian Governments and by the Commission, 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 *639 proceedings pending before the national court, the decision on costs is a matter for that court.

Order

On those grounds, THE COURT (Fifth Chamber), in answer to the questions referred to it by the Kriminalret i Frederikshavn by order of 3 July 1995, HEREBY RULES:
1. A national legislative measure prohibiting the keeping on an island such as Laeso of any species of bee other than the subspecies *Apis mellifera mellifera* (Laeso brown bee) constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of **Article 30** E.C.
2. A national legislative measure prohibiting the keeping on an island such as Laeso of any species of bee other than the subspecies *Apis mellifera mellifera* (Laeso brown bee) must be regarded as justified, under **Article 36** of the Treaty, on the ground of the protection of the health and life of animals.

[1999] 1 C.M.L.R. 612

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