JUDGMENT OF THE COURT (Fourth Chamber)

17 July 2008 *

In Case C-389/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 27 October 2005,

Commission of the European Communities, represented by A. Bordes and E. Traversa, acting as Agents,

applicant,

v

French Republic, represented by G. de Bergues, A. Colomb and G. Le Bras, acting as Agents,

defendant,

* Language of the case: French.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, R. Silva de Lapuerta, E. Juhász (Rapporteur) and J. Malenovský, Judges,

Advocate General: P. Mengozzi,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 3 May 2007,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2008,

gives the following

Judgment

1 In its application the Commission of the European Communities seeks a declaration by the Court that, by allowing only bovine insemination centres authorised in France to carry out activities related to the artificial insemination of bovine animals, inter alia by establishing a general system of exclusive rights over a defined geographical area in favour of those centres and by making the activity of artificial insemination subject to the possession of an inseminator's licence, the French Republic has failed to fulfil its obligations under Articles 43 and 49 EC.

Legal context

Community legislation

2 Articles 43 EC and 49 EC concern, respectively, the freedom of establishment and the freedom to provide services.

3 Under 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), as amended by Council Directive 94/28/EC of 23 June 1994 (OJ 1994 L 178, p. 66; 'Directive 77/504'), the Member States shall ensure that intra-Community trade in the semen, ova and embryos of pure-bred breeding animals of the bovine species shall not be prohibited, restricted or impeded on zootechnical grounds.

4 Under Article 5 of Directive 77/504, Member States may require that pure-bred breeding animals of the bovine species and the semen or ova and embryos from such animals shall be accompanied, in intra-Community trade, by a pedigree certificate which complies with a specimen drawn up in accordance with the procedure laid down in Article 8 of that directive, particularly with regard to zootechnical performance.

5 The first, second, fourth and seventh recitals in the preamble to 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), state:

'Whereas Directive 77/504… was intended gradually to liberalise intra-Community trade in pure-bred breeding animals of the bovine species; whereas, for this purpose, additional harmonisation with regard to the acceptance of such animals and their semen for breeding purposes is necessary;

Whereas, in this respect, it is necessary to prevent national provisions relating to the acceptance for breeding purposes of pure-bred breeding animals of the bovine species and their semen from constituting a prohibition, restriction or impediment to intra-Community trade either in the case of natural service or artificial insemination;

…

Whereas artificial insemination constitutes an important technique for increasing the use of the best breeders and, hence, for improving the bovine species; whereas in so doing, however, any impairment of the pedigree must be avoided, particularly with regard to male breeders, which must possess all guarantees of their genetic value and of their freedom from hereditary defects;

…

Whereas the provision that semen must come from officially approved centres responsible for artificial insemination is capable of providing the guarantees necessary for attaining the desired end'.

6 By virtue of Article 2(1) of Directive 87/328, a Member State may not prohibit, restrict or impede the acceptance for artificial insemination within its territory of pure-bred bulls or the use of their semen when those bulls have been accepted for artificial

insemination in a Member State on the basis of tests carried out in accordance with Commission Decision 86/130/EEC of 11 March 1986 laying down performance monitoring methods and methods for assessing cattle's genetic value for pure-bred breeding animals of the bovine species (OJ 1986 L 101, p. 37).

7 The third to fifth recitals in the preamble to Council Directive 88/407/EEC of 14 June 1988 laying down the animal health requirements applicable to intra-Community trade in and imports of semen of domestic animals of the bovine species (OJ 1988 L 194, p. 10), as amended by Council Directive 2003/43/EC of 26 May 2003 (OJ 2003 L 143, p. 23; 'Directive 88/407') state:

'… [I]t is… necessary to create a harmonised system for intra-Community trade and imports into the Community of semen of bovine animals;

… in the context of intra-Community trade in semen, the Member State where the semen is collected should be under an obligation to ensure that such semen has been collected and processed at approved and supervised semen collection centres, has been obtained from animals whose health status is such as to ensure that the risk of spread of animal disease is eliminated, has been collected, processed, stored and transported in accordance with rules which preserve its health status and is accompanied during transport to the country of destination by an animal health certificate in order to ensure that this obligation has been fulfilled;

… the difference in the policies pursued within the Community with regard to vaccination against certain diseases justifies the maintenance of derogations, limited in time, authorising the requirement by the Member States, in respect of certain diseases, of additional protection against those diseases'.

8 The first paragraph of Article 1 of Directive 88/407 lays down the animal health conditions applicable to intra-Community trade in and imports from third countries

of semen of domestic animals of the bovine species. According to the second paragraph of that article, that directive does not affect Community and/or national zootechnical provisions governing the organisation of artificial insemination in general and the distribution of semen in particular.

9 Articles 3, 5 and 6 of Directive 88/407 are included in Chapter II thereof, entitled, 'Intra-Community trade'.

10 Article 3 of that Directive provides that each Member State must ensure that only semen meeting the general conditions laid down in that article is sent from its territory to the territory of another Member State. The semen must, inter alia, have been collected and processed and stored in collection or storage centres approved for the purpose with a view to artificial insemination and for the purposes of intra-Community trade.

11 Under Article 5(1) of Directive 88/407, the Member State on whose territory the semen collection or storage centre is situated is to ensure that the approval provided for in Article 3 of that directive is granted only where the provisions of Annex A on the conditions for the approval and of the supervision of centres are observed and where the semen collection or storage centre is able to satisfy the other provisions of that directive. Under Article 5(1), the Member State is also to ensure that the official veterinarian supervises the observance of those provisions and shall withdraw approval when one or more of the provisions is no longer observed.

12 Article 5(2) of Directive 88/407 provides, first, that all approved semen collection or storage centres must be registered, each centre being given a veterinary registration number. Each Member State must send a list of semen collection or storage centres and their veterinary registration numbers to the other Member States and to the Commission and must notify them of any withdrawal of approval.

13 By virtue of Article 6(1) of that directive, the Member States must make the admission of semen conditional upon submission of an animal health certificate drawn up by an official veterinarian of the Member State of collection in accordance with Annex D to that directive.

14 As provided in paragraph 3(a) of Annex C to Directive 88/407, semen for intra-Community trade must be stored in approved conditions for a minimum period of 30 days prior to dispatch. However, that requirement does not apply to fresh semen.

15 According to Article 2 of Council Directive 91/174/EEC of 25 March 1991 laying down zootechnical and pedigree requirements for the marketing of pure-bred animals and amending Directives 77/504 and 90/425/EEC (OJ 1991 L 85, p. 37), Member States must 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.

16 Article 18 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1), entitled 'Traceability', is worded as follows:

'1. The traceability of food, feed, food-producing animals, and any other substance intended to be, or expected to be, incorporated into a food or feed shall be established at all stages of production, processing and distribution.

2. Food and feed business operators shall be able to identify any person from whom they have been supplied with a food, a feed, a food-producing animal, or any substance intended to be, or expected to be, incorporated into a food or feed.

To this end, such operators shall have in place systems and procedures which allow for this information to be made available to the competent authorities on demand.

3. Food and feed business operators shall have in place systems and procedures to identify the other businesses to which their products have been supplied. This information shall be made available to the competent authorities on demand.

4. Food or feed which is placed on the market or is likely to be placed on the market in the Community shall be adequately labelled or identified to facilitate its traceability, through relevant documentation or information in accordance with the relevant requirements of more specific provisions.

…'.

National legislation

17 Under Article L. 653-5 of the Rural Code codifying, in accordance with Law No 98-565 of 8 July 1998 (JORF of 9 July 1998, p. 10458), the corresponding provisions of Law No 66-1005 of 28 December 1966 on livestock farming (JORF of 29 December 1966,

p. 11619), the operation of bovine artificial insemination centres in France is subject to ministerial authorisation.

18 Article R.* 653-103 of the Rural Code, a provision of secondary legislation implementing that code, codifying the corresponding provision of Decree No 69-258 of 22 March 1969 relating to artificial insemination (JORF of 23 March 1969, p. 2948), distinguishes the centres responsible for producing the semen from the centres carrying out its insemination, the same centre being allowed, none the less, to carry out both those types of activity. Under that article, production activities consist in maintaining a stock of male breeding animals, carrying out progeny-testing on those animals, and the collection, processing, conservation and sale of the semen, whereas the insemination activities consist in the insemination of females using the semen supplied by the production centres.

19 Under Article 1 of the Order of the Minister for Agriculture of 17 April 1969 on permits to operate artificial insemination centres (JORF of 30 April 1969, p. 4349), as amended by the Order of the Minister for Agriculture and Forests of 24 January 1989 (JORF of 31 January 1989, p. 1469; 'the Order of 1969'), authorisation to open and operate an artificial insemination centre may be accorded to natural or legal persons. That article provides that, for the purposes of issuing that authorisation, no distinction is made between French nationals and nationals of other Member States of the Community.

20 Article L. 653-7 of the Rural Code provides that each insemination centre is to serve an area which is defined by the measure authorising that centre, within which it alone is authorised to operate. However, breeders located within an insemination centre's area of activity may ask that centre to supply them with semen from production centres of their own choosing.

21 Under Article 10 of the Order of 1969, any economic operator other than an insemination centre which imports semen from another Member State of the Community is required to deliver that semen to a production centre or insemination centre of its own choosing. Under Article 7 of that order, the semen must be conserved in a store placed under the responsibility of a licensed centre manager. In the case of insemination centres, that may be the 'main' store or one of the 'secondary' stores distributed throughout the territory assigned to the insemination centre. Those secondary stores may also be located within an agricultural undertaking.

22 Article 6 of the Order of the Minister for Agriculture and Fishing of 27 December 2000 on the artificial insemination of bovine semen by breeders (JORF of 27 January 2001, p. 1477), provides, on health grounds, that semen from another authorised artificial insemination centre or from another Member State or imported directly from a non-Member State must transit via the artificial insemination centre's main store, which forwards it to the secondary store for which it is intended.

23 Under Articles L. 653-4 and R.* 653-102 of the Rural Code, the artificial insemination operation may only be carried out by licensed managers of artificial insemination centres or licensed inseminators, under the authority of authorised and territorially competent insemination centres and subject to the technical responsibility of the centre managers.

24 By virtue of Article 2 of the Order of the Minister for Agriculture and Forests of 21 November 1991 on the training of inseminators and centre managers and the award of the corresponding licenses (JORF of 6 December 1991, p. 15936), as amended by the Order of the Minister for Agriculture, Fisheries and Food of 30 May 1997 (JORF of 1 June 1997, p. 8791), an inseminator's licence is issued by the Prefect on submission of a certificate confirming that the person concerned is qualified for the post of inseminator for the species concerned, and a certificate from the director of the authorised and territorially competent insemination centre confirming that the applicant is subject to his authority when carrying out insemination. Under that same provision, for operators who are not artificial insemination centre employees,

in particular self-employed veterinary surgeons, that certificate is issued on the signing of an agreement between the managing director of the insemination centre and the person concerned, which must set out the technical, administrative and financial conditions in which that person will carry out insemination in accordance with the legislation in force.

Pre-litigation procedure

25 In response to a complaint referred to it, the Commission, on 3 April 2003, sent the French Republic a letter of formal notice drawing to its attention the incompatibility of the relevant national legislation with the provisions of Articles 43 EC and 49 EC.

26 After examining the observations submitted by the French Republic in its reply of 27 June 2003 to that letter of formal notice, the Commission, on 19 December 2003, sent that Member State a reasoned opinion in which it concluded that the national legislation at issue was incompatible with those articles of the Treaty articles.

27 Taking the view that the explanations given by the French Republic in its response of 17 March 2004 to that reasoned opinion were unsatisfactory, the Commission brought this action.

The action

The existence of obstacles to the freedom of establishment and the freedom to provide services

Arguments of the parties

28 The Commission alleges that the French Republic has infringed Articles 43 EC and 49 EC by hindering the exercise of the freedom of establishment and the freedom to provide services in the field of artificial insemination of bovine animals on account of, first, the exclusive rights over a defined geographical area conferred on authorised artificial insemination centres as regards carrying out the distribution and artificial insemination of semen and, secondly, the restrictive and discretionary conditions to which the issue of an inseminator's licence is subject.

29 First, as regards freedom of establishment, the Commission submits that conferring on authorised insemination centres only, for an unlimited period, the right to carry out, in a defined geographical area, the distribution and artificial insemination of semen prevents or renders extremely difficult the exercise of that freedom in France for the purpose of carrying on those activities. The Commission maintains, in the light of the judgment in Case C-19/92 *Kraus* [1993] ECR I-1663, that the French legislation, without being expressly discriminatory, nevertheless constitutes an obstacle to the right of establishment.

30 The Commission does not dispute the justification for the system for ascertaining ability established by the French legislation or even the fact that objective evidence of qualifications is legitimately required in order for a person to be authorised to carry out artificial insemination of bovine semen. However, it submits that the restriction

at issue is based on exclusive authorisations over defined geographical areas prohibiting the activity of any other service provider.

31 The Commission claims that it would be prepared to accept the reasons set out by the French Republic to justify the obstacle to the freedom of establishment if the national measures were to be restricted to requiring private operators to provide information and to undergo checks. Such measures could be regarded as legitimate, whereas the grant of the exclusive rights in question is unjustified and, in any event, disproportionate in relation to the objectives in the public interest relied upon.

32 In addition, the Commission submits that freedom of establishment is also hindered by the fact that veterinary surgeons cannot obtain an inseminator's licence to carry out the artificial insemination of semen in a self-employed capacity until they have concluded an agreement with the managing director of an artificial insemination centre.

33 Secondly, the Commission claims that the legislation at issue undermines the freedom to provide services, namely the freedom to provide distribution and insemination services.

34 According to the Commission, the restriction on the freedom to provide the distribution service consists in the obligation to store semen in authorised artificial insemination centres, which alone may deliver it to breeders. The distribution services are hampered by the prohibition of any action not authorised by the insemination centre, which enjoys an exclusive right of action. The Commission maintains that that obstacle to the provision of cross-border services may affect all the activities of the service providers. It claims that, even if a reason based on the protection of public health were relevant in the present case, the French rules go too far.

35 The Commission states that the obligation to store semen intended for intra-Community trade, imposed by Directive 88/407 on health grounds, concerns only

frozen semen and the stage prior to its dispatch from the place of production, whereas the objection against the French Republic concerns the storage requirement during the stage after that dispatch.

36 As regards the insemination service, the Commission submits that the freedom to provide that service is hindered because of the obligation on persons wishing to carry on that activity to sign a prior agreement with the managing director of an authorised insemination centre in order to obtain the required inseminator's licence. The Commission points out that the conclusion of those agreements is in fact left to the discretion and good will of the managing directors of the insemination centres, who refuse, however, to enter into such agreements with some independent inseminators.

37 The Commission does not dispute the legitimacy of an authorisation scheme for carrying out artificial insemination, but provided that it is only a means, for the inseminator, of demonstrating his abilities to the competent veterinary authority. By contrast, it does not accept that that authorisation should be granted only under an agreement with an authorised artificial insemination centre, a condition which has nothing to do with the inseminator's competence. The Commission adds that the Member State must take into account the knowledge and qualifications already acquired by the person concerned in another Member State (Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 15) and that the obligation, for self-employed veterinary surgeons, to sign an agreement with an insemination centre in order to be able to obtain an inseminator's licence, does not satisfy the criteria laid down by case-law relating to the justification of prior administrative authorisation schemes (Case C-205/99 *Analir* [2001] ECR I-1271, paragraphs 35 to 38).

38 The Commission invokes as a further obstacle the fact that service providers from other Member States wishing to distribute and inseminate semen are prevented from offering both those services together, because of the requirement to deposit the semen with the centres which alone may deliver it to breeders.

39 The French Republic contends, first of all, that the French legislation was fundamentally amended from 1 January 2007 and that, inter alia, the amended legislation provides for the abolition of exclusive rights over geographically defined areas. It points out, however, that that reform is not concerned with removing an alleged incompatibility of the legislation which is the subject of this action with Community law.

40 Concerning the legislation at issue, the French Republic does not dispute that that legislation constitutes an obstacle to the freedom of establishment. However, that restriction is not discriminatory, since it allows nationals from other Member States to open and operate an insemination centre in French territory, under the same conditions as those required so far as French nationals are concerned. In any event, according to that Member State, that legislation is justified by overriding interests relating to the public interest.

41 The French Republic submits that the aim of granting exclusive territorial rights is not to delimit a determined geographical area, but to collect information. It is therefore possible to amend the extent of the areas and approximately 30 transfers have been made since the entry into force of Law No 66-1005. That Member State submits that the authorisations granting exclusive rights for an unlimited duration to providers already in the area does not prevent new centres from being established.

42 As regards the distribution service, the French Republic accepts that the sale, in France, of semen originating from an operator located in another Member State may include not only frozen semen but also fresh semen. However, according to that Member State, such transactions concerning fresh semen, where they are not prohibited, are of no economic interest and are almost non-existent.

43 So far as the insemination service is concerned, the French Republic concedes that the insemination of semen can be carried out only by licensed managers of insemination centres or licensed inseminators. It adds that, in respect of operators who

are not official employees of such a centre, in particular self-employed veterinary surgeons, that licence is issued after the signature of an agreement between the managing director of the centre and those operators. That Member State observes, however, that that obligation on the independent operator does not amount to prohibiting the practice of insemination by a veterinary surgeon acting in a self-employed capacity. The French Republic claims that that agreement ensures the applicable rules are observed and guarantees that the centre manager will be properly informed of the nature and content of the services provided.

44 That Member State admits that, like veterinary surgeons, breeders must request a special temporary inseminator's licence for the purposes of the insemination of females from their own livestock population and that they must obtain an agreement from the territorially competent insemination centre. It adds that the breeders must prove their ability or professional experience of farming or, if they do not, must receive training in the insemination of the bovine species. That Member State concludes that any operator who has the qualifications or training required can apply for the licence necessary to carry out artificial insemination.

Findings of the Court

45 First of all, it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-168/03 *Commission* v *Spain* [2004] ECR I-8227, paragraph 24, and Case C-23/05 *Commission* v *Luxembourg* [2005] ECR I-9535, paragraph 9). Thus, the national legislative process after that period has ended cannot be included in the Court's examination.

46 Secondly, it must be observed that the Court has not yet ruled on the compatibility of the French legislation at issue with the Treaty provisions on freedom of establishment and freedom to provide services.

47 In the case giving rise to the judgment in Case 271/81 *Société coopérative d'amélioration de l'élevage et d'insémination artificielle du Béarn* [1983] ECR 2057, the national court dealt only with the question of whether insemination centres had a commercial character within the meaning of Article 37 of the EC Treaty (now, after amendment, Article 31 EC), holding that it was undeniable that those centres had monopolies. The exclusive rights of those centres were examined only from the point of view of the free movement of goods.

48 The case giving rise to the judgment in Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077 dealt with the compatibility of the French legislation with the Treaty provisions on the free movement of goods (Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC)) and with the rules on competition set out in that treaty (Articles 86 and 90(1) of the EC Treaty (now Articles 82 EC and 86(1) EC)) and not the compatibility of that legislation with freedom of establishment and the freedom to provide services.

49 As regards the case at the origin of the judgment in Case C-17/94 *Gervais and Others* [1995] ECR I-4353, the Court held that the provisions of the Treaty on freedom of establishment and the freedom to provide services do not apply to purely internal situations in a Member State (paragraphs 24, 28 and 39). It also examined the compatibility of the national legislation only with Directives 77/504 and 87/328 (paragraph 33).

50 In contrast to the cases mentioned above, these proceedings for failure to fulfil obligations raise the question whether the French rules, which confer on authorised centres the exclusive right to provide the service of artificial insemination of bovine animals in a determined territory and make the issue of an inseminator's licence subject to concluding an agreement with one of those centres, infringe Articles 43 EC and 49 EC.

51 First, so far as the restriction of the freedom of establishment is concerned, it must be stated at the outset that the French Republic accepts that the exclusive rights over defined geographical areas established to the benefit of insemination centres and the condition making the issue of an inseminator's licence subject to the conclusion of an agreement with the territorially competent insemination centre hamper that freedom, although it submits that those measures do not totally prevent operators from other Member States from carrying out in France the artificial insemination of bovine animals.

52 In this respect, it must be recalled that Article 43 EC requires the elimination of restrictions on the freedom of establishment and that it is settled case-law of the Court that all measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as restrictions within the meaning of that article (see Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11 and the case-law cited).

53 The exclusive rights over a geographical area conferred on authorised insemination centres restricting the overall number of operators permitted to open and manage such centres in French territory and the unlimited duration of those exclusive rights hamper the access of other operators, including those from other Member States, to the insemination market. The fact that the geographical areas covered by those exclusive rights can, as the French Republic claims, be adjusted or divided cannot affect that assessment.

54 In the absence of the possibility of acquiring rights over a determined geographical area, an operator who seeks to carry on an activity in the artificial insemination sector is required to conclude an agreement with the territorially competent insemination centre in order to obtain an inseminator's licence. Since the conclusion of such an agreement depends on the managing directors of authorised centres, that requirement is likely to prevent such an objective from being attained.

55 It must therefore be found that, as the Commission maintains, the national measures at issue, on account of their nature, render it difficult, if not impossible or, in any event, less attractive, to exercise freedom of establishment with a view to carrying on, in French territory, the distribution and insemination of bovine semen.

56 The fact that those measures are applicable without distinction to national operators and to those of other Member States does not preclude that finding, given that such national measures, even though applicable without discrimination on grounds of nationality, are liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of a fundamental freedom guaranteed by the Treaty (see, to that effect, *Kraus*, paragraph 32).

57 Secondly, concerning the freedom to provide services, it is settled case-law that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against service providers, but also the abolition of any restriction, even if it applies without distinction to national service providers and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where he lawfully provides similar services (Case C-433/04 *Commission* v *Belgium* [2006] ECR I-10653, paragraph 28, and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 55).

58 It is common ground that, under the French legislation, a cross-border service provider who wishes to distribute bovine semen or carry out insemination in French territory by virtue of the freedom to provide services, is obliged to store that semen in authorised artificial insemination centres, which alone are authorised to deliver semen to breeders, and to obtain an inseminator's licence in order to be able to act as an inseminator.

59 The French Republic disputes the arguments alleging that that legislation hampers the freedom to provide the service of distribution of bovine semen. On the other hand, it does not dispute the fact that it is an obstacle to the freedom to provide the service of the insemination of that product.

60 The Commission claims that, as regards the distribution service, and stating that its objection does not concern the obligation to store frozen semen before its dispatch in accordance with paragraph 3(a) of Annex C to Directive 88/407, the freedom to provide that service is affected, first, by the obligation to store semen in authorised artificial insemination centres which alone are authorised to deliver it to breeders and, secondly, by the prohibition of any intervention not authorised by the insemination centre enjoying an exclusive right of action.

61 Even if breeders may, as the French Republic contends, request the centre to which they are affiliated to order specific semen originating from a producer established in another Member State, the obligation to store the semen in that centre, after its dispatch, is likely to impede or render less attractive the provision of the distribution service by the producer.

62 The same is true of the prohibition on any insemination not authorised by the territorially competent insemination centre, since that prohibition, on account of the connection between distribution and insemination, is also likely to impede or render less attractive the provision of the semen distribution service.

63 As regards, specifically, the freedom to provide the service of semen insemination, the French Republic concedes that the national legislation constitutes an obstacle to the provision of that service.

64 Cross-border service providers wishing to carry out insemination in French territory in accordance with the freedom to provide services must obtain, in France, an inseminator's licence. The requirement to obtain that licence, regardless of the conditions under which it is issued, is a restriction on the freedom to provide services, since it is liable to impede or render less attractive the provision of the insemination service in France by operators established and already lawfully operating in other Member States (see, to that effect, Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 35, and Case C-134/05 *Commission* v *Italy* [2007] ECR I-6251, paragraph 23).

65 Moreover, after obtaining that licence, those operators may carry out the insemination of bovine semen only under the authority of a territorially competent insemination centre.

66 In those circumstances, it must be held that the French legislation, inasmuch as it grants authorised centres the exclusive right to provide the service of artificial insemination of bovine animals in a determined area and makes the activity of insemination subject to the issue of an inseminator's licence, constitutes a restriction on freedom of establishment and the freedom to provide services.

67 Such measures can be allowed only if they pursue a legitimate aim compatible with the Treaty and are justified by overriding reasons in the public interest, in so far as there is no harmonising measure of Community law providing for the necessary measures to protect those interests. Furthermore, it is settled case-law of the Court that those restrictive measures can be justified by those reasons only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures (see judgment of 14 December 2006 in Case C-257/05 *Commission* v *Austria,* paragraph 23 and the case-law cited).

The justification for the restriction on freedom of establishment and the freedom to provide services

The protection of bovine genetic stock

— Arguments of the parties

68 The French Republic submits that the legislation at issue is designed to improve bovine genetic stock, which the Court has already accepted in Case C-162/97 *Nilsson and Others* [1998] ECR I-7477 constitutes an overriding reason in the public interest. It adds that, while Directives 77/504 and 87/328 harmonised the conditions governing movement within the Community of pure-bred breeding animals of the bovine species and their semen, they did not, by contrast, harmonise the rules relating to the insemination of female animals of the bovine species.

69 That Member State, referring to the implementation in its territory of programmes of selection for progeny and stock conservation, points out that the exclusive rights over a defined geographical area conferred on the authorised insemination centres and the conditions governing the issue of an inseminator's licence are the only way of guaranteeing accurate and comprehensive genetic information on bovine animals, which is essential to the continued genetic improvement of the stock. The measures at issue are necessary in order to centralise within a single body in each exclusively defined area all the data on the inseminations carried out.

70 The Commission maintains that the objective of protecting bovine genetic stock, which falls within the context of zootechnical and pedigree requirements, has, as the Court recognised in paragraph 33 of *Centre d'insémination de la Crespelle*, been the subject of comprehensive harmonisation at Community level. In any event, it

submits, the lack of Community provisions does not in itself constitute a justification for such a restriction.

71 The Commission submits that improvement of the stock depends on the breeder and not the inseminator, whereas the act carried out by the inseminator which, at most, raises considerations relating to health, has no effect on either the quality or provenance of the semen inseminated.

72 The Commission adds that, for the purposes of guaranteeing the accurate collection of genetic information concerning bovine animals by centralising the data in one place, an obligation merely to send the necessary information to a centre collecting the genetic data would suffice.

— Findings of the Court

73 First, as is apparent from the provisions of Directives 77/504, 87/328 and 91/174, referred to in paragraphs 3 to 6 and 15 above and paragraph 33 of *Centre d'insémination de la Crespelle*, the pedigree conditions, so far as intra-Community trade in bovine semen from pure-bred animals is concerned, have been fully harmonised at Community level.

74 As recalled in paragraph 67 above, an overriding reason in the public interest cannot be relied upon where there is harmonisation at Community level providing for measures necessary to ensure that interest is protected (see, to that effect, *Commission* v *Austria*, paragraph 23).

75 Therefore, the aim of protecting the pure-bred bovine stock by national pedigree requirements cannot justify obstacles to intra-Community trade in semen from those bovine animals not laid down by the Community legislation harmonising the field concerned.

76 The second paragraph of Article 1 of Directive 88/407, which does not amend the content of Directives 77/504, 87/328 and 91/174 or conflict with the case-law cited in paragraph 73 above, does not cast doubt on that assessment. That provision, specifying that Directive 88/407 does not affect the Community and/or national zootechnical provisions governing the organisation of artificial insemination in general and the distribution of semen in particular, is aimed only at zootechnical measures, whereas the justification relied on by the French Republic is based solely on considerations of pedigree.

77 Secondly, in so far as the arguments relied on by the French Republic aim to vindicate the national system at issue in so far as it establishes restrictions on carrying out the insemination of bovine semen and issuing the inseminators' licences, it must be observed that the considerations set out by that Member State do not concern pedigree but, as the Commission points out, relate to the field of health.

78 In fact, the genetic aspect of an insemination does not depend on the action of the inseminator but on the characteristics of the female bovine animals and the semen inseminated.

79 Thirdly, even supposing that the Community harmonisation of intra-Community trade of semen from bovine animals other than pure-bred animals, carried out in Directive 88/407, is incomplete as regards the conditions on pedigree, an absence of

Community provisions, as the Commission has observed, cannot, in itself, justify a restriction.

80 The French Republic's claims that the national system at issue is intended to protect the genetic stock in so far as it allows the collecting of information relating to artificial inseminations completed in the territory of that Member State to be centralised, which is essential for the purposes of programmes of selection for progeny and stock conservation, do not demonstrate either the necessity or proportionality of the restrictions resulting from that system.

81 That centralised collecting of information, even if it is useful so far as bovine animals other than pure-bred animals are concerned, might have been accomplished using less restrictive measures than the grant to authorised centres of exclusive rights to carry out the semen insemination service in specific geographical areas. It would have been possible, in particular, to impose on operators carrying out the artificial insemination of semen the obligation to communicate to a body designated for that purpose the data relating to the inseminations carried out, thereby collecting the same data centrally without hindering the freedom of establishment and the freedom to provide services.

82 Therefore, the justification relied on by the French Republic relating to the protection of bovine genetic stock must be rejected.

The protection of public health

— Arguments of the parties

83 The French Republic maintains that the rules relating to the qualifications of operators carrying out insemination satisfy concerns about protection of animal and human health.

84 First of all, so far as animal health is concerned, it submits that the act of inseminating the semen must comply with health and safety rules in relation to both the handling of the semen and contact with the animal. Inseminators must possess the skills required to avoid physical harm to the animal which is being artificially inseminated. In addition, the very decision to carry out insemination may affect the health of the animal, in terms of its fertility in particular, as the latter may be compromised as a result of ill-judged crossbreeding.

85 Next, as regards protection of the health of the operators carrying out the semen insemination, the French Republic maintains that the grant of a licence attesting to the ability of the person concerned to carry out insemination is necessary, since the act of inseminating carries risks, both in terms of contact with a large animal and in terms of the use of liquid nitrogen, which can cause serious burns.

86 Lastly, as regards the protection of human health in terms of food safety, that Member State claims that the issue of a licence helps fulfil the requirement of product traceability. It maintains that, in accordance with Article 18 of Regulation No 178/2002, the traceability of food must be established at all stages of production, processing and distribution. It thus submits that the principle of traceability also applies to semen which, being a living biological product, underpins the process of livestock production and it adds that the insemination centres ensure the security of the trade in semen and carry out the documentary and physical checks and checks on the identity of that product.

87 The Commission submits that the act of insemination, even if it requires certain competences and precautions, does not involve any particular difficulty which might warrant such a serious obstacle to freedom of establishment and the freedom to provide services. The Commission submits that the health objectives relied upon can be satisfied adequately as long as the ability of the inseminator is proved, whether by a certificate of aptitude, evidence of veterinary training or indeed, for Community nationals, by a system of recognition. In any event, according to the Commission, the French provisions at issue must be held to be unjustified and disproportionate.

88 As regards the traceability of the semen, the Commission observes, referring to Directives 87/328 and 88/407, that Community harmonisation in the health and zootechnical fields is intended, inter alia, to ensure that concerns about health are met at all stages of the collection and transportation of sperm and its identification. It thus takes the view that giving responsibility to artificial insemination centres with exclusive territorial rights is not the appropriate means for the purpose of ensuring a high level of protection and that the legislation at issue cannot be founded on a systematic distrust of independent operators, in particular those from other Member States.

— Findings of the Court

89 As regards the objectives of the protection of animal health and the health of the operator practising the semen insemination, it is necessary to observe, as the Commission has, that those objectives invoked by the French Republic might be attained by less restrictive measures, inter alia by the requirement of appropriate evidence of aptitude.

90 A mechanism for the checking and recognition of veterinary qualifications or the requirement of a certificate of aptitude is capable of demonstrating whether the persons concerned possess the necessary knowledge and qualifications to safeguard those interests.

91 However, the system at issue is based on much more restrictive measures, namely the granting of exclusive rights over defined geographical areas to authorised insemination centres and making the issue of an inseminator's licence subject to the inseminator concluding an agreement with such a centre.

92 Admittedly, it is legitimate for a Member State, in order to verify an applicant's ability to carry out the tasks of an inseminator, to require a licence for the exercise of that

activity. However, in the present case, that licence is granted only if an agreement has been concluded between the applicant and an authorised artificial insemination centre.

93 As the Commission observes, in the case of an authorisation procedure for carrying out an activity, in its application of the national provisions the Member State concerned must take into account the knowledge and qualifications already acquired by the party concerned in another Member State (see, to that effect, *Vlassopoulou*, paragraph 15). In the context of this authorisation procedure, the examination of abilities and qualifications must be carried out by the national authorities in accordance with a procedure in conformity with the requirements of Community law concerning the effective protection of the fundamental rights conferred by the Treaty on Community subjects. Consequently, reasons must be given for a decision taken following that examination and it must be capable of being made the subject of judicial proceedings (see, to that effect, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 17, and *Vlassopoulou*, paragraph 22).

94 Moreover, a prior administrative authorisation scheme must be based on objective non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the national authorities'discretion, so that it is not used arbitrarily (see *Analir*, paragraph 38).

95 However, that agreement must be signed with an artificial insemination centre which is in potential competition on the insemination market with the same operator whose competence as an inseminator it is supposed to check. In addition, the conclusion of that agreement is left to the discretion of the managing directors of those centres, who are not required to sign it even if the candidate fulfils the objective non-discriminatory selection criteria known in advance.

96 Accordingly, the conclusion of the agreement is not an appropriate examination procedure, allowing the authorities of the host Member State to check solely and

objectively the abilities of inseminators from another Member State, and does not meet the criteria referred to in paragraphs 93 and 94 of this judgment.

97 Consequently, it must be held that the legislation at issue, even if it is appropriate for ensuring the protection of animal health and the health of the operator carrying out the insemination, goes beyond what is necessary to attain the objective pursued (see, to that effect, Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 37, and Case C-464/05 *Geurts and Vogten* [2007] ECR I-9325, paragraph 24).

98 As regards food safety and the traceability of semen, in contrast to what the French Republic submits, Article 18 of Regulation No 178/2002 cannot be interpreted to justify the restrictions stemming from the system at issue. That article concerns the field of food safety, the requirements of which relating to traceability can be met by a system providing that the semen insemination service is carried out by qualified and properly identified persons, without the application of restrictions such as those resulting from the system at issue.

99 Furthermore, that Member State has not in any way proved that granting exclusive rights over defined geographical areas to authorised centres and making the issue of an inseminator's licence subject to concluding an agreement with the managing director of such a centre are proportionate and necessary measures for the purposes of guaranteeing food safety and traceability. No evidence has been submitted to prove that the obligations imposed on inseminators as regards the quality and use of the semen and the checking of whether those obligations have been observed require the granting of those exclusive rights or the condition imposed for the issue of the licence.

100 In those circumstances, the justification relied on by the French Republic alleging the protection of public health cannot be accepted.

Town and country planning requirements

— Arguments of the parties

101 The French Republic submits that the rules at issue pursue a town and country planning objective and that the Court has already acknowledged that that constitutes an overriding requirement in the public interest (Case C-254/98 *TK Heimdienst* [2000] ECR I-151, paragraph 34). That Member State claims that that system has enabled it to conserve agricultural activity in the greater part of the French territory, most of which consists of areas sparsely populated with livestock or mountainous areas. It submits that preserving cattle breeds adapted to the climactic constraints and terrain has allowed livestock rearing to be maintained in regions threatened with depopulation on account of their climatic or geographical characteristics.

102 According to the Commission, the exclusive rights over a determined geographical area granted to authorised insemination centres cannot be justified, in the absence of statistical data, by the contention that, without those exclusive rights, a large part of the French territory might be deprived of insemination services. In any event, the Commission submits that the preservation of breeds adapted to the climatic constraints or constraints imposed by the terrain would not be affected by the removal of the obstacles at issue.

— Findings of the Court

103 As the Commission states, the French Republic's contentions are not substantiated by any statistical information or data. That Member State has not fully established that the exclusive rights over defined geographical areas granted to those authorised centres were necessary to ensure that the insemination service was offered throughout French territory.

104 In addition, that justification could not be relied upon so far as the areas of French territory which do not have the unfavourable characteristics described by that Member State are concerned.

105 Consequently, as the Advocate General observed in point 83 of his Opinion, without it being necessary to consider whether planning requirements are in theory capable of justifying restrictions on freedom of establishment and the freedom to provide services, it has not been established that such requirements exist in this case and that they are such as to render those exclusive rights over determined geographical areas necessary.

106 In those circumstances, the justification relied upon by the French Republic concerning planning requirements must also be rejected.

107 It follows that, in the absence of any proper justification for the restrictions at issue, the Commission's action must be held to be well founded.

108 Therefore, in the light of the foregoing considerations it must be held that, by allowing only authorised artificial insemination centres, with exclusive rights over determined geographical areas, and persons holding an inseminator's licence, the issue of which is subject to the conclusion of an agreement with one of those centres, to provide the service of artificial insemination of bovine animals, the French Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC.

Costs

109 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked that the French Republic be ordered to pay the costs and the latter has been unsuccessful, the French Republic must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that, by allowing only authorised artificial insemination centres, with exclusive rights over determined geographical areas, and persons holding an inseminator's licence, the issue of which is subject to the conclusion of an agreement with one of those centres, to provide the service of artificial insemination of bovine animals, the French Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC.**

2. **Orders the French Republic to pay the costs.**

[Signatures]