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EUROPEAN PARLIAMENT

# Working Documents

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15 May 1981

DOCUMENT 1-184/81

## Report

drawn up on behalf of the Committee on the Rules of Procedure and Petitions

**on the ~~petition~~ No 41/79 concerning the incompatibility of French  
Artificial Insemination Monopoly with the Treaty of Rome**

**Rapporteur: Mr G.B. PATTERSON**

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By letter of 16 January 1980 the President of the European Parliament, in accordance with Rule 48 (3) of the Rules of Procedure, referred petition no. 41/79 introduced by representatives of nine artificial insemination companies to the Committee on the Rules of Procedure and Petitions.

At its meeting of 18 March 1980 the Committee, in accordance with Rule 48 (3), declared this petition admissible, appointed Mr Patterson as rapporteur and decided to request the opinion of the Legal Affairs Committee.

At its meeting of 3 December 1980 the Committee discussed the opinion of the Legal Affairs Committee, and at its meeting of 16 February 1981 the committee decided to draw up a report on this petition in accordance with Rule 48 (4) of the Rules of Procedure.

The draft report was discussed by the committee at its meeting of 23 April 1981 and adopted by 7 votes to 0 with 1 abstention.

The committee decided to request that the present report be taken on the agenda of Parliament without debate in accordance with Rule 34 of the revised Rules of Procedure.

Present: Mr Nyborg, chairman; Mr Malangré, vice-chairman; Mr Patterson, rapporteur; Mr Chambeiron, Mr Frangos (deputizing for Mr Vandemeulebroucke), Mr van Minnen (deputizing for Mrs Kouwe-Vlam), Mr Prout (deputizing for Mr Turner) and Mr Verroken.

The opinion of the Legal Affairs Committee is attached.

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A

The Committee on the Rules of Procedure and Petitions hereby submits to the European Parliament the following motion for a resolution, together with explanatory statement:

MOTION FOR A RESOLUTION

on petition no. 41/79 concerning the incompatibility of French Artificial Insemination Monopoly with the Treaty of Rome

The European Parliament,

- having regard to Petition No. 41/79,
- having regard to the report of the Committee on the Rules of Procedure and Petitions and the opinion of the Legal Affairs Committee (Doc. 1-184/81),
- 1. Supports the Commission view that there are two distinguishable aspects of artificial insemination - the distribution of goods (i.e. the semen) and the provision of the service of insemination;
- 2. Urges the Commission to proceed with the action it has instituted against the French Government under Article 169 for an alleged infringement of Article 37 with all possible speed;
- 3. Believes that the Commission should investigate further several aspects of the French monopoly system acting under Articles 85 & 86;
- 4. Believes that the delay of two months beyond the deadline by the French Government in replying to the letter sent by the Commission is unacceptable;
- 5. Requests the Commission to make available the Commission's letter and the French reply to the Committee on the Rules of Procedure and Petitions (while maintaining the need for confidentiality) and regrets that the Commission has not cooperated on this point so far;
- 6. Endorses the opinion of the Legal Affairs Committee that the Commission should draw up proposals to resolve the problems relating to the doctrine of "acte claire";

7. Calls on the Commission to report back to the competent committee on further actions concerning this question;
8. Believes that, while the petitioners have a genuine grievance - as evidenced by the Commission action against the French Government - many of their actions have clearly been contrary to French law and affirms that redress should be sought entirely through legal and constitutional means;
9. Requests the Commission to investigate whether similar circumstances exist in other Member States;
10. Instructs its President to forward this resolution together with the report to the Commission.

EXPLANATORY STATEMENTI Introduction

1. The background to this petition which concerns artificial insemination monopoly in France is outlined in paragraphs 1 - 3 of the opinion of the Legal Affairs Committee annexed to this report (see p. 19). The petitioners make two allegations:

- a) that the French Artificial Insemination Monopoly contravenes Article 37 of the EEC Treaty; and
- b) that the French courts have been flouting Article 177 of the EEC Treaty by not referring the matter for a ruling by the Court of Justice.

The petitioners make reference only to these two Articles. As the Legal Affairs Committee notes, however, an examination of the matter indicates that other Articles may apply: for example, Articles 59 - 62 (on services), or Article 86 (abuse of dominant position). A short description of the French system of local artificial insemination monopolies will be found in paragraphs 4 and 6 of the Legal Affairs Committee opinion, and supplementary information is given below.

2. The opinion of the Legal Affairs Committee was adopted at its meeting 27 - 28 October 1980. However, recently a number of developments have taken place which affect the matter raised by the petitioners and which at that time could not be taken fully into account by the Legal Affairs Committee. Thus, the Commission went some way towards meeting the case raised by the petitions when, by letter of 25 September 1980, it instituted action against the French Government under Article 169 of the EEC Treaty.

Meanwhile, an increasing number of cases, in some instances involving the petitioners themselves, have been working their way through the French courts.

Both these developments have now reached a critical stage, and it is for this reason that the Committee on the Rules of Procedure and Petitions has decided to present a report on the matter.

## II THE FRENCH SYSTEM

### Legal Framework

3. The legal framework governing artificial insemination set up in 1946 did not establish a monopoly but laid down requirements for a licence to be issued for the supply of semen for use outside the breeder's own herd.

The law on livestock breeding of 20th December 1966 (Article 5) did establish a system of local monopolies, so that artificial insemination can only be carried out under the direction or control of centres authorised by the French Ministry of Agriculture. It should be noted that this monopoly does not apply to breeders wishing to inseminate artificially their own herds: that is permitted under the system.

4. Two categories of activity can be distinguished: those relating to the production of semen and those connected with the act of insemination itself. The difference in function has been reinforced by the existence of two different types of centre. Within each geographical zone one insemination centre is granted exclusive rights to operate by the French Ministry of Agriculture. Normally, the insemination centres have contracts with given production centres which provide a regular supply of semen. They can, however, obtain supplies from other centres on behalf of breeders within their zone by individual orders. There may be a supplementary charge involved in individual orders to cover extra testing costs etc. which the Commission consider to be justifiable in most cases.

5. The importation of bulls' semen from other Community Member States is subject to the issue of an import licence, which must be accompanied by the following documents:

- a pro forma invoice indicating the quantities of straws ordered;
- a genealogical certificate of the bull;
- official results of control tests on the bull;
- certificates showing the results of tests taken in an agreed laboratory in the country of origin.

When the merchandise is presented at the frontier the following documents have to be produced:

- commercial invoice;
- import licence;
- health certificates.

Authorisation to import is only given to recognised centres of production or to an approved intermediary organisation, acting on behalf of one of these centres.



6. UNCEIA (National Union for Breeding and Artificial Insemination Cooperatives), to which all officially recognised centres belong, accounts for virtually all the semen imported from abroad. In practice, a breeder wanting to use semen of a foreign bull from outside France applies to his local centre which will import the semen for him through UNCEIA. The French authorities advance this practice as reason why artificial insemination should be regarded as a unified act. They argue that to give anyone the right to import semen would in effect give them the means to break French regulations.

7. "La guerre de l'insemination"

There have been skirmishes between the French authorities and certain private insemination centres even since the introduction of the present system in 1966. In recent years, the efforts of both the authorities and the monopolies themselves to close down these private centres have been particularly vigorous.

8. In 1973 police raided a private insemination centre at Lavoux in the Vienne, owned by M. Delage, one of the petitioners. The intention was to confiscate semen and equipment from the centre. The police, however, met with resistance from local farmers, who for nearly three weeks sustained a seige. Tear gas was used. Eventually the Préfet withdrew the police. Later, the farmers went on the offensive and themselves attacked the local monopoly.

9. Another raid took place on 3rd April 1980 against Montbéliarde-Sélection in the Jura, a centre owned by another of the petitioners, M. Richème. The following is an account of what took place:

"On Thursday morning, April 3rd at 8 o'clock, three hundred riot police with an armoured car and a lorry equipped with a crane surrounded the artificial insemination centre and confiscated everything except the bulls. They carried away with them the microscopes and all the containers of semen. The laboratory which was installed in a van was loaded onto a lorry and confiscated. A helicopter was wheeling overhead while the riot policemen were at work."

It subsequently emerged that the raid had not been in accordance with a regulation requiring the owner to be informed of any such action. In this case, no warning had been given of the impending confiscation. It was carried out under powers conferred to the Préfet of the Jura under the law of 1966 establishing the insemination monopoly.

10. The strength of feeling on the issue can run high also in other ways. On the 16th February this year, some 1,500 farmers demonstrated in Mayenne in support of Mr Jean Audras, the principal signatory of the petition.

#### Court Cases

11. Those involved in private insemination centres outside the monopoly system have increasingly found themselves the subject of legal action. The actions have been of several kinds:

- a) Actions for damages brought by local monopolies. The monopolies have claimed that private centres have carried out the service of insemination, whereas they are only permitted to produce semen. There is evidence of a determined effort in recent years by the monopolies to remove the threat of competition from the private centres. On the other hand, the courts have not always been convinced of the case for damages: for example, the court in Laval, on 18th September 1980, awarded the local monopoly damages of only 1 French Franc (though the monopoly has appealed).
- b) Actions by the French authorities. The French authorities have also been taking determined steps to ensure that the monopoly law of 1966 is observed. At the same court in Laval on the same day, 18 local inseminators were fined 1,000 French Francs (though the public prosecutor has likewise appealed against the leniency of the fine). Moreover, these same inseminators were later summoned to Paris on 18th February, where they faced the prospect of losing their licences to practise insemination.
- c) Cases arising from the smuggling of semen. In February 1981 for example, Mr Delage was fined 95,000 French Francs for failing to declare straws of semen which he was importing into France from another Community country. There can be little doubt that Mr Delage was knowingly in contravention of the law. On the other hand, it should be noted that when semen being imported into France has been declared, this has resulted in confiscation. This case, however, is not yet concluded, since the authorities have called for an additional report on the matter which should be available in May.

III ISSUES RAISED BY THE COMMISSION ACTION AGAINST THE FRENCH  
INSEMINATION SYSTEM

12. The Commission has examined the French regulations governing the importation of semen outlined above and concluded that the right to import - if confined, as at present, to authorised centres - could constitute an infringement of Article 37 of the EEC Treaty and of Article 2 of the Council Directive no 77/504/EEC. This Directive states that Member States should not restrict or impede, on zootechnical grounds, "intra-Community trade in the semen and embryos of pure bred breeding animals of the bovine species". The Commission has instituted an action against the French government under Article 169 of the EEC Treaty alleging infringement of these Articles.

13. Applicability of Article 37 of the EEC Treaty

There is some dispute about whether artificial insemination involves just the provision of services or whether it also involves the distribution of goods. The French government has maintained that the provision of semen and the service of artificial insemination are indivisible. This stems from a ruling by the Conseil d'Etat that artificial insemination constitutes the provision of services (case 155/73 30.5.74) and thus falls outside the scope of Article 37, which the European Court of Justice has held to apply only to goods. (Thus, if the French view is accepted, the importation of semen would be subject to Articles 59-66, not to the Chapter covering the distribution of goods, Articles 9 to 37.)

14. The Commission view is that there are two distinguishable aspects of artificial insemination: the distribution of goods, i.e. the semen, and the provision of the services of artificial insemination. This distinction is the basis for the Commission action against the French government for infringement of Article 37. Semen is, according to Annex II of the Treaty (05.15) an agricultural good ("animal products not elsewhere specified or included"). Therefore, it is logical to count the importation and distribution of semen as subject to Articles 9 - 37 covering the free movement of goods, and the act of insemination itself as a service, which in turn is covered by Articles 59 - 66.

15. The view of the Commission, in the opinion of the Committee, is correct. The Committee considers that Article 37 should be held to be applicable to the following areas, relating to importation:

- i. importation procedure
- ii. pricing policy of the monopolies
- iii. quality control
- iv. abuses of procedure.

All these should be considered and resolved in the light of the Commission action.

#### Importation Procedure

16. The present procedure for importation is outlined above (paras 5 and 6). The Commission considers that a strict application of Article 37 requires the liberalisation of importation beyond the authorised centres. As well as being able to request the local cooperative to place a special order for semen to be imported, if the action under Article 169 prevails, alternative procedures would have to be permitted. The Commission has indicated that the following would be acceptable: each breeder would be allowed to import semen himself and then take it to the local artificial insemination centre; alternatively, he would be able to place the order direct with centres in other Community Member States and arrange for the semen to be imported direct to the local monopoly.

17. One of the allegations against the local monopolies is that they refuse to carry out artificial insemination with semen purchased abroad by the breeder. In the Commission's view, any such refusal (after the action is resolved) would constitute a breach of Article 37 and also possibly provide further evidence of contraventions of Article 86 of the EEC Treaty.

#### Pricing policy

18. The pricing policy followed by the local cooperatives is the second aspect which requires clarification. Normally, any special order placed by the cooperative entails an extra charge, the justification being that additional administrative, research and testing costs are incurred by the monopoly. Where orders from other centres within France are concerned this may well be a legitimate levy. But, where imported semen is involved this practice runs into several difficulties. Any levy or tax placed exclusively on imported semen is discriminatory and thus contrary to Article 37 of the Treaty. It could also be in contravention of Articles 85 and 86.

19. The major problem lies in determining the cost of the service of insemination itself. Normally, the centre charges an inclusive price covering research and testing costs. But what justification is there for imposing a surcharge on imported semen which has already undergone testing in the country of origin? Also, is it legitimate to levy a surcharge on such semen to contribute towards research costs within France?

20. One point is clear, if the authorised centres are found by the Commission to be charging for the service of artificial insemination in a discriminatory way, i.e. imposing a surcharge for inseminating with imported semen, then the Commission should consider further action under Articles 37 and 85 and 86.

#### Quality Control

21. Some of the questions posed above can partly be answered by consideration of the quality control function enjoyed by the local cooperatives. If the quality control tests carried out in the Member State of origin are "equivalent" to the tests required in France, then they should provide an acceptable proof of the quality of the semen. If, however, the French authorities were to rule that testing was only valid if carried out in France, then the Commission view is that this would constitute discrimination - unless the French could show that the tests carried out were significantly different.

22. There are, of course, problems of definition here. Who is to deem whether a test is "equivalent"? What degree of difference is necessary for the tests to be adjudged "significantly different"? In this connection, it should be noted that pending before the Council is a Commission proposal acting as a follow up to Council Directive No. 77/504/EEC, which aims further to free intra-Community trade in "the semen and embryos of pure bred animals of the bovine species". If adopted, this directive would lay down mutually acceptable standards.

#### Abuses in procedure

23. The Commission is currently studying the Lancien-Lebras case. The importers, Mme. Lancien and M. Lebras, applied to UNCEIA to import, through their local monopoly, 1915 straws of semen of a particular bull in July 1977. They waited nine months before receiving a reduced quantity of only 930 straws. They allege that UNCEIA was responsible for the delay and for the reduction in the order.

Here there is a clear link between the issues at stake in the current Commission action for infringement of Article 37 and possible contraventions of Articles 85 and 86 - relating to competition and abuse of dominant position. The Commission clearly has a responsibility to establish the facts in the Lancien-Lebras case and this should be done without necessarily waiting for the outcome of the current action against the French government.

24. A further case alleging difficulties caused by the local monopoly in the importation of semen has recently been reported from near Angers. This bears investigation by the Commission. A group of twenty farmers wished to import semen from a bull in Germany. They accordingly applied to the local monopoly cooperative to be told that importation would involve a delay of some four months. There was also the possibility of a higher price being charged for the insemination itself than if the monopoly's own suppliers had been used.

IV

REFERRAL UNDER ARTICLE 177 OF THE EEC TREATY

25. Article 177 of the EEC Treaty deals with the referral by national courts for an interpretation by the Community Court of Justice of the Treaty itself, or of acts and statutes flowing from it.

Any court or tribunal of a Member State, "if it considers that a decision on the question is necessary to enable it to give judgment", has the option to ask the Court of Justice for a ruling.

However, "where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, the court or tribunal shall bring the matter before the Court of Justice".

26 There is, then, no obligation on the lower courts which have been hearing the cases outlined above to make referral to the Court of Justice. On the other hand, there is such an obligation on the Cour de Cassation (in civil cases) or on the Conseil d'Etat (in administrative cases).

In the judgments of the Cour de Cassation to which the petitioners refer, however, there has been no referral for an interpretation. The French courts have interpreted Article 177

to mean that referral is only obligatory if the question of Community law is such as to prevent them giving a judgment: i.e. if the law is not clear. This is the doctrine of "acte claire" to which the opinion of the Legal Affairs Committee refers.

27. It is no part of the duties of the Rules Committee itself to provide an interpretation of Article 177. The Legal Affairs Committee is already engaged upon an "own initiative" report on "the responsibility of the Court of Justice in the Communities for the uniform application of Community law in Member States" and states in its opinion that it will bear the petition in mind in the work on the report.

The Rules Committee, however, can strongly endorse the opinion of the Legal Affairs Committee that the Commission should make proposals to resolve the problems relating to the doctrine of "acte claire".

28. In the particular matter raised by the petitioners, however, the developments of the last year have introduced an important special factor.

Whereas it can be argued that no issue of Community law arose prior to 25 September last year, the fact that the Commission then took action under Article 169 regarding a possible breach of Article 37 must surely give rise to doubt on the matter.

No case has so far reached the Cour de Cassation since September last year, but could well do so in the coming months.

In addition, new actions have begun in lower courts since September. In January of this year, for example, the local monopoly took action in Boulogne against a private inseminator. The case came to court on February 11, but no reference for interpretation to the Community Court of Justice was made.

#### V. OTHER ISSUES

##### Applicability of Articles 85 and 86 of the EEC Treaty

29. The French monopoly covers only the act of insemination (mise en place) rather than the supply of semen itself. The Legal Affairs Committee points out that the existence of a monopoly is not contrary to the Treaty in itself; but that the behaviour of a monopoly might be.

Articles 85 and 86 are relevant in this context; the Commission has considered the possibility of an action under Article 86 (abuse of dominant position). The Committee understands that further consideration of a second action has been suspended until the action under Article 37 has been resolved. There are several aspects of the operation of the monopoly which the Commission has investigated relating to the application of Article 37 (see above paras 13 to 24). The Committee believes that further investigation into these issues should be undertaken by the Commission when any changes effected by the current action have been implemented and evaluated.

30. A monopoly with the role of ensuring quality control is maintained may well prove acceptable and legal under the Treaty: some method of quality control is essential, and each Member State in practice retains some form of central control for this purpose. The geographical nature of the French system, however, cannot be justified under this heading, and demands further investigation by the Commission.

The question of the nature of the monopoly is concerned not only with the avowed function of the monopoly, but with the actual effect its operation has on the market. Further investigation is needed by the Commission to ensure that the monopoly of service is not de facto a monopoly of supply and thus a distortion of competition (Art. 85). Two aspects are particularly relevant: the effect on a) supply and b) intra-Community trade.

31. If, in matters relating to an alleged breach of Article 85 or 86 of the Treaty, the facts are put in issue by an enterprise after the Commission has initiated an action and sent a statement of objections, then the Commission procedures entitle that enterprise to make a written defence, and, if they wish, in their defence to request an oral hearing (Article 7(1), Regulation 99/63 of the Commission). In addition to the undertaking which sought a hearing being invited to the hearing, the competent authority of each Member State for the purpose of Regulation 17/62 of the Council would be invited to delegate a representative to attend the hearing. The Commission is also, pursuant to Article 7(2) of Regulation 99/63 entitled to afford to any other person the opportunity of orally expressing his views, and this would mean that if the Commission felt their presence would be helpful, one way or another, the complainants could be invited to attend and participate in the proceeding.

Although such evidence as might be given at the hearing is unsworn there are certain safeguards designed to ensure that wrong or misleading evidence is not presented. The Commission then proceeds to consider all