JUDGMENT OF THE COURT

13 December 2001 *

In Case C-1/00,

Commission of the European Communities, represented by D. Booss and G. Berscheid, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by J.E. Collins, acting as Agent, D. Anderson QC and M. Hoskins, Barrister, with an address for service in Luxembourg,

intervener,

* Language of the case: French.

French Republic, represented initially by K. Rispal-Bellanger and J.-F. Dobelle, subsequently by R. Loosli-Surrans and J.-F. Dobelle, and then by R. Loosli-Surrans and G. de Bergues, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by refusing to adopt the measures necessary in order to comply with:

— Council Decision 98/256/EC of 16 March 1998 concerning emergency measures to protect against bovine spongiform encephalopathy, amending Decision 94/474/EC and repealing Decision 96/239/EC (OJ 1998 L 113, p. 32), in the version resulting from Commission Decision 98/692/EC of 25 November 1998 (OJ 1998 L 328, p. 28), in particular with Article 6 and Annex III, and

— Commission Decision 1999/514/EC of 23 July 1999 setting the date on which dispatch from the United Kingdom of bovine products under the date-based export scheme may commence by virtue of Article 6(5) of Decision 98/256 (OJ 1999 L 195, p. 42), in particular with Article 1,

in particular, by refusing to permit the marketing in its territory of products eligible under that scheme, which are covered by Article 6 of, and Annex III to, Decision 98/256 as amended by Decision 98/692, after 1 August 1999, the French Republic has failed to fulfil its obligations under those two decisions, in particular their provisions referred to above, and the EC Treaty, in particular Articles 28 EC and 10 EC,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric, S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, L. Sevón (Rapporteur), M. Wathelet, R. Schintgen and V. Skouris, Judges,

Advocate General: J. Mischo,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 19 June 2001, at which the Commission was represented by D. Booss and G. Berscheid, the French Republic by R. Loosli-Surrans and F. Alabrune, acting as Agent, and the United Kingdom by J.E. Collins, D. Anderson and M. Hoskins,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 January 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by refusing to adopt the measures necessary in order to comply with:

— Council Decision 98/256/EC of 16 March 1998 concerning emergency measures to protect against bovine spongiform encephalopathy, amending Decision 94/474/EC and repealing Decision 96/239/EC (OJ 1998 L 113, p. 32), in the version resulting from Commission Decision 98/692/EC of 25 November 1998 (OJ 1998 L 328, p. 28, hereinafter 'Decision 98/256 as amended'), in particular with Article 6 and Annex III, and

— Commission Decision 1999/514/EC of 23 July 1999 setting the date on which dispatch from the United Kingdom of bovine products under the date-based export scheme may commence by virtue of Article 6(5) of Decision 98/256 (OJ 1999 L 195, p. 42), in particular with Article 1,

in particular, by refusing to permit the marketing in its territory of products eligible under that scheme, which are covered by Article 6 of Decision 98/256 as

amended and Annex III thereto, after 1 August 1999, the French Republic has failed to fulfil its obligations under those two decisions, in particular their provisions referred to above, and the EC Treaty, in particular Articles 28 EC and 10 EC.

2 By order of the President of the Court of 13 June 2000, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Commission.

Community legislation

3 Following the discovery of a probable link between a variant of Creutzfeldt-Jakob disease, a disease affecting human beings, and bovine spongiform encephalopathy (hereinafter 'BSE') which was widespread in the United Kingdom at the time, the Commission adopted Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy (OJ 1996 L 78, p. 47, hereinafter the 'ban decision'), prohibiting the United Kingdom from exporting from its territory to the other Member States and third countries, in particular, live bovine animals, meat of bovine animals and products obtained from bovine animals.

4 The ban decision was based on: (i) the Treaty; (ii) Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra -Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29), as last amended by Council Directive 92/118/EEC of 17 December 1992 laying down animal health and public health requirements governing trade in and imports into the Community of products not subject to the said requirements laid down in specific Community rules referred to in Annex A (I) to Directive 89/662/EEC and, as regards pathogens, to Directive 90/425 (OJ 1993 L 62, p. 49) (hereinafter

'Directive 90/425'), in particular Article 10(4) thereof; and (iii) Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13), as last amended by Directive 92/118 (hereinafter 'Directive 89/662'), in particular Article 9 thereof.

5 The ban decision provided, in Article 3, that the United Kingdom was to send to the Commission every two weeks a report on the application of the protective measures taken against BSE, in accordance with Community and national provisions.

6 Under Article 4 of the ban decision, the United Kingdom was invited to present further proposals to control BSE in its territory.

7 The seventh recital in the preamble to the ban decision stated that the decision would have to be reviewed once all the elements mentioned in it had been examined.

8 On 16 March 1998 the Council adopted Decision 98/256, by which it lifted the ban for certain meat and meat products from bovine animals slaughtered in Northern Ireland, subject to the strict conditions of a scheme based on the certification of herds (the Export Certified Herds Scheme, hereinafter 'the ECHS').

9 The resumption of exports under that scheme was authorised by Commission Decision 98/351/EC of 29 May 1998 setting the date on which dispatch from

Northern Ireland of bovine products under the Export Certified Herds Scheme may commence by virtue of Article 6(5) of Decision 98/256 (OJ 1998 L 157, p. 110).

10 Under Decision 98/692, the principle of authorising the dispatch of bovine products under a Date-Based Export Scheme (hereinafter 'the DBES') was adopted by amendment of Article 6 of Decision 98/256.

11 The DBES is set out in Annex III to Decision 98/256, which was inserted in that decision by Decision 98/692.

12 Point 3 of Annex III to Decision 98/256 as amended defines animals eligible under the DBES as follows:

'A bovine animal is DBES-eligible if it has been born and reared in the United Kingdom and at the time of slaughter the following conditions are shown to have been met:

(a) the animal has been clearly identifiable throughout its life, enabling it to be traced back to the dam and herd of origin; its unique eartag number, date and holding of birth and all movements after birth are recorded either in the

animal's official passport or on an official computerised identification and tracing system; the identity of its dam is known;

(b) the animal is more than six months but less than 30 months of age, determined by reference to an official computer record of its date of birth, and in the case of animals from Great Britain, the animal's official passport;

(c) the competent authority has obtained and verified positive official evidence that the dam of the animal has lived for at least six months after the birth of the eligible animal;

(d) the dam of the animal has not developed BSE and is not suspected of having contracted BSE.'

13 Point 4 of Annex III states:

'If any animal presented for slaughter or any circumstance surrounding its slaughter does not meet all of the requirements of this Decision, the animal must be automatically rejected. If that information becomes available after slaughter, the competent authority must immediately cease issuing certificates, and cancel issued certificates. If dispatch has already taken place, the competent authority must notify the competent authority of the place of destination. The competent authority of the place of destination must take the appropriate measures.'

14 Point 5 of Annex III requires the slaughter of eligible animals to be carried out in specialised slaughterhouses not handling ineligible animals, and point 7 provides that traceability must be absolutely guaranteed:

'Meat must be traceable back to the DBES-eligible animal, or after cutting, to the animals cut in the same batch, by means of an official tracing system until the time of slaughter. After slaughter, labels must be capable of tracing fresh meat and products referred to in Article 6(1)(b) and (c) back to the eligible animal to enable the consignment concerned to be recalled. Food for domestic carnivores must be traceable by means of accompanying documents and records.'

15 The 13th recital in the preamble to Decision 98/692 states in this connection:

'Animals presented for slaughter under the ECHS or the DBES must meet all of the relevant conditions laid down in this Decision;... if it [is] discovered after slaughter of an animal under one of those schemes that it should have been considered ineligible, the competent authority must take the necessary measures to prevent the dispatch of products from that animal;... if any product from an animal subsequently found to be ineligible has been dispatched, the measures laid down in Article 9 of Directive 89/662/EEC must be applied.'

16 Article 6(5) of Decision 98/256 as amended states that the Commission, after having verified the application of all the provisions of that decision on the basis of Community inspections and after having informed the Member States, is to set the date on which dispatch of the products referred to in Annex III to the decision may commence.

17 Pursuant to that provision, Decision 1999/514 set that date as 1 August 1999.

Facts and procedure

18 In French law, the prohibition on the import of beef and veal from the United Kingdom results from the order of 28 October 1998 establishing specific measures applicable to certain products of bovine origin dispatched from the United Kingdom (JORF of 2 December 1998, p. 18169, hereinafter 'the order of 28 October 1998'). That order was amended by an order of 11 October 1999 (JORF of 12 October 1999, p. 15220) in order to permit the transit of beef and veal originating from the United Kingdom.

19 On 10 September 1999 the Commission wrote a letter to the French Republic in which it expressed its surprise at the referral to the Agence française de sécurité sanitaire des aliments (French Food Safety Agency, hereinafter 'the AFSSA') in connection with the implementation, in French law, of Decisions 98/256 as amended and 1999/514. The Commission urged the French Republic to comply rapidly with those decisions, so that the Commission would not be compelled to resort to the procedure laid down in Article 226 EC.

20 By letter of 1 October 1999, the French Republic forwarded to the Commission the opinion issued by the AFSSA on 30 September 1999 and requested that the opinion and the data on which it was based be examined by the Scientific Steering Committee (hereinafter 'the SSC'), set up by Commission Decision 97/404/EC of 10 June 1997 (OJ 1997 L 169, p. 85).

21 According to that opinion, recent scientific advances and the factual context still raised questions with regard to the safety of products subject to the DBES. In the opinion, the experts claimed in particular that the risk of cattle being infected with BSE could come from a third route, and not only from the two routes already known about, namely feed and maternal transmission. Given the incubation period for the disease, there were no scientific data enabling the validity of the eligibility criteria for animals under the DBES to be established. Only diagnostic tools helped to control the risk. Furthermore, according to the experts, the reliability of the programme set up depended on the reliability of the system for identification and tracing of animals although, under the legislation in force, traceability of certain products was not guaranteed.

22 The Commission forwarded that opinion to the SSC, requesting answers to the following questions:

(1) Do the opinions and documentation provided by the French authorities contain scientific information, epidemiological data or other evidence which has not been taken into account by the SSC?

(2) If that documentation contained new information, data or evidence, or if the SSC had any such new information at its disposal, would that necessitate a re-examination of any of the four SSC opinions directly relating to the scientific justification for the DBES?

(3) In the light of the answers to the above question, does the SSC confirm or not its position that the conditions of the DBES, if appropriately complied with, are satisfactory with regard to the safety of meat or meat products?

23 Those questions were examined first by the group specialising in transmissible spongiform encephalopathies, the TSE/BSE ad hoc group. At its meetings of 14 and 25 October 1999, the group considered the AFSSA opinion and did not reach unanimous conclusions with regard to the questions put to it by the Commission.

24 At its meetings of 28 and 29 October 1999, the SSC also examined that opinion and the questions from the Commission. It pointed out that new data were continually becoming available and were examined by it and by the TSE/BSE ad hoc group at their monthly meetings. It noted that the value of rapid diagnostic tests was not new, but that the newly-developed tests had not yet been evaluated. That evaluation would be complex but should be accorded priority. Having examined the epidemiological data relating to BSE in the United Kingdom up to mid-October 1999, it found that the incidence of the disease was continuing to decline and that there was therefore no reason to suppose that there was a new route of infection. It concluded that there were no grounds for re-examining its conclusions relating to the justification for the DBES. It stressed that its risk assessment was dependent on the action taken by the Commission and the Member States to ensure that the proposed measures for preventing or limiting the risk were meticulously complied with. It pointed out that the assurance provided by the United Kingdom DBES was very dependent on maintaining the prohibition of the use of feed made from meat-and-bone meal, on the 30-month rule and on clear evidence that the risk through maternal transmission was reduced to a minimum. In conclusion, it took the view that the measures adopted by the United Kingdom made the risk to human health from the United Kingdom DBES at least comparable to that in the other Member States.

25 Since the French Republic did not lift its ban, various meetings were held on 2, 5, 12 and 15 November 1999 between representatives of the French and United Kingdom authorities and of the Commission.

26 On 17 November 1999 the Commission sent the French Republic a letter of formal notice under Article 226 EC. In that letter the Commission stated in

particular that, by refusing to allow United Kingdom beef conforming to Community requirements to be marketed in its territory after 1 August 1999, the French Republic had failed to fulfil its obligations under Community law. In the letter, the Commission requested the French Government to submit its observations to it within 15 days and reserved the right, after examining them, to deliver a reasoned opinion under Article 226 EC.

27 On 24 November 1999 the French and United Kingdom authorities and the Commission drew up a protocol of understanding (hereinafter 'the protocol of understanding'). According to that protocol, the French authorities were satisfied with the clarifications provided by the United Kingdom authorities and the Commission with regard to traceability of products in the United Kingdom and on-the-spot controls in that Member State. The protocol of understanding envisages implementation of a disease surveillance project on cohort animals from cattle farms where an animal born after 1 January 1996 has contracted BSE and the carrying out of new post mortem diagnostic tests.

28 With regard to traceability of products outside the United Kingdom, point 5 of the protocol of understanding states:

'DBES meat directly dispatched to France could be subject to a specific identification laid down in the framework of the French legislation, allowing for a transparent traceability in a way which, if necessary, would allow for a recall as quickly as possible.

The existing Community legislation already provides for traceability but not in a very transparent or rapid manner. An improvement of the system to cover, in particular, "triangular" trade is ensured through an interpretative declaration of the Commission and, if appropriate, through an agreement based on the "mutual assistance between Member States".'

29 Annex II to the protocol of understanding contains the Commission's interpretative declaration, worded as follows:

'The Commission declares that, in accordance with its obligations as regards traceability and recall, and following Decision 98/256/EC as amended by Decision 98/692/EC, each Member State, in order to guarantee the effectiveness of this measure based on the precautionary principle, shall take binding measures with a view to maintaining maximum traceability by ensuring that all meat and all products dispatched from the United Kingdom in accordance with Annex II and III of that Decision:

— are marked or labelled upon their arrival on its territory with a distinct mark which cannot be confused with the Community health mark;

— remain marked or labelled as above where the meat or products are cut, transformed or rewrapped on its territory.

Each Member State is invited to notify to the Commission and the other Member States the model of the distinct mark which has been chosen. In the light of the experience gained, the Commission will endeavour to clarify and complete if needed the existing Community legislation, for instance based on the system of mutual assistance and/or by adopting a decision based on Article 6(1)(f) of Directive 64/433/EEC and/or Article 17 of Directive 77/99/EEC and/or Article 7(5) of Directive 94/65.

Furthermore the Commission confirms that where traceability cannot be established, a Member State is in a position to refuse, in conformity with Community law and, in particular, with Article 7 of Directive 89/662/EEC, meat or products containing such meat which do not clearly comply with this obligation.

This declaration will be addressed to all the Member States.'

30 By letter of 1 December 1999, the French Government requested a one-week extension for replying to the letter of formal notice, in order to enable it to submit the protocol of understanding to the AFSSA.

31 The AFSSA gave its opinion on 6 December 1999. Paragraph 2 of that opinion states:

'Pending scientific or epidemiological evidence positively enabling the premisses upon which the DBES is based to be confirmed or invalidated, the additional clarifications and measures relating to checks, traceability and labelling may effectively contribute, should the French authorities decide to lift the ban, to better control of those of the risks that might be the result of imperfect implementation of the DBES, or to being better placed to be able to act upon new information, in particular any warning signs.'

32 Paragraph 4 of the opinion is worded as follows:

'Any decision must take into account:

— the elements of risk, which are plausible but not currently quantifiable, linked to the absence of certainty, first, as to the distribution of BSE infectivity in the body of bovine animals over time and, secondly, as to all the modes of transmission of the infectious agent in animals;

— the fact that steps to strengthen controls and monitor the machinery, such as to ensure that the measures adopted are actually complied with, do not, however, have any direct and immediate impact on those elements of risk;

— the need to provide that the measures taken may be reversed in order to stop immediately any exposure of consumers to a risk which is confirmed subsequently.'

33 On 8 December 1999 the French Prime Minister's press office issued a press release announcing that 'France is not currently able to lift the ban on British beef and veal'. After noting the AFSSA's conclusions, the press release states that French Republic is unable to lift the ban 'in the absence of adequate guarantees on the following points:

— the establishment and implementation of programmes of tests, which must be improved and widened. For this purpose, it appears necessary for the Commission to organise meetings between scientific experts, in particular United Kingdom and French experts;

— the adoption of Community legislation which would provide a basis for ensuring traceability and compulsory labelling in Europe of United Kingdom beef and veal and derived products'.

34 By letter of 9 December 1999, the French Government replied to the Commission's letter of formal notice. Its letter essentially reproduces the text of the press release of 8 December 1999.

35 On 14 December 1999 the Commission sent a reasoned opinion to the French Republic referring to the press release of 8 December 1999 and calling on it to adopt, within five working days, the measures necessary in order for it to comply with its Community obligations.

36 That reasoned opinion was replaced by a second one, of 16 December 1999, which also set a time-limit for compliance of five working days. At the request of the French Republic that time-limit was extended to 30 December 1999.

37 By letter of 29 December 1999, the French Government replied to the reasoned opinion. It pointed out that, under French law, the AFSSA had to be consulted before any amendment of the order of 28 October 1998. According to the opinions given by the AFSSA, serious doubts remained as to the risks presented by products subject to the DBES.

38 The French Government also argued that the Commission had not taken account of minority opinions within the TSE/BSE ad hoc group, thereby infringing the precautionary principle, or of the fact that the French Republic had contested the date set for the lifting of the ban, which it considered premature.

39 The French Government maintained that the guarantees provided by the protocol of understanding were ineffective since they presupposed that products of United Kingdom origin were traceable in the other Member States, whereas traceability had not been achieved. The discussions which took place in the course of the meetings of the Standing Veterinary Committee of 23 and 24 November and 6 December 1999 demonstrated that a majority of the Member States were not prepared of their own accord to fall in with the Commission's interpretation and thus to ensure product traceability. Faced with that situation, the Commission should have imposed application of its interpretation and, at the very least, proposed an amendment to Council Regulation (EC) No 820/97 of 21 April 1997 establishing a system for the identification and registration of bovine

animals and regarding the labelling of beef and beef products (OJ 1997 L 117, p. 1). On the contrary, it proposed deferring implementation of compulsory labelling of beef and veal until 31 December 2000.

40 In addition, the French Government reiterated the importance attached by it to rapid implementation of a programme of detection tests, a concern which had not been met at that stage.

41 In the light of those factors, the French Government contended that the scientific arguments contained in the AFSSA's opinion should have led the Commission to revise the decision on lifting the ban or, in any event, to suspend its application. By not doing so, the Commission infringed the precautionary principle.

42 The French Government also drew attention to the very short time-limits which it had been allowed for replying to the letter of formal notice and the reasoned opinion, time-limits which demonstrated the Commission's intent to require the French Republic to implement a decision not providing all the guarantees necessary in order to ensure that human health was protected.

43 Furthermore, the French Government announced its intention to bring before the Court an action relating to the refusal to amend Decision 1999/514.

44 On 29 December 1999 the French Republic brought an action before the Court for annulment of the decision by which the Commission was alleged to have refused to amend or repeal Decision 1999/514. According to the French Government, that decision was revealed by a statement made by Commissioner Byrne, and by the choice made by the Commission on 17 November 1999 to give the French Republic formal notice requiring it to comply with Decision 1999/514.

45 However, ruling on an objection of inadmissibility raised by the Commission, the Court declared that action manifestly inadmissible by order of 21 June 2000 in Case C-514/99 *France* v *Commission* [2000] ECR I-4705. At paragraph 47 of the order, the Court pointed out that the Commission had not received an express request for the amendment of Decision 1999/514, but merely some allegedly new evidence which might have altered the legal and factual context taken into consideration. It held at paragraph 48 of the order that, 'if the applicant considered that the information in question gave rise to an obligation for the Commission to adopt a fresh decision, it was for the applicant to have recourse to the procedure for failure to act for which provision is made by the Treaty'.

46 In view of the French Republic's reply to the reasoned opinion, the Commission brought the present action.

Objection of inadmissibility

47 By separate document, the French Republic objected in accordance with Article 91(1) of the Rules of Procedure that the action is inadmissible.

48 In accordance with Article 91(4) of the Rules of Procedure, the Court, by decision of 23 May 2000, reserved its decision on the objection for final judgment and new time-limits were prescribed for the further steps in the proceedings.

49 The objection is based on two pleas in law. The first plea alleges defects in the pre-litigation procedure and the second that the principle of collegiality was infringed.

The plea alleging defects in the pre-litigation procedure

50 This plea subdivides into four complaints.

51 In the first complaint, the French Government submits that, by sending the letter of formal notice before the AFSSA issued its second opinion, the Commission infringed the principle that the subject-matter of the dispute must be clearly defined. In so acting, the Commission failed to have regard to the purpose of the pre-litigation procedure, which is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself.

52 The Commission replies that the complaint is unfounded on the ground that it was under no obligation to await that opinion. In any event, the sending of a letter of formal notice is intended to establish the complaints and does not in any way prevent discussions from continuing. Nor has the French Republic indicated any harm caused by the alleged prematurity in sending the letter of formal notice.

53 As to those submissions, it is to be observed that the function of the pre-litigation procedure laid down in Article 226 EC is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission. The proper conduct of that procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraphs 16 and 17).

54 It follows from that function that the purpose of the letter of formal notice is, first, to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence and, second, to enable the Member State to comply before proceedings are brought before the Court (Case C-230/99 *Commission* v *France* [2001] ECR I-1169, paragraph 31).

55 In the present case, the breach of obligations alleged was clearly defined in the letter of formal notice as being the refusal to adopt the measures necessary in order to comply with Decisions 98/256 as amended and 1999/514 from 1 August 1999.

56 The French Republic no doubt wished to persuade the Commission, by sending a copy of the AFSSA's second opinion, of the validity of the view which it had put forward in its letter of 1 October 1999 and at various meetings with the Commission. However, the Commission was entitled to retain unaltered its definition of the alleged failure by the French Republic to fulfil its obligations and to take the view that a supplementary opinion from the AFSSA would not affect that definition.

57 It follows that the complaint alleging that the letter of formal notice was flawed because of the time at which it was sent is unfounded.

58 In the second complaint, the French Government alleges that the Commission violated the fundamental rule which requires it to prove the infringement, by refusing to take account of the legal arguments put forward by the French Government to show that it was not possible to apply Decision 1999/514.

59 The Commission responds to this complaint that the French Republic had put forward a line of argument which was not legal, but political, in nature and that,

in any event, the complaint is clearly contradicted by the facts. It points out that it forwarded the AFSSA's opinion to the SSC and held numerous meetings with the French authorities.

60 It need only be stated in this regard that this complaint relates to an alleged failure to prove the infringement, that is to say to a substantive issue, and that, as such, it cannot affect the admissibility of the action.

61 In the third complaint, the French Government argues that the Commission required it to reply both to the letter of formal notice and to the reasoned opinion within urgent time-limits which it did not justify with regard to either traders' economic interests or protection of consumers' health. In so doing, the Commission infringed the *audi alteram partem* rule. It also committed an abuse of process by substituting a shortened pre-litigation procedure for proceedings for interim relief, in order to put pressure on the French Government, without observing the procedural and substantive conditions governing proceedings for interim relief.

62 The Commission responds to this complaint by stating that the period which a Member State is allowed for replying to a letter of formal notice must be reasonable and that, in order to determine whether it is, account must be taken of all the circumstances of the case (Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraph 20). Here, the French authorities were well aware of the Commission's standpoint before the letter of formal notice was sent but had made clear their intention not to implement the decisions at issue and, moreover, announced that intention to the press before notifying the Commission. Furthermore, the present case did not involve a subtle and new interpretation of a provision of the Treaty or of secondary Community legislation, but a failure to implement Community measures benefiting from the presumption of legality against which no action for annulment had been brought within the time-limit laid down for that purpose. The Commission also points out that it granted the extension of time sought by the French Government.

63 In addition, the Commission denies the existence of an obligation to state reasons for the brevity of the periods in question and contests the argument that, to avoid committing an abuse of process, it should have applied for interim relief in parallel with the proceedings dealing with the merits of the case.

64 As to those arguments, it should be noted that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission.

65 That dual purpose requires the Commission to allow Member States a reasonable period to reply to letters of formal notice and to comply with reasoned opinions, or, where appropriate, to prepare their defence. In order to determine whether the period allowed is reasonable, account must be taken of all the circumstances of the case. Thus, very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission's views long before the procedure starts (Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraph 51).

66 As stated in paragraph 19 of the present judgment, the French Republic had been informed as early as 10 September 1999 of the Commission's concern that it should implement Decisions 98/256 as amended and 1999/514 within a short time, failing which infringement proceedings would be brought.

67 Furthermore, the Commission had regard to certain requests and observations made by the French Republic, seeking a fresh opinion from the SSC and organising negotiations with the United Kingdom authorities in order to reach a friendly settlement of the dispute. However, the efforts which it expended to that end for three months remained fruitless.

68 Having regard to the binding nature of Decisions 98/256 as amended and 1999/514, the period which had elapsed since the date on which imports of British beef and veal should have resumed, the economic interests involved, the warning given by the Commission on 10 September 1999 and the negotiations in progress at the time, the time-limits set by the Commission for replying to the letter of formal notice and the reasoned opinion were not unreasonable.

69 It should also be remembered that the Commission did not refuse to extend those time-limits for reply when asked.

70 As regards the part of the complaint alleging abuse of process, the Commission applied the Treaty rules correctly in bringing infringement proceedings under Article 226 EC. The Commission chose the proceedings specifically envisaged by the Treaty for cases where it considers that a Member State has failed to fulfil one of its obligations under the Treaty.

71 Nor did any provision of the Treaty compel the Commission to apply for interim relief. The Commission cannot be reproached for initiating the infringement proceedings rapidly, since there was no flaw in the pre-litigation procedure, as has been found above.

72 It follows that the complaint alleging that the pre-litigation procedure was flawed because of the brevity of the periods allowed for replying to the letter of formal notice and the reasoned opinion must be rejected.

73 In the fourth complaint, the French Government contests the action on the ground that the Federal Republic of Germany, which likewise did not implement Decisions 98/256 as amended and 1999/514, has not been subject to any proceedings before the Court.

74 The Commission responds by stating that it is also pursuing its efforts in relation to that Member State, which is, however, in a different position. It also points out that a Member State cannot justify its own failure to comply with Community law by reference to that of another Member State.

75 As to that, the absence of infringement proceedings against one Member State is irrelevant when assessing the admissibility of infringement proceedings brought against another Member State. The admissibility of the present proceedings cannot therefore be affected by the fact that analogous infringement proceedings have not been brought against another Member State.

76 Consequently, the first plea, alleging defects in the pre-litigation procedure, must be rejected.

The plea alleging that the principle of collegiality was infringed

77 The French Government states that the decision of the Commission acting as a college to authorise its President, Mr Prodi, and Commissioner Byrne to bring an action before the Court was adopted on 22 December 1999, that is to say at a time when the college of Commissioners was not yet acquainted with the French Government's reply to the reasoned opinion. Since, first, that reply made express reference to the precautionary principle and to the French Government's intention to challenge before the Court the Commission's refusal to amend Decisions 98/692 and 1999/514 and, second, the Commission was unable to examine that information as a college before making the application to the Court, the French

Government concludes that the decision to make the application was not collegiate in the strict sense.

78 The Commission responds that the college of Commissioners was perfectly aware of the complaints relating to the French Republic, of factual developments such as meetings, memoranda and SSC opinions, of the legal bases for the action to be undertaken and of the AFSSA's argument upon which the French Government would rely when invoking the precautionary principle. The intention to bring an action before the Court was not mentioned but, in any event, at that time a mere procedural threat was involved. Since the college had all the information needed to adopt the decision, the requirement for collegiality was scrupulously observed.

79 In this regard, it is to be remembered that, in accordance with settled case-law, the principle of collegiality is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation and that all the members of the college of Commissioners should bear collective responsibility at the political level for all decisions adopted (Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 39).

80 The Court has stated that a decision by the Commission to bring infringement proceedings against a Member State must be the subject of collective deliberation by the college of Commissioners and that all the information on which that decision is based must be available to the members of the college (*Commission* v *Germany*, paragraph 48).

81 In the present case, the 'infringement sheet' annexed to the decision of the college of Commissioners sets out the legal bases for the envisaged proceedings, the matter complained of and an account of the latest position summarising the

opinion of the AFSSA, that of the SSC, the negotiations undertaken with the French and United Kingdom authorities and the terms of the French Government's press release of 8 December 1999.

82 In the light of those details, the members of the college of Commissioners had all the relevant information for adopting a decision to bring proceedings before the Court with full knowledge of the facts.

83 As regards the express reference to the precautionary principle which was not made until the reply to the reasoned opinion and was therefore unavailable to the college of Commissioners at the time of adoption of the decision to bring proceedings before the Court, it must be found that express reference to that principle did not alter the account of the latest position as submitted to the college. The French Government had for several months been putting forward arguments regarding the obligation to protect public health, scientific uncertainty in the matter and problems connected with risk management. The addition of the label 'precautionary principle' to those arguments added nothing to their content.

84 The same is true of the French Government's intention to bring proceedings before the Court. This involved a mere threat to bring proceedings of an unspecified legal nature which would not in any event have undermined the presumption that Decisions 98/692 and 1999/514 were lawful and the binding nature of those decissions (see, to that effect, Case C-261/99 *Commission* v *France* [2001] ECR I-2537, paragraph 26).

85 Furthermore, having regard to the position adopted by the French Government in the press release of 8 December 1999 and in the reply of 9 December 1999 to the letter of formal notice, the Commission was entitled to take the view that the pre-litigation procedure had achieved its objectives and that the file was ready to be submitted to the college of Commissioners for it to adopt a decision relating to the commencement of infringement proceedings, should the French Government keep to its position notwithstanding the sending to it of the reasoned opinion.

86 It follows that the second plea, alleging that the principle of collegiality was infringed, is unfounded.

87 In view of the foregoing considerations, the objection of inadmissibility must be dismissed.

Merits of the case

88 The Commission contends that, under Article 249 EC, decisions are binding upon those to whom they are addressed. Article 1 of Decision 1999/514, which set 1 August 1999 as the date on which dispatch of products subject to the DBES could commence, allowed the Member States no discretion as to that date and the conditions governing dispatch. A Member State cannot, by relying on the scientific opinion of a national body, substitute its own assessment of the risks for that carried out by the Commission in accordance with its powers, which in the present case are those conferred by Article 10(4) of Directive 90/425 and Article 9(4) of Directive 89/662.

89 The Commission maintains that the precautionary principle, which guides its actions, does not have the effect of obliging it to follow every scientific opinion without any power to carry out its own assessment, be it an opinion issued by a Member State body or by minority members of a Community working party. It points out in this connection that Article 7 of Decision 97/404 states that minority views are always to be included in opinions of the SSC.

90 In the Commission's submission, a Member State cannot rely on internal legal reasons, possible problems of interpretation or alleged doubts concerning the validity of a Commission decision to justify unilaterally a failure to apply that

decision. Similarly, it cannot make its implementation of decisions subject to the condition that certain amendments are made to them.

91 With regard to Decision 1999/514, the Commission explains that it was required to set the date on which the dispatch of products subject to the DBES was to commence inasmuch as the conditions laid down by Article 6 of Decision 98/256 as amended and Annex III thereto were materially fulfilled. The complaint that it failed to take account of considerations of expediency is therefore unjustified.

92 The Commission contends that, in addition to the breach of Decisions 98/256 as amended and 1999/514, the imposition of restrictions on the entry of goods from other Member States constitutes an infringement of Article 28 EC. Since the products concerned are covered by Community harmonisation constituting a coherent and exhaustive system intended to ensure that human and animal health are protected, the ban cannot be justified by the French Republic on the basis of Article 30 EC.

93 The Commission also submits that, by refusing to comply with Decisions 98/256 as amended and 1999/514 over several months, the French Republic failed to comply with its obligation under Article 10 EC to cooperate in the achievement of the Community's tasks.

94 The French Government essentially contends that the conditions for lifting the ban were not met because: (i) the DBES did not take account of new data such as the discovery of a suspected case of BSE; (ii) United Kingdom beef and veal did not comply with the conditions of the DBES; and (iii) there was no system for tracing products subject to the DBES and the Member States had refused to set up such a system, although this is a fundamental condition of the DBES. It maintains that the Commission is not entitled to bring proceedings against it for failure to fulfil an obligation to implement an unlawful decision when it is not ensuring that the other Member States comply with its fundamental elements. In those

circumstances, the French Government was entitled to rely on Article 30 EC in order to prevent the import of United Kingdom beef and veal. Furthermore, the French Government denies that it has infringed its obligation to cooperate in good faith under Article 10 EC.

Challenge to the DBES on the basis of the discovery of a suspected case of BSE

95 The French Government relies on its concern as to the effectiveness of the DBES, a concern reinforced by events subsequent to the commencement of the present infringement proceedings.

96 In its submission, the discovery of a case of BSE in a United Kingdom cow born after 1 August 1996, the date on which the body of measures guaranteeing the application of the DBES was supposed to be fully effective, is a particularly significant fact. It presupposes the existence of a level of latent infectivity well before clinical signs of the disease appear, which means that animals slaughtered before 30 months could be infected while being eligible for export under the DBES. The fact that the United Kingdom authorities have been unable to explain that case and to state the cause of the death of the dam of the cow affected casts serious doubt on the effectiveness of the whole of the United Kingdom monitoring system, which is the cornerstone of the DBES. Such circumstances call for appropriate means of control, such as tests.

97 The Commission contends that, by that argument, the French Government is challenging the validity of the decisions which the Commission is seeking to enforce in the present action. It is clear from the Court's case-law that a Member State cannot plead that the measure which the Commission is seeking to enforce is unlawful (Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 34).

98 In so far as the French Government refers in its argument to new facts justifying, in its submission, the adoption of a fresh decision, the Commission recalls the decision of the Court in the order in *France* v *Commission*, cited above.

99 As regards more specifically the case of a cow born after 1 August 1996 which contracted BSE, the Commission maintains that, in any event, the case does not call the DBES into question. First, as is apparent from the opinion of the SSC of 14 and 15 September 2000, scientists always considered that occasional cases of BSE in animals born after 1 August 1996 were possible, because of maternal transmission, and that has occurred only once to date. Second, there was no risk of that animal entering the DBES, because it did not meet two of the DBES eligibility conditions: it was over 30 months of age, and the dam did not survive for at least six months after its birth. Furthermore, as is apparent from the opinion of the SSC of 13 and 14 April 2000, the number of cases of infected cattle which may enter the food chain at an age below 30 months in their final year of incubation is extremely low. Finally, every animal eligible under the DBES is cut in an appropriate manner so as to remove certain parts and tissues, while the risk of infection from consuming meat comprising muscle is negligible.

100 As to those arguments, the French Government's questioning of the effectiveness of the DBES must be interpreted as a challenge, in the light of the precautionary principle, to the legality of the decision which established that scheme, namely Decision 98/692 which amended Decision 98/256 for that purpose.

101 However, the system of remedies set up by the Treaty distinguishes between actions under Articles 226 EC and 227 EC, which are directed to obtaining a declaration that a Member State has failed to fulfil its obligations, and those under Articles 230 EC and 232 EC, which are directed to obtaining judicial review of measures adopted by the Community institutions or of failure to act on their part. Those remedies have different objectives and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot, therefore, properly plead the unlawfulness of decisions

addressed to it as a defence to infringement proceedings arising out of its failure to implement those decisions (Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 10, and Case C-261/99 *Commission* v *France*, cited above, paragraph 18).

Challenge to the DBES on the basis of the alleged non-compliance of United Kingdom beef and veal with Community legislation

102 The French Government states that, according to point II.5.1 of the report of the inspection mission carried out in the United Kingdom from 20 to 24 March 2000 by the Food and Veterinary Office, more than 20% of the 'records/animals' failed to meet the requirements of Article 3 of Regulation No 820/97. Furthermore, according to point III.2 of that report, Commission Regulation (EC) No 494/98 of 27 February 1998 laying down detailed rules for the implementation of Regulation No 820/97 as regards the application of minimum administrative sanctions in the framework of the system for the identification and registration of bovine animals (OJ 1998 L 60, p. 78) is not fully enforced in the United Kingdom. The report states: 'This means in practical terms that cattle for which no discrepancies were found but were kept in a holding with more than 20% discrepant cattle can enter the Date Based Export Scheme because a legal basis to restrict these animals is not existing.'

103 The Commission replies that the failings noted by that report do not in any way alter the fact that, since the DBES is based on the individual status of each animal, only animals which comply with the identification and recording requirements can be eligible thereunder. The failings simply mean that those animals may come from holdings in which 20% or more of the animals do not comply with those requirements. In any event, that issue did not come to light until after the decisions in question had been adopted and is not sufficiently serious to undermine the DBES.

104 As to those arguments, the essence of the French Government's complaint is that the DBES eligibility criteria take no account of a failure to comply with the Community legislation on traceability with regard to United Kingdom cattle, in particular animals reared in a holding where some cattle individually meet the conditions of the DBES and others do not.

105 In so doing, the French Government is again challenging the validity of the legislation which established the DBES, namely Decision 98/692. In contrast to the ECHS laid down by Decision 98/256, which is based on the certification of herds, the basis for the DBES is that each animal considered individually must comply with the conditions prescribed.

106 It should nevertheless be reiterated that, as stated in paragraph 101 of this judgment, in the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot properly plead the unlawfulness of decisions addressed to it as a defence to infringement proceedings arising out of its failure to implement those decisions.

107 It follows that the French Government cannot rely on failings relating to the identification of animals other than those eligible under the DBES to challenge that scheme and refuse to comply with Decisions 98/256 as amended and 1999/514.

Lack of traceability of products subject to the DBES

108 The French Government essentially argues that traceability of products subject to the DBES was one of the fundamental conditions of that scheme but that, when

exports of British meat resumed, such traceability did not exist beyond United Kingdom cutting plants. At the meetings of the Standing Veterinary Committee of 23 and 24 November and 6 December 1999, the other Member States announced their decision not to implement the provisions of Decision 98/256 as amended and the Commission abandoned the idea of requiring them to do so. The French Government was not aware of those matters until after the time-limit had expired for bringing an action for annulment of Decision 1999/514 setting the date for the resumption of exports under the DBES, a fact justifying its challenge to the legality of that decision in the present action.

109 Given the lack of harmonisation regarding labelling and traceability, the French Government contends that it was entitled to rely on Article 30 EC in order to prevent the import of products subject to the DBES. Its reaction was consistent with the principle of proportionality because it did not prevent transit of those products through its territory. It submits that the Commission adopts too formalistic a position by requiring notification of a protective measure making express reference to the protective clauses in Directives 89/662 and 90/425. First, negotiations were in progress. Secondly, it is apparent from the account of the facts in the judgment in Case C-477/98 *Eurostock* [2000] ECR I-10695, at paragraph 24, that the Commission showed more concern for another Member State which had made a notification error. Pleading the circumstances of the case and in particular the fact that it was France that drew the Commission's attention to the problems posed by traceability, the French Government claims that it has complied with its obligation to cooperate in good faith under Article 10 EC.

110 The Commission acknowledges first of all that traceability was one of the fundamental conditions of the DBES. However, traceability was adequately provided for by the Community legislation in force at the material time. It was, moreover, improved by Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Regulation No 820/97 (OJ 2000 L 204, p. 1).

111 The Commission then submits that the French Republic cannot put the legality of Decision 1999/514 in issue or plead as a defence the failure of the other Member States to fulfil their obligations. In any event, the failure of the other Member States to comply with their obligations regarding traceability affected only triangular trade, that is to say cases where products from the United Kingdom pass through another Member State before arriving in France. By contrast, where products were correctly labelled on leaving United Kingdom cutting plants, the French Government could not rely on the lack of traceability in its own territory to prevent direct imports of those products from the United Kingdom.

112 Finally, the Commission disputes that Article 30 EC may be relied on since the decisions at issue achieved full harmonisation and Directives 89/662 and 90/425 set out the procedure for applying the protective clauses.

113 As to those arguments, it should be noted at the outset that traceability of products subject to the DBES was a fundamental condition for the proper operation of that scheme, in order to protect public health.

114 As is clear from the 13th recital in the preamble to Decision 98/692 and point 7 of Annex III to Decision 98/256 as amended, it was essential for products subject to the DBES to be traceable up to the point of sale in order to enable a consignment to be recalled, in particular if it were to become apparent that an animal was ineligible under the DBES.

115 However, the evidence submitted to the Court shows that such traceability was not fully guaranteed by the Community legislation existing at the time of

adoption of Decision 1999/514, in particular so far as concerns meat and products subject to the DBES which had been cut, processed or rewrapped.

116 The Commission acknowledged the existence of that legislative lacuna, since point 5 of the protocol of understanding stated that, at the time of signature of that document, traceability was not very transparent or rapid.

117 In order to remedy that problem, point 5 of the protocol of understanding provided that consignments under the DBES directly dispatched to France could be subject to specific identification laid down under French legislation and allowing for transparent traceability in a way which, if necessary, would permit recall as quickly as possible.

118 As for triangular trade, the interpretative declaration of the Commission set out in Annex II to the protocol of understanding provided that each Member State was to take binding measures to ensure that all meat and meat-based products dispatched from the United Kingdom under the ECHS or DBES were marked or labelled with a distinct mark and remained so where the meat or meat-based products were cut, processed or rewrapped on its territory. Point 5 of the protocol of understanding stated, however, that, if appropriate, the system of traceability should be improved through an agreement based on 'mutual assistance between Member States'.

119 It is apparent from the report of the meeting of the Standing Veterinary Committee of 6 December 1999 that, at that meeting, the representatives of most of the Member States stated that they did not intend to use a distinct mark for United Kingdom meat. They were nevertheless in favour of harmonisation of labelling at Community level.

120 When the Commission reminded the veterinary authorities of the Member States, by letter of 16 October 2000, that, in accordance with the 13th recital in the preamble to Decision 98/692 and point 4 of Annex III to Decision 98/256 as amended, they could be required, if need be, to take measures at the place of destination and that the recall of meat or meat-based products would be facilitated if the Member States adopted specific marking which remained even when the meat or meat-based products were cut, processed or rewrapped, certain Member States expressed the view in reply that the Community legislation was sufficient or that additional marking could not be introduced without amending the Community rules.

121 Regulation No 820/97 which, despite its title, merely contained provisions regulating the power of the Member States to impose a labelling system was to remain in force until 31 December 1999. It provided in Article 19(1) that 'a compulsory beef-labelling system shall be introduced which shall be obligatory in all Member States from 1 January 2000 onwards'. As the Court has recorded in its judgment delivered today in Case C-93/00 *Parliament* v *Council* [2001] ECR I-10119, at paragraphs 8 and 10, it was, however, not until 13 October 1999 that the Commission presented to the European Parliament and the Council two proposals for regulations, the first designed to establish a compulsory labelling system with effect from 1 January 2003 and the second temporarily to prolong the validity of Regulation No 820/97.

122 On 21 December 1999 the Council adopted Regulation (EC) No 2772/1999 providing for the general rules for a compulsory beef labelling system (OJ 1999 L 334, p. 1). Since it corresponded to the Commission's second proposal, its effect was, however, only to maintain in force the voluntary labelling system.

123 It was not until 17 July 2000 that the European Parliament and the Council, by Regulation No 1760/2000, established a complete compulsory tracing and

labelling system. However that regulation, as stated in the second paragraph of Article 25, is applicable only to meat from cattle slaughtered on or after 1 September 2000.

124 Accordingly, at the time of adoption of Decision 1999/514, that is to say 23 July 1999, there was no binding legislation enabling the DBES to be implemented in compliance with the conditions imposed by it concerning traceability. It was thus for the Member States to adopt, on their own initiative, appropriate measures for organising a system of specific marking and tracing of products subject to the DBES.

125 It is in the light of those circumstances that the subject-matter of the failure to fulfil obligations and the defence put forward by the French Republic should be assessed.

126 The arguments relating to lack of traceability relied on by the French Government by way of defence are apposite in so far as they concern products subject to the DBES which have been cut, processed or rewrapped in another Member State and subsequently exported to France without the affixing of a distinct mark in order, in particular, to enable consignments to be recalled.

127 The Commission has not, however, established that the French Government would have prevented the import of all beef and veal or all meat-based products from other Member States not bearing the distinct mark of products subject to the DBES on the ground that certain consignments of meat or of cut, processed or rewrapped products could include beef, veal or products of United Kingdom origin which would not be identifiable as such.

128 It follows that the application for a finding of failure to fulfil obligations must be dismissed in so far as it concerns that category of products.

129 So far as concerns products subject to the DBES which are correctly marked or labelled, whether coming directly from the United Kingdom or from another Member State, the French Government has not put forward a ground of defence capable of justifying the failure to implement Decisions 98/256 as amended and 1999/514.

130 It is settled case-law that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law (Case C-217/88 *Commission* v *Germany* [1990] ECR I-2879, paragraph 26).

131 Furthermore, a Member State which encounters temporarily insuperable difficulties preventing it from complying with its obligations under Community law may plead *force majeure* only for the period necessary in order to resolve those difficulties (see, to that effect, Case 101/84 *Commission* v *Italy* [1985] ECR 2629, paragraph 16).

132 In the present case, the French Government has not referred to specific difficulties which would have prevented it from adopting, at the very least after expiry of the period allowed for complying with the reasoned opinion, the legislation necessary

in order to ensure the traceability of any products subject to the DBES which are cut, processed or rewrapped on its own territory.

133 It should be noted that traceability requirements for meat and meat-based products originating from the United Kingdom were not established by Decision 1999/514, but had existed since 1 June 1998 under the ECHS, set up by Decision 98/256. Furthermore, Decision 98/692 made clear the importance of traceability for the proper operation of the DBES.

134 It is true that there were difficulties in interpreting and consequently in implementing Decision 98/256 as amended, since the requirements imposed on all the Member States were neither clear nor precise. Exports of products subject to the DBES were to commence at a time when there was no compulsory Community system providing a means of ensuring that those products could be traced. The protocol of understanding seems to permit the French Government to make arrangements for tracing products dispatched directly to France, whereas the Commission specifies, in the interpretative declaration annexed to that protocol, the obligations imposed on the Member States while retaining the possibility of improving if necessary the working of the system by an agreement negotiated between the Member States. It is also apparent from the documents relating to the positions adopted by the national veterinary authorities that certain Member States took the view that national legislation was not needed or that only Community harmonisation would enable the required traceability to be achieved.

135 However, the French Republic was fully informed by the protocol of understanding concluded on 24 November 1999 of the extent of its obligations under Decisions 98/256 as amended and 1999/514 as regards the traceability of meat and meat-based products from the United Kingdom dispatched directly to French territory. The same is true of correctly marked or labelled meat and meat-based products originating from the United Kingdom but coming from another Member State.

136 Since the French Republic had to have a reasonable period for implementing Decisions 98/256 as amended and 1999/514, as interpreted and clarified by the protocol of understanding, it must be held that the infringement consisting of a failure to implement those decisions is proved only from expiry of the period allowed for complying with the reasoned opinion, that is to say after 30 December 1999.

Infringement of Article 28 EC

137 As regards the Commission's claim for a declaration that Article 28 EC has been infringed, it is to be observed that the Commission has not adduced in support of this claim evidence that is separate from the matters which constitute the infringement resulting from the failure to implement Decisions 98/256 as amended and 1999/514.

138 Nor does the Commission offer any justification for finding a separate infringement of Article 28 EC when it takes the view that the French Republic is not entitled to rely on Article 30 EC in support of its refusal to import products subject to the DBES on the ground that the applicable Community rules constitute exhaustive and coherent harmonisation in the field.

139 Given the lack of evidence adduced in support of this part of the application and the contradiction apparent in the application, the claim seeking a declaration that the French Republic has failed to fulfil its obligations under Article 28 EC must be held to be unfounded.

Infringement of Article 10 EC

140 As regards the Commission's claim for a declaration that the obligation to cooperate in good faith under Article 10 EC has been infringed, it is to be recalled that, as noted in paragraph 134 of this judgment, there were difficulties in interpreting and implementing Decision 98/256 as amended. It was specifically the French Government which drew the Commission's attention to the problems posed by the lack of clarity of that decision and of the Community rules applicable generally to the traceability of products subject to the DBES.

141 In the light of those factors, it has not been proved that the French Republic failed to comply with its obligation to cooperate in good faith under Article 10 EC.

Conclusion

142 It follows from all those considerations that the infringement is proved only in so far as, by refusing to adopt the measures necessary in order to comply with Decision 98/256 as amended, in particular Article 6 and Annex III, and Decision 1999/514, in particular Article 1, in particular by refusing to permit the marketing in its territory after 30 December 1999 of products subject to the DBES which are correctly marked or labelled, the French Republic has failed to fulfil its obligations under those two decisions, in particular their provisions referred to above.

143 The remainder of the application must be dismissed.

Costs

144 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. Under Article 69(3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

145 Account should be taken of the fact that the application has not been allowed in respect of the whole of the infringement as defined by the Commission. In addition, it has become apparent from the documents before the Court that some of the difficulties encountered by the French Republic in implementing Decisions 98/256 as amended and 1999/514 resulted from a lack of clarity in the obligations imposed on the Member States.

146 Having regard to those factors, the French Republic should be ordered to bear two thirds of the costs and the Commission to bear the other third.

147 Under Article 69(4) of the Rules of Procedure, the United Kingdom is to bear its own costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by refusing to adopt the measures necessary in order to comply with:

— Council Decision 98/256/EC of 16 March 1998 concerning emergency measures to protect against bovine spongiform encephalopathy, amending Decision 94/474/EC and repealing Decision 96/239/EC, in the version resulting from Commission Decision 98/692/EC of 25 November 1998, in particular with Article 6 and Annex III, and

— Commission Decision 1999/514/EC of 23 July 1999 setting the date on which dispatch from the United Kingdom of bovine products under the date-based export scheme may commence by virtue of Article 6(5) of Decision 98/256, in particular with Article 1,

in particular, by refusing to permit the marketing in its territory after 30 December 1999 of products subject to that scheme which are correctly marked or labelled, the French Republic has failed to fulfil its obligations under those two decisions, in particular their provisions referred to above;

2. Dismisses the remainder of the application;

3. Orders the French Republic to bear two thirds of the costs and the Commission of the European Communities to bear the other third.

4. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Rodríguez Iglesias Jann Macken

Colneric von Bahr Gulmann

Edward La Pergola Puissochet

Sevón Wathelet

Schintgen Skouris

Delivered in open court in Luxembourg on 13 December 2001.

R. Grass G.C. Rodríguez Iglesias

Registrar President