



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

17 October 2013*

(Reference for a preliminary ruling — Agriculture — Regulation (EC) No 21/2004 — System for the identification and registration of ovine and caprine animals — Obligation of individual electronic identification — Obligation to keep a holding register — Validity — Charter of Fundamental Rights of the European Union — Freedom to conduct a business — Proportionality — Equal treatment)

In Case C-101/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Stuttgart (Germany), made by decision of 9 February 2012, received at the Court on 27 February 2012, in the proceedings

Herbert Schaible

v

Land Baden-Württemberg,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász (Rapporteur), D. Šváby and C. Vajda, Judges

Advocate General: N. Wahl,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 7 March 2013,

after considering the observations submitted on behalf of:

- Mr Schaible, by M. Winkelmüller, Rechtsanwalt,
- the Land Baden-Württemberg, by C. Taubald, Rechtsanwältin,
- the French Government, by G. de Bergues and C. Candat, acting as Agents,
- the Netherlands Government, by B. Koopman and C. Wissels, acting as Agents,
- the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

* Language of the case: German.

— the Council of the European Union, by P. Mahnič Bruni, Z. Kupčová and R. Wiemann, acting as Agents,

— the European Commission, by G. von Rintelen and B. Burggraaf, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 May 2013,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the validity of Articles 3(1), 4(2), 5(1) and the first paragraph of Article 9(3) of Council Regulation (EC) No 21/2004 of 17 December 2003 establishing a system for the identification and registration of ovine and caprine animals and amending Regulation (EC) No 1782/2003 and Directives 92/102/EEC and 64/432/EEC (OJ 2005 L 5, p. 8), as amended by Commission Regulation (EC) No 933/2008 of 23 September 2008 (OJ 2008 L 256, p. 5, ‘Regulation No 21/2004’).
- 2 The reference has been made in the course of proceedings between Mr Schaible and the Land Baden-Württemberg concerning the compatibility of those provisions with the primary law of the European Union.

Legal context

European Union law

- 3 According to Articles 1 and 3(1)(c) of 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), the lifting of those border controls between Member States makes it necessary for the animals to be identified in accordance with the requirements of European Union rules and registered in such a way that the original or transit holding, centre or organisation can be traced.
- 4 Recitals 1, 3, 7 and 11 in the preamble to Regulation No 21/2004 state:

‘(1) Pursuant to Article 3(1)(c) of Council Directive 90/425/EEC ... animals for intra-Community trade have to be identified in accordance with the requirements of Community rules and be registered in such a way that the original or transit holding, centre or organisation can be traced.
...
...
(3) Rules concerning the identification and the registration of ovine and caprine animals in particular have been laid down in [Council] Directive 92/102/EEC [of 27 November 1992 concerning the identification and registration of animals (OJ 1992 L 355, p. 32)]. In respect of ovine and caprine animals, experience, and in particular the foot-and-mouth disease crisis, has shown that the implementation of Directive 92/102/EEC has not been satisfactory and is in need of improvement. It is therefore necessary to lay down more stringent and specific rules, as has already been done for bovine animals with 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 Council Regulation (EC) No 820/97 (OJ 2000 L 204, p. 1)].

...

- (7) In 1998 the Commission launched a large-scale project on the electronic identification of animals (IDEA), and its final report was completed on 30 April 2002. That project demonstrated that a substantial improvement in ovine and caprine animal identification systems could be achieved by using electronic identifiers for those animals, provided that certain conditions concerning the accompanying measures were fulfilled.

...

- (11) In Member States with a relatively small ovine or caprine animal population, the introduction of an electronic identification system may well not be justified. It is therefore advisable to allow such Member States to make the system optional. Provision should also be made for a rapid procedure to adjust the demographic thresholds below which electronic identification may be made optional.'

- 5 Article 1(1) of Regulation No 21/2004 states:

'Each Member State shall establish a system for the identification and registration of ovine and caprine animals in accordance with the provisions of this Regulation.'

- 6 According to Article 3(1) of that regulation:

'The system for the identification and registration of animals shall comprise the following elements:

- (a) means of identification to identify each animal;
- (b) up-to-date registers kept on each holding;
- (c) movement documents;
- (d) a central register or a computer database.'

- 7 Article 4 of that regulation is worded as follows:

'1. All animals on a holding born after 9 July 2005 ... shall be identified in accordance with paragraph 2 within a period to be determined by the Member State as from the birth of the animal and in any case before the animal leaves the holding on which it was born. ...

By way of derogation Member States may extend the period, which may not, however, exceed nine months, for animals kept in extensive or free-range farming conditions. Member States concerned shall inform the Commission of the derogation granted. If necessary, implementing rules may be laid down in accordance with the procedure referred to in Article 13(2).

2.

- (a) Animals shall be identified by a first means of identification which complies with the requirements of Section A.1 to A.3 of the Annex, and
- (b) by a second means of identification approved by the competent authority and conforming to the technical characteristics listed in Section A.4 of the Annex.

(c) However, until the date referred to in Article 9(3), the second means of identification may be replaced by the system set out in Section A.5 of the Annex, except in the case of animals involved in intra-Community trade....

3. However for animals intended for slaughter before the age of 12 months and intended neither for intra-Community trade nor for export to third countries, the identification method described in Section A.7 of the Annex may be authorised by the competent authority as an alternative to the means of identification mentioned in paragraph 2.

...'

8 According to Article 5(1) of Regulation No 21/2004, each keeper of animals, with the exception of the transporter, is to keep an up-to-date register containing at least the information listed in Section B of the Annex to that regulation.

9 Article 9(3) of that regulation provides:

'As from 31 December 2009, electronic identification according to the guidelines referred to in paragraph 1, and in accordance with the relevant provisions of Section A of the Annex, shall be obligatory for all animals.

However, Member States in which the total number of ovine and caprine animals is 600 000 or less, may make such electronic identification optional for animals not involved in intra-Community trade.

Member States in which the total number of caprine animals is 160 000 or less may also make such electronic identification optional for caprine animals not involved in intra-Community trade.'

10 Section A of the Annex to Regulation No 21/2004, to which Article 4 of that regulation refers concerning individual identification, determines the means of identification and provides, in particular, that those means must be designed to ensure at least one visible mark and one electronically readable mark as well as the characteristics, the information provided by the codes displayed by those means of identification, the criteria that the first and second means of identification must meet and the technical criteria for the electronic devices.

11 Section B of the Annex to Regulation No 21/2004, to which Article 5 of that regulation refers concerning the holding register, lists the minimum information that that register must contain.

German law

12 It is apparent from the reference for a preliminary ruling that the national rules, adopted in accordance with Regulation No 21/2004, prescribe that every animal is to be individually identified by two means of identification and by a 12-digit code. Those two means of identification are, first, an eartag with black figures on a yellow background and, secondly, an electronic means of identification by an eartag or ruminal bolus.

13 The individual means of identification of the animals must also be entered in a holding register which contains, in particular, the identification code of the holding, the identification code of the holding of destination for animals leaving the holding, the identification code of the holding of origin for animals arriving on the holding, the identification code of the animal, the year of birth and date of identification, the month and the year of death if the animal has died on the holding, and the race and, if known, the genotype of the animal.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 14 Mr Schaible, a keeper of sheep with 450 ewes, brought an action before the referring court seeking a declaration that he is not subject to the obligations of identifying individual animals, of electronic identification of individual animals, and of keeping a holding register in accordance with Regulation No 21/2004.
- 15 The Land Baden-Württemberg contended that the action should be dismissed.
- 16 Entertaining doubts as to the validity of several provisions of Regulation No 21/2004, the Verwaltungsgericht Stuttgart (Stuttgart Administrative Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling, asking whether:
- ‘1. [The] obligation to identify individual animals under Articles 3(1) and 4(2) of Regulation ... No 21/2004,
 2. the ... obligation of electronic identification of individual animals under the first subparagraph of Article 9(3) of Regulation ... No 21/2004 ...,
 3. the ... obligation to keep a holding register ... in accordance with Article 5(1), read in conjunction with point B(2) of the Annex to Regulation ... No 21/2004
- are compatible with higher-ranking European Union law and therefore valid?’

The application to reopen the oral procedure

- 17 By document lodged at the Court Registry on 8 July 2013, Mr Schaible requested the reopening of the oral procedure, raising the possibility that the Court is not sufficiently informed on two points of the argument of the Council of the European Union and of the European Commission that are liable to constitute essential elements to enable it to give judgment.
- 18 First, Mr Schaible argues that, contrary to what these institutions argued at the hearing and as follows from the proposal for a Regulation of the European Parliament and of the Council on animal health [COM(2013) 260 final], no legislative reform is envisaged to extend individual electronic identification also to pigs. Secondly, Mr Schaible claims that it can be inferred from that proposal for a regulation that the Commission no longer considers that electronic and individual identifications are necessary to effectively control epizootic diseases and that the Commission, being aware of the technical difficulties associated with electronic identification of animals that still need to be overcome, is considering a feasibility study and an impact assessment prior to developing integrated electronic systems to facilitate the traceability of animals.
- 19 According to Article 83 of the Rules of Procedure of the Court of Justice, the Court may, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.
- 20 In the present case, the Court, after hearing the Advocate General, considers that it has before it all the necessary evidence to give judgment and that it is not apparent from Mr Schaible’s application that there is any new fact which is of such a nature as to be a decisive factor in the judgment to be given, or any argument not yet debated between the parties on the basis of which the case must be dealt with.

- 21 In those circumstances, it is not appropriate to accede to Mr Schaible's request to reopen the oral procedure.

Consideration of the questions referred

- 22 By its questions the referring court is, in essence, asking the Court to assess the validity of Articles 3(1), 4(2), 5(1) and the first subparagraph of Article 9(3), as well as point B(2) of the Annex to Regulation No 21/2004, in the light of the freedom to conduct a business and the principle of equal treatment.
- 23 According to that court, the obligations of keepers of sheep and goats under those provisions of Regulation No 21/2004, namely the individual identification of animals, their individual electronic identification and the keeping of an up-to-date register ('the contested obligations') are liable, first, to infringe Article 16 of the Charter of Fundamental rights of the European Union ('the Charter'), establishing the freedom to conduct a business, due to a disproportionate interference with the rights of those animal keepers and, secondly, to be discriminatory.

The freedom to conduct a business

- 24 Under Article 16 of the Charter, the freedom to conduct a business in accordance with European Union law is recognised.
- 25 The protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition, as is apparent from the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter (Case C-283/11 *Sky Österreich* [2013] ECR, paragraph 42).
- 26 The provisions of Regulation No 21/2004 at issue in the main proceedings impose on keepers of sheep and goats obligations regarding an individual electronic identification of the animals and the keeping of a holding register. Thus, with regard to persons breeding animals for commercial purposes, those provisions may limit the exercise of the freedom to conduct a business.
- 27 However, Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights and freedoms, such as the freedom to conduct a business, as long as those limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (see, to that effect, Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063, paragraph 65, and *Sky Österreich*, paragraph 48).
- 28 According to the case-law of the Court, the freedom to conduct a business is not absolute. It may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest (see, to that effect, *Sky Österreich*, paragraphs 45 and 46 and the case-law cited).
- 29 As regards proportionality, the Court recalls that, according the case-law of the Court, that principle requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question, it being understood that, when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be

disproportionate to the aims pursued (Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 45, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR, paragraph 71 and *Sky Österreich*, paragraph 50).

- 30 As regards, first, the objectives of Regulation No 21/2004 and whether the measures implemented by that regulation are appropriate to achieving them, consideration should be given, first, to recitals 1 and 3 in the preamble to that regulation, according to which the European Union legislature seeks to prevent the spread of infectious diseases, in particular foot-and-mouth disease which caused the 2001 crisis in the ovine or caprine animal population, in the context of establishing the internal market in the trade of those animals and their products.
- 31 The elimination of the risk of epizootic diseases in sheep and goats and the implementation of the internal market in their sector were not yet achieved at the time of adoption of Regulation No 21/2004.
- 32 In order to guarantee the proper functioning of the market in animals and products of animal origin, Directive 90/425 removed the zootechnical and veterinary barriers to the development of intra-Community trade. According to Article 1 and Article 3(1)(c) of that directive, the abolition of checks at the borders between Member States makes it necessary for the animals to be identified in accordance with the requirements of European Union rules and registered in such a way that the original or transit holding, centre or organisation can be traced.
- 33 Initially, the identification and registration of ovine and caprine animals were governed by Directive 92/102. That system was based on the identification of animals by holding. Article 4(1)(b) of that directive provided that any animal keeper had to keep a register indicating the total number of sheep and goats present on the holding each year and Article 5(3) of that directive required that sheep and goats be marked with an eartag or a tattoo, making it possible to determine the holding from which they came.
- 34 However, after the major outbreak of foot-and-mouth disease in 2001, it became apparent that the dual objective of preventing epidemics affecting sheep and goats and establishing an internal market for those animals functioning without barriers could only be achieved by reinforcing the system established by Directive 92/102. It is from that point of view that the legislature of the European Union introduced, by adopting Regulation No 21/2004, a new system for the identification and registration of ovine and caprine animals.
- 35 Health protection, the control of epizootic diseases and the welfare of animals, objectives which overlap, constitute legitimate objectives in the public interest pursued by European Union legislation, as well as the completion in the sector concerned of the agricultural internal market (see, to that effect, as regards health protection, Case C-269/97 *Commission v Council* [2000] ECR I-2257, paragraph 48, and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 78, and, as regards the welfare of the animals, Joined Cases C-37/06 and C-58/06 *Viamex Agrar Handel and ZVK* [2008] ECR I-69, paragraph 22, and Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel* [2008] ECR I-4475, paragraph 27).
- 36 Since that finding has been made, it is necessary to consider, secondly, whether the measures implemented by Regulation No 21/2004 are appropriate for attaining those objectives.
- 37 The system introduced by that regulation provides for the individual identification of each animal by two means of identification. Those two means of identification are, with some exceptions, the traditional eartag and an electronic device in the form of an electronic eartag, a ruminal bolus, an electronic transponder or an electronic mark on the pastern, which can be read by specific readers. The identity of each animal must be recorded in a holding register. Moreover, when animals leave the holding, their movements are to be recorded in a document accompanying those animals. In addition,

each Member State is obliged to set up a central register or computer database recording all holdings located on its territory and, at regular intervals, to take an inventory of the animals kept on those holdings.

- 38 Mr Schaible considers that such a system is inappropriate for achieving the objective of controlling epizootic diseases. Furthermore, he argues that the system is ineffective, since 5% of the electronic means of identification attached to the animals are lost over time or become defective.
- 39 As regards the individual identification of the animals, it must be pointed out that this allows a system of control and traceability of each animal, which is essential in the event of major epizootic disease outbreaks. An electronic means of identification improves the effectiveness of the fight against infectious diseases since it ensures greater reliability and speed of data communication.
- 40 As regards the obligation to keep a register for each holding, it should be pointed out, as the French Government observes, that the data recorded by the identifier must be entered in a document which can be rapidly updated and, upon request, easily accessed by the competent authorities. Accordingly, that system allows the place of origin of each animal to be established as well as the various places through which an animal has passed. In the event of epizootic disease, that information is fundamental to carry out accurate epidemiological studies, identify dangerous contacts that are liable to spread the disease and, consequently, enable the competent authorities to take the necessary measures to prevent the spread of such contagious disease. It must be added, as regards epizootic diseases, that, according to recital 4 in the preamble to Council Directive 2003/50/EC of 11 June 2003 amending Directive 91/68/EEC as regards reinforcement of controls on movements of ovine and caprine animals (OJ 2003 L 169, p. 51), movements of sheep largely contributed to the spread of foot-and-mouth disease in certain parts of the European Union during the outbreak of foot-and-mouth disease in 2001.
- 41 As regards the allegations concerning the technical flaws of the identification system, even if the percentage of the means of electronic identification attached to animals which are lost or become defective can reach the level indicated by Mr Schaible, such malfunctions cannot, in themselves, demonstrate that the system concerned is, as a whole, unsuitable.
- 42 It must be concluded, therefore, that the obligations of the system established by Regulation No 21/2004 are appropriate to achieve the objective of controlling epizootic diseases and that no factor has been found that could call into question the overall effectiveness of that system.
- 43 Next, as regards whether the measures implemented by Regulation No 21/2004 are necessary to achieve the objectives pursued by that regulation and whether the contested obligations are disproportionate, it is appropriate to consider three sets of complaints raised by Mr Schaible.
- 44 First, he claims that the old system for identifying the holding, which allowed effective tracing of the movements of animals and an effective control of epizootic diseases has, in practice, already proven its efficiency. Mr Schaible considers that the outbreak of foot-and-mouth disease in 2001 does not call that system into question, since that epidemic was not caused by the system itself, but by the fact that the authorities carried out insufficient controls. Consequently, according to Mr Schaible, it was unnecessary for the European Union legislature to review the old system, since the correct implementation and application of the less stringent rules laid down in Directive 92/102 would have been sufficient to ensure the attainment of the objectives pursued.
- 45 Secondly, Mr Schaible argues that the contested obligations are excessively costly for animal keepers because of the additional equipment that they are required to purchase, namely transponders and electronic scanners in particular, and because of the very substantial labour input that the use of that

equipment requires by the animal keepers themselves and by specialists, namely the application of the transponder, reproduction of the codes into the holding register, management of that register, maintenance of the scanners, and the cost of IT and veterinary interventions.

- 46 Thirdly, Mr Schaible alleges that the contested obligations are incompatible with the guiding principles of animal welfare, since the application of transponders produces a high number of wounded animals. He recalls that, in the previous system, only one identification mark was applied to each animal, reducing by 50% the risk of injury and that non-electronic ear tags cause much less inflammation. He adds that ruminal boluses may be rejected during rumination or digestion and that the electronic identification marks affixed to the ankle of the animals with a plastic bandage can cause a particular risk of injury.
- 47 It should be pointed out, with regard to judicial review of the validity of the provisions of a regulation, that the Court, when it assesses the proportionality of the measures implemented by those provisions, has accepted that the legislature of the European Union, in the exercise of the powers conferred on it, must be allowed a broad discretion in areas which involve, on its part, political, economic and social choices and in which it is called upon to undertake complex assessments (see, to that effect, Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraphs 51 and 52).
- 48 In the area of agriculture, the European Union legislature enjoys, inter alia, such a broad discretion, corresponding to the political responsibilities given to it by Articles 40 TFEU to 43 TFEU. Consequently, review by the Court is limited to verifying whether that legislature has manifestly exceeded the limits of its discretion (see, to that effect, Case C-221/09 *AJD Tuna* [2011] ECR I-1655, paragraph 80, and Case C-545/11 *Agrargenossenschaft Neuzelle* [2013] ECR, paragraph 43).
- 49 Indeed, even though it has such a discretion, the European Union legislature must base its choice on objective criteria and, in assessing the burdens associated with various possible measures, it must examine whether the objectives pursued by the measure chosen are such as to justify even substantial negative consequences for certain economic operators (see, to that effect, *Vodafone and Others*, paragraph 53).
- 50 However, it should be pointed out that the validity of a European Union measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted and cannot depend on retrospective assessments of its efficacy. Where the European Union legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question (see, to that effect, Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 38, and C-309/10 *Agrana Zucker* [2011] ECR I-7333, paragraph 45).
- 51 Consequently, the review by the Court concerning the proportionality of the provisions at issue of Regulation No 21/2004 must be carried out within that framework.
- 52 As regards the alleged adequacy of the old system, it must be noted that, given the animal health, epizootic, economic and social context characterising the period when Regulation No 21/2004 was prepared and adopted, the European Union legislature was entitled to find that, even if the rules of the system established by Directive 92/102 could have been implemented more correctly, those rules and that system needed to be revised.
- 53 During the epizootic disease outbreak of 2001, as was noted by the Council, it was necessary to systematically slaughter millions of animals, because sheep were unidentified and could not be traced, only to then discover that many of them were not infected. It was necessary to have recourse to various

restrictions within the European Union and a worldwide ban on all exports of livestock, meat and animal products from the United Kingdom. Those measures resulted in significant losses for the food industry and for the budgets of the Member States and the European Union.

- 54 It is apparent from paragraph 9 of the Special Report of the Court of Auditors No 8/2004 on the Commission's management and supervision of the measures to control foot-and-mouth disease and of the related expenditure, together with the Commission's replies (OJ 2005 C 54, p. 1) that, for the 2001 crisis alone, the overall total expenditure declared by Member States for compensation for slaughter and destruction of animals as well as disinfecting of farms and equipment was around 2 693,4 million euros. The report also states, at paragraph 36, that European Union regulations did not require sheep to be identified individually, and that there were also shortcomings in the system of batch identification, which hampered the tracing of animals that were suspected of being infected and so delayed their slaughter.
- 55 Moreover, already in 1998, before the epizootic disease outbreak of 2001, the Commission had launched the IDEA project, coordinated by the European Union Joint Research Centre, the Final Report of which was completed on 30 April 2002. One of the findings of the IDEA Final Report was that the various outbreaks of livestock disease within the European Union had revealed that the identification systems used at the time were not efficient and reliable enough to provide a correct traceability and veterinary monitoring of livestock species. Closer control of the individual animals and their movements was deemed to constitute a critical issue for sanitary control and disease monitoring, which make it necessary for it to be possible to trace the whereabouts of any animal at any given time. Accordingly, in order to make the monitoring of individual animals more efficient, a unique identification, for the entire life cycle of each animal, was suggested, by the application of a means of electronic identification.
- 56 Recital 7 in the preamble to Regulation No 21/2004 states that the IDEA project demonstrated that a substantial improvement in ovine and caprine animal identification systems could be achieved by using electronic identifiers for those animals, provided that certain conditions concerning the accompanying measures were fulfilled. It should be added that, as the Council has rightly pointed out, individual identification does not yet guarantee full traceability, as it only allows data collection for later use, and it is the register which constitutes the central element of the traceability system.
- 57 As the Advocate General points out at points 72 to 74 of his Opinion, having regard to the various studies carried out in the aftermath of the 2001 epizootic disease crisis, the Court of Auditors Special Report No 8/2004 and the IDEA Final Report were by no means the only documents to suggest a more in-depth revision of the regulatory framework on the identification of animals.
- 58 Having regard to the animal health, epizootic, economic and social context in which Regulation No 21/2004 was adopted, and to the abovementioned Reports, the legislature of the European Union was entitled to consider, first, that, under the contested obligations, the animals must be individually identified and that the competent authorities must have access to the data that, as a result of the electronic identifiers and holding registers, allow the necessary measures to be adopted in order to prevent and limit the spread of infectious diseases among ovine and caprine animals and, secondly, that the old system of identifying the holding was not as efficient a means of ensuring the objectives referred to in Regulation No 21/2004.
- 59 It must therefore be held that the contested obligations are necessary to achieve the aims pursued by that regulation.

- 60 As regards any disproportionate nature of the contested obligations, it should be noted that the European Union legislature was required to strike a balance between the interests at issue (see, to that effect, *Volker und Markus Schecke and Eifert*, paragraph 77, and *Sky Österreich*, paragraph 59), namely, on the one hand, the freedom of keepers of sheep and goats to conduct business and, on the other, the general interest in controlling epizootic disease in sheep and goats.
- 61 With regard to the allegedly excessive nature of the financial burdens resulting from the contested obligations, which a study carried out by the German Association of Sheep Farmers (Vereinigung deutscher Landesschafzuchtverbände e.V.), relied on by Mr Schaible, estimated at more than 20 euros per year per sheep, it should be noted that, according to the referring court, that study does not take into account costs that are, in any event, connected to identification by holding. Likewise, as the Commission argues, the cost of electronic ear tags is likely to fall over time and increased use. Furthermore, as the Netherlands Government contends, the actual costs are likely to be less than the costs of non-selective measures, such as the ban on exports or the preventive slaughter of livestock in the event of the occurrence of a disease.
- 62 Next, it should be noted that there is nothing in the documents before the Court that calls into question the contention of the Council and of the Commission that the financial aspects of the new system established by Regulation No 21/2004 were widely discussed during the legislative process and that the costs and advantages of that system were weighed up.
- 63 Furthermore, it should be noted that Regulation No 21/2004 contains several derogations from the requirement of electronic identification, to take into account the outcome of the process of weighing up the advantages of the contested obligations and the burdens arising from them.
- 64 Accordingly, under the second subparagraph of Article 4(1) of that regulation, Member States may provide that animals kept in extensive or free-range farming conditions need only be identified after a period of up to nine months, instead of six. According to Article 4(3) of that regulation, the competent authorities may allow a solution other than electronic identification for animals intended for slaughter before the age of 12 months and intended neither for intra-Community trade nor for export to third countries. Subparagraphs two and three of Article 9(3) of Regulation No 21/2004 provide that electronic identification is compulsory only for Member States in which the total number of animals exceeds a certain threshold.
- 65 It should be noted that the Commission, in view of the costs of the electronic devices, readers and data processing equipment, together with the calculations carried out by the European Union Joint Research Centre, proposed a gradual introduction of the electronic identification obligation, starting with the electronic tagging as a first step and then the linking of the movement information with the individual animal codes, with a view to limiting expenses during the introductory period of the system, as is apparent from paragraph 2.3 of the Report from the Commission to the Council of 16 November 2007, on the implementation of electronic identification in sheep and goats [COM(2007) 711 final], and from the amendments to Regulation No 21/2004 made by Regulation No 933/2008.
- 66 Finally, it should be noted that the European Union legislature has mitigated the additional costs for animal keepers by allowing Member States and regions to grant them, where appropriate, financial aid from European Union funds. Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 2004 L 160, p. 80) was amended shortly before the adoption of Regulation No 21/2004. Accordingly, Article 21b(1) of Regulation No 1257/1999, as amended by Council Regulation No 1783/2003 of 29 September 2003 (OJ 2003 L 270, p. 70), provides that a temporary support intended to contribute partly to costs incurred and income foregone may be granted to farmers who have to apply demanding standards based on European Union legislation and newly introduced in national legislation. That provision applies, in particular, to the animal keepers concerned by the contested obligations.

- 67 In that regard, the Council states that that possibility, for farmers, to obtain financial support was an important factor that it took into account in its decision-making process. It also states that Article 31 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1), which repealed Regulation No 1257/99 and is currently in force, has preserved the gist of that rule.
- 68 In those circumstances, it cannot be argued that the European Union legislature did not duly consider the financial burden resulting from the additional costs that keepers of sheep and goats are required to bear in order to comply with the contested obligations and the advantages attained through those obligations, nor did it commit any error of assessment when weighing the various interests in order to strike a fair balance between them.
- 69 As regards the argument that the application of the electronic means of identification results in an increased number of injuries in animals and that their injuries become more serious, it is must be noted that some adverse effects that could affect the health and welfare of sheep and goats were examined and taken into account in the studies that were conducted prior to the adoption of Regulation No 21/2004.
- 70 In particular, the IDEA Final Report surveyed the main causes of injuries and death after electronic identifier application and provided the legislature with useful information on the manner in which the various types of device could affect the health of animals.
- 71 The evidence produced by Mr Schaible does not call into question the assessments and choices of the European Union, made on the basis of those studies, when adopting Regulation No 21/2004.
- 72 The fact that two means of identification must be affixed to the animals instead of one and the fact that the new means of identification statistically cause more injuries and complications than traditional devices, given the procedure and the place of attachment of these new devices and their weight, are not such as to demonstrate that the assessment of the European Union legislature concerning the benefits of introducing the obligation of electronic identification of sheep and goats was wrong, on the ground that it failed to respect the welfare of animals.
- 73 Furthermore, it should be pointed out that the new system established by Regulation No 21/2004, which allows a more precise identification of those animals which have been in contact during epizootic disease outbreaks, is able to limit the spread of contagious disease and will accordingly enable the resultant suffering of infected animals to be avoided. Accordingly, the contested obligations, from this perspective, contribute positively to the protection of animal welfare.
- 74 Therefore, Court rejects the argument that Regulation No 21/2004 is invalid due to the scale of the negative impact on the welfare of the animals of the obligation under that regulation to electronically identify sheep and goats.
- 75 In those circumstances, the European Union legislature could legitimately impose the contested obligations and consider that the disadvantages resulting from those obligations are not disproportionate to the objectives pursued by Regulation No 21/2004 and it did not commit an error in considering the advantages and disadvantages of those contested obligations with regard to all the interests involved and that, therefore, it did not infringe the freedom of keepers of sheep and goats to conduct a business.

Equal treatment

- 76 Equality before the law, set out in Article 20 of the Charter, is a general principle of European Union law which requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such different treatment is objectively justified (see, to that effect, Case C-313/04 *Egenberger* [2006] ECR I-6331, paragraph 33).
- 77 According to the case-law of the Court a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 47).
- 78 Since a European Union legislative act is concerned, it is for the European Union legislature to demonstrate the existence of objective criteria put forward as justification and to provide the Court with the necessary information for it to verify that those criteria do exist (*Arcelor Atlantique et Lorraine and Others*, paragraph 48).
- 79 In the main proceedings, the validity of certain provisions of Regulation No 21/2004 is challenged in several regards, on the ground of that they are discriminatory. First, it is argued that the derogation provided for in Article 9(3) of Regulation No 21/2004 ('the contested derogation') constitutes a difference of treatment which is not justified. Secondly, the contested obligations provided for by that regulation, it is alleged, discriminate against keepers of sheep and goats as compared to keepers of cattle and pigs.

The contested derogation

- 80 Mr Schaible argues that the contested derogation, which permits Member States with a small ovine or caprine animal population to make the electronic identification system optional, constitutes discrimination and confers on animal keepers in Member States which have not introduced that system a competitive advantage as compared to other animal keepers established in the European Union. He considers that the burdens imposed on animal keepers are identical in the two categories of Member States, as are the risks of epizootic disease.
- 81 As regards the allegations of Mr Schaible, it should be noted that, in the present case, it is undisputed that the contested derogation entails a different legal treatment for animal keepers, depending on the category of the Member State in which they are established.
- 82 However, it must be stated that the criterion forming the basis of the contested derogation is objective and reasonable.
- 83 First, the thresholds referred to in Article 9(3) of Regulation No 21/2004 are entirely objective criteria. Thus, Member States that meet those criteria regardless of their absolute geographical size and that decide to opt for the contested derogation may introduce electronic identification in the future if the relevant circumstances change, and they are even obliged to introduce it if their animal population exceeds the respective thresholds.
- 84 Secondly, the thresholds provided for by the contested derogation appear to be reasonable and proportionate to the objectives pursued by Regulation No 21/2004 given that, as the Commission points out, in the event of an animal population that is small and not intended for intra-Community trade, it is not possible to achieve economies of scale at national level in order to control the costs of the electronic system.

- 85 As regards costs and expenses, the Council rightly points out that, in Member States that have small animal populations, the financial burden of eradication and elimination in the event of major outbreaks of epizootic disease may be lower than the costs of implementing such an electronic identification system. In that way, even if there is an increased risk of contagion, that risk is, in principle, confined to the territories of the Member States which, having decided to make use of the contested derogation, accept that they have to bear such financial burdens in the event of an outbreak of epizootic disease.
- 86 As the contested derogation permits Member States to make individual electronic identification optional only with respect to animals that are not involved in intra-Community trade, it must be held, as the French Government concluded, that an animal keeper established in a Member State in which that identification is obligatory suffers no economic disadvantage resulting from the common effects of that obligation and from the contested derogation. any animal destined for that Member State will also have to be electronically identified, even if that animal originates in a Member State where, under that derogation, an individual electronic identification is not obligatory for animals which are not involved in intra-Community trade.
- 87 Finally, it should be pointed out that, according to settled case-law, the prohibition on discrimination is not concerned with any disparities in treatment which may result, between the Member States, from divergences existing between the legislation of the various Member States so long as that legislation affects equally all persons subject to it (Case C-428/07 *Horvath* [2009] ECR I-6355, paragraph 55 and the case-law cited). The Court held that while it is true that that principle was developed in the context of the interpretation of provisions of European Union law with a view to assessing the compatibility of national legislation by reference to the principle of non-discrimination, the situation cannot be any different as regards the assessment of the validity of the provision of European Union law granting the Member States a margin of discretion by virtue of which they adopt such different legislation (see, by analogy, Case C-373/11 *Panellinos Syndesmos Viomichanion Metapoisis Kapnou* [2013] ECR, paragraphs 35 and 36).
- 88 In those circumstances, it must be concluded that no factors have emerged that call into question the validity of the contested derogation on the ground that it is discriminatory.

The alleged discrimination against keepers of sheep and goats as compared to keepers of cattle and pigs

- 89 Mr Schaible points out that the obligation to electronically identify each animal is not imposed on keepers of cattle and pigs despite the fact that those animals are just as exposed to epizootic diseases as sheep and goats. He considers that the system of identification of the holding allows effective control of epizootic diseases in pigs. Mr Schaible argues that the introduction of an obligatory system of electronic identification of cattle is not envisaged and that it is apparent, from the Proposal for a Regulation of the European Parliament and of the Council of 30 August 2011 amending Regulation (EC) No 1760/2000 as regards electronic identification of bovine animals and deleting the provisions on voluntary beef labelling [COM(2011) 525 final], that the Commission proposes to maintain the optional nature of the electronic identification of cattle, mainly because of problems experienced in the context of obligatory individual identification of sheep and goats. He considers that the policies of the European Union in that area are inconsistent and a technology that is not ready to be applied is being tested by the European Union in a sector where farmers have little influence.
- 90 The French and Netherlands governments highlight the differences characterising, on the one hand, the sheep and goats sector and, on the other, the cattle and pigs sectors. They emphasise the particularities of those different types of animals, as regards their breeding, transport and marketing, as well as the diseases and risk profiles that threaten them. In particular, sheep and goats are normally subject to more movements than cattle and pigs and, unlike cattle and pigs, they are also more often

traded through auctions of very large lots. Moreover, the groups of sheep and goats change composition more frequently than cattle and pigs. In the case of foot-and-mouth disease, the risk of contagion is higher among sheep and goats than among pigs. These circumstances obviously make it more difficult to identify and trace each ovine and caprine animal.

- 91 In that regard, it should be noted that, where the legislature of the European Union is called on to restructure or establish a complex system, it is entitled to have recourse to a step-by-step approach and to proceed in the light of the experience gained, provided that its choice is based on objective criteria appropriate to the aims pursued by the legislation in question (see, to that effect, *Arcelor Atlantique et Lorraine and Others*, paragraphs 57 and 58 and the case-law cited).
- 92 It should be noted, with regard to the arguments set out in paragraphs 89 and 90 of the present judgment regarding the similarities and differences that characterise, on the one hand, sheep and goats and, on the other hand, cattle and pigs, that there are, despite some similarities of these various types of mammals, differences that justify a specific regulatory framework for each animal species. Given the historical context of the foot-and-mouth disease crisis in 2001, the European Union legislature could legitimately introduce, with Regulation No 21/2004, specific legislation providing for the electronic identification of species particularly affected by that crisis.
- 93 Consequently, the Council was not obliged to refuse to adopt Regulation No 21/2004, following the Commission proposal, on the introduction of electronic identification of sheep and goats on the ground that its scope was too limited.
- 94 However, it should be noted that, although the legislature could lawfully make use of such a step-by-step approach for the introduction of electronic identification, it must, in view of the objectives of Regulation No 21/2004, consider the need to review the measures adopted, inter alia as regards whether electronic identification is optional or obligatory (see, by analogy, *Arcelor Atlantique et Lorraine and Others*, paragraph 62).
- 95 It must therefore be held that that regulation does not discriminate against keepers of sheep and goats as compared to keepers of cattle and pigs.
- 96 In those circumstances, it is not established that the contested derogation and obligations provided for by Regulation No 21/2004 infringe the principle of equal treatment.
- 97 It follows from all the foregoing that the consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Articles 3(1), 4(2), 5(1) and the first subparagraph of Article 9(3) and point B(2) of the Annex to Regulation No 21/2004.

Costs

- 98 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

The consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Articles 3(1), 4(2), 5(1) and the first subparagraph of Article 9(3) and point B(2) of the Annex to Council Regulation No 21/2004 of 17 December 2003 establishing a system for the identification and registration of ovine and caprine animals and amending Regulation (EC) No 1782/2003 and Directives 92/102/EEC and 64/432/EEC, as amended by Commission Regulation (EC) No 933/2008 of 23 September 2008.

[Signatures]