JUDGMENT OF THE COURT
3 October 1985 *

In Case 195/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesverwaltungsgericht [Federal Administrative Court] for a preliminary ruling in the action pending before that court between

Denkavit Futtermittel GmbH, whose registered office is at Warendorf (Federal Republic of Germany),

and

Land Nordrhein-Westfalen [the *Land* of North Rhine-Westphalia],

on the interpretation of Directive 70/524/EEC concerning additives in feedingstuffs, Directive 74/63/EEC on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs and Directive 79/373/EEC on the marketing of compound feedingstuffs,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), P. Pescatore, T. Koopmans, U. Everling, K. Bahlmann and Y. Galmot, Judges,

Advocate General: M. Darmon
Registrar: P. Heim

after considering the observations submitted on behalf of:

Denkavit Futtermittel GmbH, the plaintiff in the main proceedings, by Dietrich Ehle, Rechtsanwalt, Cologne, during the written and oral procedure,

the Land Nordrhein-Westfalen, the defendant in the main proceedings, by Herbert Wolfering, Rechtsanwalt, Düsseldorf, during the written procedure,

* Language of the Case: German.

the Government of the Federal Republic of Germany by Martin Seidel, Ministerialrat at the Federal Ministry for the Economy, and Michael Loschelder, Rechtsanwalt, Cologne, during the written procedure and by Michael Loschelder during the oral procedure,

the Government of the Italian Republic by Arnaldo Squillante, Head of the Department for Contentious Diplomatic Affairs, Treaties and Legislative Matters of the Ministry for Foreign Affairs, assisted by Ivo M. Braguglia, Avvocato dello Stato, during the written procedure and by Ivo M. Braguglia during the oral procedure,

the Commission of the European Communities by its Legal Adviser, Peter Karpenstein, during the written and oral procedure,

after hearing the Opinion of the Advocate General delivered at the sitting on 9 July 1985,

gives the following

JUDGMENT

(The accounts of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 24 May 1984, which was received at the Court on 24 July 1984, the Bundesverwaltungsgericht referred to the Court for a preliminary ruling, under Article 177 of the EEC Treaty, several questions on the interpretation of Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs (Official Journal, English Special Edition 1970, III, p. 840; hereinafter referred to as 'the additives directive'), Council Directive 74/63/EEC of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs (Official Journal 1974, L 38, p. 31; hereinafter referred to as 'the undesirable substances directive') and Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs (Official Journal 1979, L 86, p. 30; hereinafter referred to as 'the compound feedingstuffs directive').

The background to the dispute

2 Paragraph 7 of the Futtermittelverordnung [Feedingstuffs regulation] of 16 June 1976 was amended by the Dritte Verordnung zur Änderung der Futtermittelverordnung [Third Regulation amending the Feedingstuffs regulation] of 19 July 1979 (Bundesgesetzblatt I, p. 1122), which introduced a new subparagraph laying down a minimum iron content and a maximum permitted level of sodium for milk-replacer feed intended for use as complete feedingstuffs for the rearing of calves. That provision, which is now contained in Paragraph 8 (3) of the Futtermittelverordnung of 8 April 1981 (Bundesgesetzblatt I, p. 352), provides as follows:

'Milk-replacer feed intended for use as complete feedingstuffs for calf-rearing must contain at least 60 mg of iron per kg. Milk-replacer feed intended for use as complete feedingstuffs for the fattening of calves up to approximately 80 kg in weight must contain at least 40 mg of iron per kg. Milk-replacer feed intended for use as complete feedingstuffs for the fattening of calves may contain no more than 6 000mg of sodium per kg. In each case the content level relates to dry matter of milk feed'.

3 According to Paragraph 14 (1) of the Futtermittelgesetz [Law on feedingstuffs] of 2 July 1975 (Bundesgesetzblatt I, p. 1745) feedingstuffs which fail to comply with the requirements in force may not be introduced into the territory in which the Law is applicable.

4 Denkavit Futtermittel GmbH [hereinafter referred to as 'Denkavit'] is a manufacturer and importer of feedingstuffs obtained from powdered milk. As part of its business activities it wishes to manufacture and sell milk-replacer feed which do not satisfy the requirements of the aforementioned provisions of the Futtermittelverordnung. It referred the matter to the Landesamt für Ernährungswirtschaft Nordrhein-Westfalen [Regional Board for Food Production and Distribution of North Rhine-Westphalia], which notified it on 22 November 1979 that the marketing of the feedingstuffs in question was illegal and that it would take action against infringements of the said provisions, as it was required to do by law.

5 Denkavit brought an action before the Verwaltungsgericht [Administrative Court], Düsseldorf, against that decision seeking a declaration that it was authorized under Directives 70/524, 74/63 and 79/373 to market feedingstuffs which did not comply with the new requirements concerning the levels of iron and sodium. By a judgment of 8 August 1980 the Verwaltungsgericht upheld the application on the ground that the aforementioned provisions of the Futtermittelverordnung were contrary to Article 30 of the EEC Treaty. It stated that they could not be justified under Article 36 of the Treaty in view of the harmonization effected by the said Community directives.

6 On appeal by the Landesamt the North Rhine Westphalian Oberverwaltungsgericht [Higher Administrative Court] set that ruling aside by a judgment of 21 September 1981. It stated that iron did not constitute an additive and sodium did not constitute an undesirable substance; they were natural constituent elements or ingredients of a compound feedingstuff. The second sentence of Article 3 of Directive 79/373 expressly left it to the Member States to prescribe that compound feedingstuffs should not represent a danger to animal or human health. Consequently, the validity of the national rules could not be contested by reference to Community law.

7 Denkavit brought an appeal on a point of law before the Bundesverwaltungsgericht which, by an order of 24 May 1984 pursuant to Article 177 of the EEC Treaty, stayed the proceedings until the Court of Justice had delivered a preliminary ruling on the following questions:

(1) Is the term 'additives' contained in Article 2 (a) of Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs to be interpreted:

(i) as encompassing all substances which are contained in feedingstuffs and affect their characteristics or livestock production, or

(ii) as encompassing the abovementioned substances only where they are not merely contained in the constituents of feedingstuffs (as so-called 'constituent substances') but are added — possibly on their own — to the constituents of feedingstuffs?

(2) Is the rule contained in Article 13 of Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs to be interpreted as meaning that the Member States are no longer permitted to subject feedingstuffs to a marketing restriction relating to the absence of a substance by providing that milk-replacer feed must have a certain minimum iron content?

(3) Are the rules contained in Articles 5 and 7 of Council Directive 74/63/EEC of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs to be interpreted as meaning:

(i) that the Member States are in principle no longer permitted to subject feedingstuffs to a marketing restriction relating to the presence of a substance not listed in the annex to the directive by providing that milk-replacer feed may only have a specific sodium content;

(ii) that the Member States may only in exceptional cases, in accordance with the first sentence of Article 5 (1) of the above directive and subject to compliance with the second sentence of that provision, provisionally fix a maximum sodium content?

(4) (a) Is the rule contained in Article 1 (2) (b) and (c) of Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs to be interpreted as meaning:

— that the Member States are still not permitted to subject feedingstuffs to marketing restrictions relating to the absence of additives within the meaning of Directive 70/524/EEC and the presence of undesirable substances within the meaning of Directive 74/63/EEC which according to those directives may not be prescribed, or

(b) is the rule contained in the second sentence of Article 3 of Directive 79/373/EEC to be interpreted as meaning:

(i) that the Member States are permitted to subject feedingstuffs to a marketing restriction relating to the absence of an additive or the presence of an undesirable substance where the absence of the substance in question or the presence thereof constitutes a danger to animal or human health;

(ii) and that they may do so without having recourse to the adaptation procedure under Article 6 (2) A (a) of Directive 70/524/EEC or Article 5 (1) of Directive 74/63/EEC?

8 The Bundesverwaltungsgericht observes that in the legal assessment of the matter a primary question is whether, and to what extent, the Community directives are legal provisions upon which an appeal on a point of law may be founded within the meaning of Paragraph 137 of the Verwaltungsgerichtsordnung [Rules of Procedure for Administrative Courts]. It considers that that question poses certain difficulties in view of the legal nature of directives which, according to the third paragraph of Article 189 of the EEC Treaty, are binding, as to the result to be achieved, upon the Member States to which they are addressed but leave to the national authorities the choice of form and methods for the achievement of that result. Although a directive is binding on the Member States to which it is addressed, its provisions do not constitute legislation directly applicable to citizens of those Member States. However, in the opinion of the Bundesverwaltungsgericht, that does not mean that Community directives are devoid of any external

effect. That is particularly important in cases where a Member State has failed to fulfil its obligation to transpose the provisions of a directive into national law. In such cases individuals in that Member State who are affected by that situation must be allowed to rely, as against national law which is not in keeping with the directive, on that State's obligation to transpose the directive into national law. If a Member State were able to deny a right to its nationals by relying on a provision of national law which was inconsistent with a provision of Community law by which it was bound, it would be difficult to reconcile such conduct with the principle of good faith. Accordingly, the Bundesverwaltungsgericht concludes, a national provision of that kind cannot be relied upon as against the person concerned.

Observations of the parties

9 In the course of the procedure before the Court, observations were submitted by Denkavit, the plaintiff in the main proceedings, the Land Nordrhein-Westfalen, the defendant in the main proceedings, the Federal Republic of Germany, the Italian Republic and the Commission.

10 Denkavit contends that the three directives constitute a complete and exhaustive set of rules in the matter, in particular governing questions of health arising from the composition of feedingstuffs, in such a manner that there is no further room in that field for national measures concerning the composition of feedingstuffs and, in particular, for the application of Article 36 of the EEC Treaty. It contends in particular that controls on the iron content of feedingstuffs fall within the scope of the additives directive, Annex I to which refers to iron but merely fixes a maximum permitted level. According to Article 3 (1) of that directive only those additives listed in Annex I thereto may be incorporated in feedingstuffs and only on the conditions referred to therein. A Member State may not, therefore, by means of unilateral measures, amend the provisions of the annex, which do not fix a minimum iron content. Sodium falls, in Denkavit's view, within the scope of the undesirable substances directive. Unlike the additives directive, which permits the use only of the products listed and regulated in the annex thereto, Article 3 (1) of the undesirable substances directive provides that the substances and products listed in the annex thereto are tolerated in feedingstuffs only under the conditions set out therein. It follows that unless it is included in that list a product may not be regarded as 'undesirable'; sodium is, however, not mentioned therein. A Member State may not therefore declare a product to be undesirable if that product is not referred to in the annex to the said directive.

11 Denkavit also emphasizes that the procedure adopted by the German authorities endangers the functioning of the Common Market. If such national measures were regarded as lawful, each Member State would be able to implement special rules in an area which has been harmonized with the effect, ultimately, of rendering the free movement of goods illusory. Denkavit draws attention to the considerable hindrance which provisions of that sort cause for producers who must be able to determine precisely and specifically the constituent elements of the feedingstuffs which they seek to market.

12 The Land Nordrhein-Westfalen, the defendant in the main proceedings, contends that since iron is present naturally in certain products used for the manufacture of compound feedingstuffs it cannot be regarded as an additive within the meaning of the additives directive; it also considers sodium to be a natural product which cannot be regarded as an undesirable substance within the meaning of Directive 74/63. Both elements must be regarded as 'constituent elements' of feedingstuffs. As such their utilization is not regulated by the directives. Consequently, the national legislature cannot be prevented from acting in an area which is not regulated by the directives and from bringing into force, at the very least, supplementary provisions intended to avoid dangers to animal and human health or to have a favourable effect on livestock production.

13 The same argument is put forward by the Federal Republic of Germany which considers that the directives constitute only a fragmentary set of rules concerning the manufacture and marketing of compound feedingstuffs. Harmonization extends only to additives, undesirable substances and provisions on the packaging and labelling of products. The use of the ingredients involved in the composition of feedingstuffs is not yet the subject of a coherent set of rules. Since iron and sodium must be classified as constituent elements and not additives or undesirable substances, it is not possible to contest the Member States' power to adopt measures at national level, especially measures for the protection of animal and human health. The Federal Republic of Germany points out that the measures complained of by Denkavit were adopted in order to deal with certain harmful practices in the feeding of calves. One such practice is artificially inducing anaemia by using feedingstuffs with a low iron content, in order to obtain white meat which is particularly highly regarded by consumers; the other is making the calves artifically thirsty by administering excessive quantities of salt so that they consume excessive quantities of liquid feedingstuffs, in order to increase their slaughter

liveweight. In so far as the directives do not contain an exhaustive set of rules on those matters, it is for the Member States to adopt appropriate measures in each case, as is expressly recognized in Article 3 of the compound feedingstuffs directive.

14 The Federal Republic of Germany's view was supported by the Italian Republic, which considers that the two substances to which the German rules relate cannot be classified as additives or undesirable substances since they are substances which are naturally present in compound feedingstuffs; accordingly, Article 3 of the compound feedingstuffs directive may be relied upon with good effect by the Member States in order to justify the adoption of measures such as those which are the subject of the proceedings before the Bundesverwaltungsgericht.

Substance

15 All the questions raised by the Bundesverwaltungsgericht have been the subject of parallel proceedings in Case 28/84 in the context of an action brought under Article 169 of the EEC Treaty by the Commission against the Federal Republic of Germany alleging the latter's failure to fulfil its Treaty obligations, to which the Bundesverwaltungsgericht referred in its order for reference. By a judgment earlier today the Court has declared that the provisions which are now contained in Paragraph 8 (3) of the Futtermittel- verordnung of 8 April 1981 are incompatible with the aforementioned directives and Article 30 of the EEC Treaty.

16 As the Court stated in the grounds of the said judgment the three directives constitute a coherent system governing the manufacture and marketing of compound feedingstuffs, including the question of additives and undesirable substances. Consequently, feedingstuffs which conform to the requirements of those directives must, in principle, be freely marketable throughout the Community, as follows from Article 13 of the additives directive, Article 7 of the undesirable substances directive and Article 9 of the compound feedingstuffs directive.

17 In the light of those considerations the questions referred to the Court of Justice by the Bundesverwaltungsgericht must be answered in the following manner.

18 *Question 1* seeks to ascertain whether the term 'additives' within the meaning of Directive 70/524 must be interpreted narrowly as relating only to elements which are added, that is to say which are incorporated as an additional element, or whether the term must be interpreted as capable of also encompassing elements such as iron which are present naturally in more or less significant quantities in the composition of feedingstuffs according to the ingredients chosen.

19 The Bundesverwaltungsgericht rightly points out that the term 'additives' as such appears to refer exclusively to substances added to feed mixtures but that a wider interpretation of the term is suggested by the contents of the directive and, more particularly, the annexes thereto. It is clear from the latter that various elements classified as additives may also be present in the natural state in the composition of feedingstuffs by virtue of the ingredients chosen. That is the case, in particular, in relation to iron elements which may be added within the limits laid down in Annex I but which may also be present as a result of the ingredients used in the composition of the feedingstuffs. That ambivalence does not mean that those elements are not to be classified as 'additives' and are not subject to the rules laid down by the directive. It is therefore clear that a Member State cannot unilaterally regulate the content of a given element on the ground that, in contrast to other elements, it is also present in the natural state in certain ingredients.

20 The reply to Question 1 must therefore be that the term 'additives', as used in Article 2 (a) of Directive 70/524, must be interpreted as encompassing all substances capable of affecting the characteristics of feedingstuffs, even if they are present in the natural state in certain ingredients which may be used in the composition of feedingstuffs.

21 *Question 2*, concerning the interpretation of Article 13 of Directive 70/524 seeks to ascertain whether the national legislature is authorized to fix a minimum content or maximum permitted level in respect of a substance for which Annex I to the directive has not laid down a minimum content or maximum permitted level.

22 According to Article 13: 'The Member States shall ensure that feedingstuffs which conform to the provisions of this Directive shall be subject, as regards the presence or absence of additives and as regards marking, to no marketing restrictions other than these provided for in this Directive'.

23 In view of the fact that Article 3 (1) of Directive 70/524 states that 'only those additives which are listed in Annex I may be incorporated in feedingstuffs and only subject to the requirements set out therein', it is not for the Member States to amend the directive's provisions by introducing requirements relating to minimum or maximum content levels in respect of any substance referred to in Directive 70/524. Without prejudice to the emergency procedure provided for by Article 7 of Directive 70/524, as amended by Council Directive 73/103/EEC of 28 April 1973 (Official Journal 1973, L 124, p. 17), the provisions of the directive and in particular the minimum or maximum levels fixed therein cannot be amended or supplemented so as to affect the whole of the Community except by the procedures provided for by Directive 70/524. The Member States may not unilaterally lay down provisions in that field.

24 The answer to Question 2 must therefore be that the rule contained in Article 13 of Directive 70/524 must be interpreted as meaning: that the Member States are no longer permitted to restrict the marketing of feedingstuffs because of the absence of a particular substance by providing that milk-replacer feed must have a specific minimum iron content.

25 *Question 3* seeks to ascertain whether sodium may be classified as an 'undesirable substance' within the meaning of Directive 74/63, given the fact that that directive does not contain any express definition of the term 'undesirable substance'. In the event that sodium may be regarded, above a certain threshold, as an undesirable substance, the Bundesverwaltungsgericht seeks to ascertain whether, in the light of Articles 5 and 7 of the directive, the Member States may still prescribe a maximum permitted level of sodium or whether such a measure may only be adopted provisionally under Article 5 of the directive.

26 It must be stated at the outset that even a substance which is harmless in itself may be classified as an undesirable substance if it produces harmful effects above a certain concentration. As has already been pointed out, it follows from the scheme of the undesirable substances directive that the Member States may require adherence to maximum permitted levels only in respect of the substances listed in the annex thereto and subject to the requirements set out therein. According to Article 7 of the directive feedingstuffs which conform to the directive cannot be subjected to any marketing restrictions which are stricter than those provided for by the directive.

27 However, Article 5 of the directive authorizes the Member States to adopt provisional measures in order to reduce the level of a specific substance where they consider that a maximum permitted level fixed in the annex thereto or a substance or product not listed therein presents a danger to animal or human health. A Member State which adopts such a measure must advise the other Member States and the Commission thereof without delay and must at the same time give its reasons. That notification sets in motion the procedure provided for by Article 10 of the directive in order to enable the Community institutions, if necessary, to adopt measures applicable to all Member States.

28 The answer to Question 3 must therefore be that the rules contained in Articles 5 and 7 of Directive 74/63 must be interpreted as meaning:

(i) that Member States are in principle no longer permitted to restrict the marketing of feedingstuffs because of the presence of a substance not referred to in the annex to that directive by providing, for example, that the sodium content of milk-replacer feed may not exceed a certain maximum level;

(ii) that Member States may provisionally fix a maximum sodium content in accordance with Article 5 of the directive only in exceptional cases and subject to compliance with the procedures laid down in that provision.

29 *Question 4* concerns the definition of the legal relationship between the compound feedingstuffs directive, on the one hand, and the additives directive and the undesirable substances directive, on the other. It seeks to ascertain, first, whether the compound feedingstuffs directive may be interpreted as authorizing the Member States to adopt restrictions which are not provided for in the additives directive and the undesirable substances directive, and, secondly, whether the second sentence of Article 3 of the compound feedingstuffs directive authorizes the Member States to adopt measures for the protection of animal or human health without being obliged to have recourse to the adaptation procedures provided for in Article 6 (2) A (a) of the additives directive or Article 5 (1) — in fact, Article 6 is meant — of the undesirable substances directive, as the case may be.

30 As is clear from the grounds of the judgment in Case 28/84, the additives directive and the undesirable substances directive contain an exhaustive set of rules concerning questions of public health in relation to substances used in the

composition of feedingstuffs. It follows that Article 3 of the compound feedingstuffs directive cannot be interpreted as having the purpose or effect of derogating from the exhaustive nature of those two directives.

31 The answer to Question 4 must therefore be that the terms contained in Article 1 (2) (b) and (c), which define the scope of Directive 79/373 on the marketing of compound feedingstuffs, in conjunction with Article 3 of the directive, must be interpreted as meaning:

(i) that Directive 79/373 does not permit Member States to impose marketing restrictions of the kind prohibited by Directives 70/524 and 74/63 on feedingstuffs because of the absence of additives referred to in Directive 70/524 or the presence of undesirable substances within the meaning of Directive 74/63;

(ii) that Article 3 of Directive 79/373 does not permit Member States to impose marketing restrictions on feedingstuffs because of the absence of an additive or the presence of an undesirable substance, even where the absence of the additive or the presence of the substance in question constitutes in their opinion a health risk for animals or humans, without recourse to the adaptation procedure provided for by Article 6 (2) A (a) of Directive 70/524 or by Article 6 of Directive 74/63, without prejudice to the emergency procedure referred to in Articles 7 and 5 of those directives respectively.

32 The judgment of today's date in Case 28/84 is annexed to this judgment and forms an integral part hereof.

Costs

33 The costs incurred by the Government of the Federal Republic of Germany, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court are not recoverable. As the proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesverwaltungsgericht, by order of 24 May 1984, hereby rules:

(1) **The term 'additives', as used in Article 2 (a) of Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs (Official Journal, English Special Edition 1970 (III), p. 840), must be interpreted as encompassing all substances capable of affecting the characteristics of feedingstuffs, even if they are present in the natural state in certain ingredients which may be used in the composition of feedingstuffs.**

(2) **The rule contained in Article 13 of Directive 70/524 must be interpreted as meaning that the Member States are no longer permitted to restrict the marketing of feedingstuffs because of the absence of a particular substance by providing that milk-replacer feed must have a specific minimum iron content.**

(3) **The rules contained in Articles 5 and 7 of Council Directive 74/63/EEC of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs (Official Journal 1974, L 38, p. 31) must be interpreted as meaning:**

   (i) **that Member States are in principle no longer permitted to restrict the marketing of animal feedingstuffs because of the presence of a substance not referred to in the annex to that directive by providing, for example, that the sodium content of milk-replacer feed may not exceed a certain maximum level;**

   (ii) **that Member States may provisionally fix a maximum sodium content in accordance with Article 5 of the directive only in exceptional cases and subject to compliance with the procedures laid down in that provision.**

(4) **The terms contained in Article 1 (2) (b) and (c), which define the scope of Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs (Official Journal 1979, L 86, p. 30), in conjunction with Article 3 of the directive, must be interpreted as meaning:**

(i) that Directive 79/373 does not permit Member States to impose marketing restrictions of the kind prohibited by Directives 70/524 and 74/63 on feedingstuffs because of the absence of additives referred to in Directive 70/524 or the presence of undesirable substances within the meaning of Directive 74/63;

(ii) that Article 3 of Directive 79/373 does not permit Member States to impose marketing restrictions on feedingstuffs because of the absence of an additive or the presence of an undesirable substance, even where the absence of the additive or the presence of the substance in question constitutes in their opinion a health risk for animals or humans, without recourse to the adaptation procedure provided for by Article 6 (2) A (a) of Directive 70/524 or by Article 6 of Directive 74/63, without prejudice to the emergency procedure referred to in Articles 7 and 5 of those directives respectively.

Mackenzie Stuart Bosco Due Kakouris

Pescatore Koopmans Everling Bahlmann Galmot

Delivered in open court in Luxembourg on 3 October 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President