OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 8 October 2002 [1]

I — Introduction

1. These proceedings concern the question whether Community law precludes a national provision which prohibits the cultivation of hemp, a product governed by a common organisation of the market.

II —Legal framework

A — *Community law*

1. *Primary law*

2. It follows from Article 32(2) and (3) EC that the rules laid down for the establishment of the common market are to apply to the agricultural products listed in Annex I, save as otherwise provided in Articles 33 to 38 EC. Articles 28 and 30 EC are also applicable to agricultural products.

3. Under Article 32(3) EC, the products subject to the provisions of Articles 33 to 38 EC are listed in Annex I of the EC Treaty. Entry No 57.01 in that list is: '[t]rue hemp (*Cannabis sativa*), raw or processed but not spun; tow and waste of true hemp (including pulled or garnetted rags or ropes)'.

2. Secondary law

(a) Regulation (EEC) No 1308/70

4. The legislation applicable to the facts of the main proceedings was Regulation (EEC) No 1308/70 of the Council of 29 June 1970 on the common organisation of the market in flax and hemp, [2] as amended on several occasions. Article 4(1)

1 — Original language: German.

2 — OJ, English Special Edition 1970(II), p. 411.

thereof, in the version relevant to this case, provided *inter alia* as follows:

'A system of aid shall be introduced for flax and hemp grown in the Community.

However, aid shall be granted only for hemp grown from seed of varieties providing certain safeguards to be determined in respect of the content of intoxicating substances in the harvested product.

...'.

5. The second subparagraph of Article 4(1) of Regulation No 1308/70 was inserted by Council Regulation (EEC) No 1430/82 of 18 May 1982 providing for restrictions on the importation of hemp and hemp seed and amending Regulation No 1308/70 in respect of hemp.[3] The first and second recitals in the preamble thereto read:

'Whereas the increasing abuse of narcotics in the Community is likely to endanger human health;

Whereas the stalk of true hemp may in some cases contain intoxicating substances; whereas, however, the cultivation of hemp in the Community is of considerable significance in some regions; whereas, to prevent the danger referred to above from being increased by the cultivation of hemp in the Community and by imports of raw hemp and hemp seed, the aid granted under Article 4 of Council Regulation (EEC) No 1308/70 of 29 June 1970 on the common organisation of the market in flax and hemp, as last amended by the 1979 Act of Accession, should be limited to varieties providing adequate safeguards in terms of human health, and imports of hemp and hemp seed which do not provide adequate safeguards should be prohibited'.

(b) Regulation (EEC) No 619/71

6. The general rules for granting aid for flax and hemp were established, on the basis in particular of Article 4 of Regulation No 1308/70, by Regulation (EEC) No 619/71 of the Council of 22 March 1971 laying down general rules for granting aid for flax and hemp.[4] Article 3(1)

3 — OJ 1982 L 162, p. 27.

4 — OJ, English Special Edition 1971(I), p. 169.

thereof, in the version relevant to the facts of these proceedings, [5] provided *inter alia* as follows:

'... Aid shall be granted only for hemp harvested after seed formation and grown from certified seed of varieties contained in a list to be drawn up in accordance with the procedure laid down in Article 12 of Regulation (EEC) No 1308/70. This list shall include only varieties for which a Member State has found by analysis that the weight of THC (tetrahydrocannabinol) in the weight of a sample maintained at constant weight is no more than:

— 0.3% for the purposes of the grant of aid for the marketing years 1998/1999 to 2000/2001;

— 0.2% for the purposes of the grant of aid for subsequent marketing'.

(c) Regulation (EC) No 1673/2000

7. Council Regulation (EC) No 1673/2000 of 27 July 2000 on the common organisation of the markets in flax and hemp grown for fibre lays down the rules applicable from the 2000/2001 marketing year onwards. [6] Article 1(3) thereof provides that the regulation is to apply without prejudice to the measures laid down in Regulation (EC) No 1251/1999.

8. Article 13 of Regulation No 1673/2000 repeals, *inter alia*, Regulations No 1308/70 and No 619/71 with effect from 1 July 2001. Article 16 provides that Regulations No 1308/70 and No 619/71 are to continue to be applied in relation to the 1998/1999, 1999/2000 and 2000/2001 marketing years, that is, until 30 June 2001.

B — *National law*

9. Section 1 of the Narkotikastrafflag [1968:64] (Law on Narcotics) prohibits the cultivation or other processing of narcotics without the necessary authorisation.

5 — As amended by Council Regulation (EC) No 1420/98 of 26 June 1998 amending Regulation (EEC) No 619/71 laying down general rules for granting aid for flax and hemp (OJ 1998 L 190, p. 7).

6 — OJ 2000 L 193, p. 16.

10. Under Section 6 of the Narkotikastrafflag, narcotics which have been the subject of an infringement must be declared forfeited.

11. Annex 1 to the Förordning [1992:1554] om kontroll av narkotika (Regulation on the Control of Narcotics) provides that the parts above ground of all cultivated plants of the cannabis species (with the exception of seeds), from which the resin has not been extracted, and irrespective of the name given, constitute narcotics. The tetrahydrocannabinol (THC) content is of no relevance in that connection.

12. Under Section 2 of the Lag (1992:860) om kontroll av narkotika (Law on the Control of Narcotics), narcotics may in particular not be imported, manufactured, exported, offered for sale or possessed — other than for medical or scientific purposes or for reasons of particular public interest.

13. Pursuant to Sections 4 and 8 of the Lag om kontroll av narkotika, the manufacture of narcotics, including the cultivation thereof, is subject to authorisation by the Swedish Läkemedelsverk (Medical Products Agency).

III — Facts and main proceedings

14. In spring 2001, Mr Ulf Hammarsten cultivated 'industrial hemp' on his farm in Sweden. The area cultivated covered approximately one hectare. The plants were seized under Swedish narcotics legislation.

15. In the proceedings before the Halmstads Tingsrätt (District Court, Halmstad (Sweden)), the Public Prosecutor applied for the forfeiture of the cannabis seized. That raised the question whether Community law, in particular Article 28 EC, is infringed by Swedish law under which all plants of the cannabis species, thus including 'industrial hemp', are considered to constitute narcotics and are therefore governed by the penalty and forfeiture provisions in the Law on Narcotics.

16. The cannabis seized is 'industrial hemp'. In the view of the Tingsrätt, this type of cannabis is to be regarded as an agricultural product and is subject to the provisions concerning the common organisation of the markets in flax and hemp grown for the production of fibre. It therefore considers that Community law permits the cultivation of hemp under certain conditions, namely that only authorised varieties with a THC content of no more than 0.3% (0.2% from the 2001/2002 marketing year onwards) be grown.

IV — Questions referred

17. The Halmstads Tingsrätt stayed proceedings and referred the following questions to the Court of Justice:

'(1) Does Article 28 of the Treaty of Rome permit a Member State to prohibit cultivation or other processing of "industrial hemp" allowed under EC regulations?

(2) If that is not the case, can an exception nevertheless be made under Article 30 of the Treaty of Rome with the result that such a prohibition does not conflict with EC law?

(3) If that is not the case, can the Swedish prohibition be accepted on some other ground?'

V — Arguments of the parties

A — *Swedish Government*

18. The Swedish Government submits that the free movement of goods represents a fundamental Community principle and that even the Community rules concerning industrial hemp are based on that principle. The relevant common organisation of the market does not provide for a prohibition of quantitative restrictions, and it is therefore Articles 28 and 30 EC which are relevant for the purposes of determining whether the Swedish rules are compatible with Community law.

19. This case, it submits, meets the criteria set out in the judgment in *Keck and Mithouard*.[7] This means that Article 28 EC does not preclude a prohibition such as that under the Swedish rules. Those rules seek only to protect the health and life of humans and are not intended to regulate trade between the Member States. Fur-

7 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

thermore, they apply to Swedish producers and to importers without distinction.

20. If the rules at issue in these proceedings must nevertheless be classified as a measure prohibited by Article 28 EC, it contends that they are compatible with Community law since they are necessary in order to attain the objective pursued.

21. The Swedish Government points out that cannabis is listed in both Schedule I and Schedule IV of the Single Convention on Narcotic Drugs of 1961. Schedule IV contains substances which must be made subject to the strictest controls. That convention merely establishes minimum standards and States are entitled to introduce stricter rules, which may extend as far as prohibition. Moreover, the THC content is of no relevance under the convention. Cultivation for industrial purposes is not covered.

22. It is true that aid is available for the cultivation of industrial hemp and that such cultivation is permitted under Community law. However, the objective pursued by Community agricultural law, in particular the common organisation of the market, is different from that of the Swedish rules. The latter are intended to guarantee a high level of health protection, as provided for by Article 3(1)(p) EC.

23. In the view of the Swedish Government, the cultivation of industrial hemp in Sweden significantly increases the risk of hemp with a high THC content being cultivated, since distinguishing between the different varieties is not possible with the naked eye but requires laboratory analysis. Moreover, plants do not exhibit their maximum content until they reach maturity. It is therefore easy to conceal the cultivation of illegal plants. In addition, the rules regarding industrial hemp may increase the acceptance of other varieties.

24. For those reasons, the comprehensive prohibition is justified. The Swedish Government therefore proposes that the first question be answered in the affirmative, that is to say to the effect that Article 28 EC is to be interpreted as not precluding such a prohibition. The answer to the second question, if necessary, should likewise be in the affirmative, that is to say to the effect that such a prohibition is permitted under Article 30 EC. In view of the answers to be given to the first two questions, the third question, concerning whether there is any

other ground of justification, need not be answered.

It follows from paragraph 23 of the judgment in *Pigs and Bacon Commission* that, where national measures are not compatible with a common organisation of the market, an assessment as to whether they are compatible with provisions of the Treaty relating to the establishment of the common market ceases to be necessary.

B — *Commission*

25. The Commission points out at the outset that, although the questions referred concern Articles 28 and 30 EC, it nevertheless appears advisable to examine the relationship between these and the provisions concerning the common organisation of the market.

26. The Commission takes the view that, where national provisions are inconsistent with both a common organisation of the market and the provisions of the Treaty relating to the common market, the rule established by the judgment in *Pigs and Bacon Commission* is to be applied. [8] Under that rule, 'in the event of proceedings relating to an agricultural sector governed by a common organisation of the market, the problem raised must first be examined from that point of view having regard to the precedence necessitated by Article 38(2) of the EEC Treaty [now, after amendment, Article 32(2) EC] for the specific provisions adopted in the context of the common agricultural policy over the general provisions of the Treaty relating to the establishment of the common market'.

27. The Commission points out, however, that national measures in an area governed by a common organisation of the market may, according to the case-law of the Court, be declared incompatible with provisions concerning the free movement of goods. Member States are not permitted to adopt measures that prejudice a common organisation of the market. Nevertheless, the establishment of a common organisation of the markets does not have the effect of exempting agricultural producers from any national provisions intended to attain objectives other than those covered by the common organisation of the markets.

28. With regard to the questions referred, the Commission is therefore of the opinion that an assessment of the compatibility of the Swedish rules with the common organisation of the market should precede the assessment of its compatibility with Articles 28 and 30 EC.

8 — Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161, paragraph 9.

29. With regard to the compatibility of the Swedish rules with the common organisation of the market, it contends that regard should be had to the material time in the main proceedings, namely spring 2001. Starting from the principle that, in criminal proceedings — and therefore in the case of Mr Hammarsten in this instance — it is the more favourable rules which apply, the relevant Community rules are those applicable not only at the time but also subsequently. In those circumstances, the Commission considers that the existence of a common organisation of the market for a particular product precludes a Member State from prohibiting the cultivation of that product.

30. With regard to the provisions concerning the free movement of goods, the Commission is of the opinion that Article 28 EC does not permit a Member State to prohibit the cultivation of authorised varieties.

31. On the second question, the Commission submits that justification under Article 30 EC presupposes that the national measure is proportionate and, in particular, that it does not prejudice the common organisation of the market. Difficulties in relation to checks do not constitute sufficient justification. Moreover, on the question of checks, the Commission points to one of its regulations. [9]

32. With respect to possible inconsistencies between the Treaty and obligations under an international agreement, the Commission points out that the convention to which Sweden refers does not relate to the industrial hemp at issue in these proceedings.

33. As regards health protection, the Commission points out that the relevant common organisation of the market also pursues that objective.

34. The Commission proposes that the answer to the second question be that a national prohibition of the cultivation of hemp which pursues an objective other than those of the common organisation of the market may not be regarded as necessary in order to protect the life or health of humans where such a prohibition adversely affects mechanisms of the common organi-

9 — Regulation (EC) No 1177/2000 of 31 May 2000 (OJ 2000 L 131, p. 38).

sation of the market and less restrictive measures are possible.

35. In the view of the Commission, the third question referred is too general and, therefore, unanswerable.

VI — Assessment

36. Regard should be had first of all to the Swedish Government's argument that Sweden has an obligation under international law to prohibit the cultivation of hemp on the basis of the Single Convention on Narcotic Drugs. It should be pointed out in this respect that, as the Commission rightly observes, the convention in question does not apply to cannabis cultivated for industrial purposes.

37. The same is true of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, by which Sweden is also bound, Article 3(1) of which merely prohibits cultivation for the purpose of the production of narcotic drugs. Moreover, Article 14 of that convention requires the Contracting Parties only to take measures to prevent illicit cultivation, that is to say not to prevent all cultivation.

38. With regard to the questions referred, it should be pointed out that, although they relate expressly to the interpretation of primary law, they also contain a reference to secondary law, namely a common organisation of the market.

39. Even though the questions principally seek the interpretation of provisions of primary law, it may be expedient — in addition or instead as the case may be — to interpret other provisions of Community law, that is to say ones which are applicable to the main proceedings, in order to provide the national court with an answer which will be of use to it in resolving the case pending before it. To that end, it is necessary first of all to determine the applicable legislation.

40. With regard to the applicable Community law, it should be made clear that the main proceedings relate only to hemp with a THC content of less than 0.3%, that is to say products governed by a common organisation of the market. The fact that the Swedish rules also relate to other products is not relevant to the preliminary ruling proceedings and is therefore imma-

terial to the answers to be given to the questions referred.

1. *Applicable Community law*

41. Attention must be drawn in this connection to the principle developed by the case-law of the Court to the effect that, in the event of a conflict of laws, provisions of secondary law supersede those of primary law. This means, for example, that the provisions governing a common organisation of the market must be applied before any others. It must therefore be examined first of all whether the facts of the main proceedings fall within the scope of provisions of secondary law. The case-law of the Court sets out the stages of assessment as follows:

'... in the event of proceedings relating to an agricultural sector governed by a common organisation of the market the problem raised must first be examined from that point of view having regard to the precedence necessitated by Article 38(2) of the EEC Treaty [now, after amendment, Article 32(2) EC] for the specific provisions adopted in the context of the common agricultural policy over the general provisions of the Treaty relating to the establishment of the common market'. [10]

42. It must therefore be examined now whether the product at issue in these proceedings is governed by a common organisation of the market and, if so, which provisions are applicable to the facts of the main proceedings.

43. The principles behind the provisions applicable to the product at issue in these proceedings, industrial hemp, are to be found in Regulation No 1308/70, in the version in force at the material time, that is to say spring 2001. Also of relevance are the conditions laid down by Regulation No 619/71 for receiving aid for industrial hemp.

44. With regard to the legal significance of common organisations of the market in relation to national law, the Court has made clear in its case-law that national

10 — Judgment in Case 177/78 (cited in footnote 8), paragraph 9; cf. also the judgments in Joined Cases 141/81, 142/81 and 143/81 *Gerrit Holdijk and Others* [1982] ECR 1299, paragraph 12, and in Case 118/86 *Nertsvöderfabriek Nederland* [1987] ECR 3883, paragraph 12.

measures may not prejudice common organisations of the market. [11]

45. At the moment, the prohibition on the cultivation of industrial hemp has a prejudicial effect on the common organisation of the market in flax and hemp. For, as a result of that prohibition, persons with an interest in cultivation refrain from pursuing that interest and are accordingly also deprived of the possibility provided for in Article 3(1) of Regulation No 619/71 of obtaining aid for harvested industrial hemp.

46. Those principles developed by the Court's case-law therefore apply to products which fall within a common organisation of the market.

47. However, the question whether the Swedish rules relate exclusively or only in part to products falling within a common organisation of the market must ultimately be decided by the national court. In the case of industrial hemp, with which the main proceedings are exclusively concerned, the answer is nevertheless clear.

11 — Judgments in Case C-1/96 *Compassion in World Farming* [1998] ECR I-1251, paragraph 41, and in Case 148/85 *Forest* [1986] ECR 3449, paragraph 14.

2. Possible justification for a national prohibition in the light of primary law

48. In order for national rules to be regarded as justified in the light of primary law, it is first of all necessary for the provisions of primary — rather than secondary — law to be applicable.

49. This case concerns the applicability or otherwise of the rules on the free movement of goods, in particular Articles 28 and 30 EC. It must be examined first of all whether the Swedish measures at issue in these proceedings, that is to say the various prohibitions and the seizure rule, represent measures having an effect equivalent to a quantitative restriction on exports within the meaning of Article 28 EC. It is sufficient to point out in this respect, as the Commission does, that the Swedish legislation — *inter alia* — affects the intra-Community trade in goods. Thus the prohibitions applicable to industrial hemp in Sweden, and its seizure, obstruct the trade in that product, which is used in the manufacture of fibre.

50. On the other hand, doubts remain as to whether the rules on the free movement of goods are applicable in this case, in so far as there is no indication in the main

proceedings of the existence of a cross-border element. However, the Court has consistently held that it may answer questions referred in relation to the interpretation of fundamental freedoms only where such an element is present. [12]

51. Next, the rules of primary law — in this context the provisions concerning the justification of national measures — are applicable in so far as the facts to be adjudicated upon are not yet governed by provisions of secondary law. In this case, the following two criteria must be met in order for that to be so: first, the national rules must pursue an objective which is not covered by secondary Community law and, secondly, the national rules must be consistent with the principle of proportionality.

52. The first condition is, according to the case-law of the Court, to be understood as meaning that 'the establishment of a common organisation of the agricultural markets pursuant to Article 40 of the Treaty does not have the effect of exempting agricultural producers from any national provisions intended to attain objectives other than those covered by the common organisation, even though such provisions may, by affecting the conditions of production, have an impact on the volume or the cost of national production and therefore on the operation of the common market in the sector concerned. The prohibition of any discrimination between producers in the Community, laid down in the second subparagraph of Article 40(3) of the Treaty, refers to the objectives pursued by the common organisation and not to the various conditions of production resulting from national rules which are general in character and pursue other objectives'. [13]

53. As is clear from the first two recitals in the preamble to Regulation No 1430/82, the relevant organisation of the market already serves the objective pursued by the Swedish rules, namely health protection. Since the first condition — that the national legislation must pursue an objective not also pursued by secondary law — is therefore not met, it is not necessary to examine whether the Swedish rules fulfil the three conditions governing the principle of proportionality. [14]

54. It should also be pointed out that the Swedish legislation provides for a prohibition. This supports the conclusion, at first glance, that Sweden has opted for one of the most stringent of measures. After all, as the Commission observes, cultivation could also be made subject to authorisation, given, perhaps, on fulfilment of certain conditions.

12 — See in this respect the judgment in Case C-510/99 *Tridon* [2001] ECR I-7777, paragraph 46, and the decisions cited therein.

13 — Judgment in Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraph 20.

14 — See in this respect my Opinion in Case C-224/00 *Commission* v *Italy* [2002] I-2965, point 40 et seq.

VII — Conclusion

55. In the light of all of the foregoing, it is proposed that the Court answer the questions referred as follows:

— Regulation (EEC) No 1308/70 of the Council of 29 June 1970 on the common organisation of the market in flax and hemp and Regulation (EEC) No 619/71 of the Council of 22 March 1971 laying down general rules for granting aid for flax and hemp are to be interpreted as precluding national rules that prohibit the cultivation of industrial hemp where such cultivation is permissible under that organisation of the market.

— Article 28 EC does not allow a Member State to prohibit the cultivation of 'industrial hemp' where such cultivation is permissible under that common organisation of the market, unless the national rules serve an objective not pursued by secondary law and are consistent with the principle of proportionality.