JUDGMENT OF THE COURT (Second Chamber)
14 June 1988 *

In Case 29/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Østre Landsret (Eastern Division of the High Court), Copenhagen, for a preliminary ruling in the proceedings pending before that court between

Dansk Denkavit ApS,

and

Danish Ministry of Agriculture

on the interpretation of Council Directive 79/524 concerning additives in feeding-stuffs (Official Journal, English Special Edition 1970 (III), p. 840), as amended by Council Directive 73/103 of 28 April 1973 (Official Journal L 124, p. 17), and the second Council Directive 75/296 of 28 April 1975 (Official Journal L 124, p. 29),

THE COURT (Second Chamber),

composed of: O. Due, President of the Chamber, K. Bahlmann and T. F. O'Higgins, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Administrator

after considering the observations submitted

on behalf of the plaintiff in the main action by Karen Dyekjaer-Hansen, of the Copenhagen Bar,

* Language of the Case: Danish.

on behalf of the Danish Government and the defendant in the main action by Jørgen Molde and Gregers Larsen, of the Copenhagen Bar,

on behalf of the Commission of the European Communities, by Richard Wainwright and Jens Christoffersen, Agents,

having regard to the Report for the Hearing and further to the hearing on 9 December 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 March 1988,

gives the following

Judgment

1 By order of 30 January 1987, which was received at the Court on 2 February 1987, the Østre Landsret referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Directive 70/524 of the Council of 23 November 1970 concerning additives in feedingstuffs (Official Journal, English Special Edition 1970 (III), p. 840), as amended by Council Directive 73/103 of 28 April 1973 (Official Journal L 124, p. 17) and the second Council Directive 75/296 of 28 April 1975 (Official Journal L 124, p. 29) as well as Articles 9, 30, 36 and 95 of the EEC Treaty for the purpose of determining the compatibility with Community law of certain provisions of Danish law on the trade in and importation of compound feedingstuffs containing antibiotics and other additives.

2 Those questions were raised in proceedings between the Danish Ministry for Agriculture and Dansk Denkavit ApS (hereinafter referred to as 'Denkavit'), which is part of the same group as a Netherlands manufacturer of compound feedingstuffs containing additives and which since 1981 has imported them into Denmark.

3 It appears from the documents before the Court that on importing the feedingstuffs into Denmark Denkavit complies with the relevant provisions of Danish law and in particular with the obligation to register the additives used, to state the registration number stated on the packing and to obtain prior authorization from the Ministry of Agriculture. Since however it took the view that Directive 70/524, as amended by Directives 73/103 and 75/296, provided for Community harmonization so as to deprive Member States of any possibility of adding supplementary national requirements to those provided for by the directive, Denkavit brought an action in September 1981 before the Østre Landsret against the aforementioned Danish provisions the lawfulness of which it challenged. During the proceedings it also claimed the refund of the amounts paid by way of an annual authorization levy.

4 Since the Østre Landsret took the view that a decision in the proceedings required an interpretation of Directive 70/524 as amended up to the adoption of Council Directive 84/587 of 29 November 1984 (Official Journal 1984, L 319, p. 13), it stayed the proceedings and referred the following questions to the Court:

'(1) Did Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs, as amended up to the adoption of Council Directive 84/587/EEC of 29 November 1984, lay down such a degree of harmonization that the Member States were precluded, as regards the importation from other Member States of feedingstuffs containing additives, from relying on Article 36 of the EEC Treaty in connection with national measures for ensuring the identification of the additives used and the purity of those additives?

(2) If Question 1 is answered in the negative it is asked whether, again up to the adoption of said Directive 84/587/EEC, such a degree of harmonization of the requirements on packaging and labelling of feedingstuffs containing additives had been achieved that Article 36 could not be relied on in connection with a national requirement that there must be a statement on the packaging that the additive in question had been approved by a national authority under the registration number assigned.

(3) Must Article 30 of the EEC Treaty be construed as meaning that it forbids a national measure whereby a Member State requires that the importation from other Member States of feedingstuffs containing additives mentioned in Directive 70/574/EEC shall only take place on the basis of a document, known as an "authorization", issued to the undertaking on a "once and for all" basis, *where* a wholly analogous authorization is required of domestic products, *where* the authorities are not informed in any other way in which undertakings the control must be carried out pursuant to the said directive, *where* the legislation does not lay down specific conditions for issuing or revoking authorizations and it must be assumed that according to principles of national law a request may be revoked only where the activitiy is pursued in such a way that considerations of human or animal health make this imperative, *where* according to administrative practice the authorization is issued within a few weeks on the basis of a request which need contain only the importer's name and address and *where* in administrative practice an authorization has hitherto never been refused to or withdrawn from an importer?

(4) Did Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs, as amended up to the adoption of Council Directive 84/587/EEC of 29 November 1984, lay down such a degree of harmonization that the Member States were wholly precluded from relying on Article 36 of the EEC Treaty in connection with a national measure such as that described in Question 3?

(5) Was it compatible with Community law, in particular Articles 9 and 95 of the EEC Treaty in conjunction with Directive 70/524, for a Member State to collect an annual levy from undertakings which obtained the authorization mentioned in Question 3, *where* the levy was collected in the same amount from domestic producers and importers and *where* the total amount of the levy corresponded to the expenditure occasioned by the checks by random sampling carried out in accordance with Directive 70/524?'

5 Reference is made to the Report for the Hearing for a fuller account of the facts and the background to the proceedings, the relevant provisions of Danish law and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The degree of harmonization achieved by Directive 70/524 with regard to the identification and purity of additives

6 By its first question the national court essentially seeks to ascertain whether Directive 70/524 of the Council of 23 November 1970, as amended prior to the adoption of Council Directive 84/587 of 29 November 1984, provided for harmonization excluding the possibility for Member States to rely on Article 36 of the Treaty in order to impose, on the importation from other Member States of feedingstuffs containing additives, national measures intended to ensure the identification and purity of the relevant additives.

7 Denkavit and the Commission maintain essentially that Directive 70/524 governs exhaustively the identification of additives and their purity in feedingstuffs so that they may circulate freely in the Community without Member States being able to impose health inspection measures not provided by the directive itself. It follows that the national provisions at issue in the main proceedings cannot be justified under Article 36 of the Treaty.

8 According to the Danish Ministry of Agriculture the presence of impurities in the additives used in feedingstuffs is likely to involve serious risks to public health. It maintains that neither the wording nor the context of Directive 70/524 or any other Community provision referred to the measures necessary for the protection of health. In its view it was only by the adoption of the third amending Directive 84/587 that the harmonization of such measures was achieved. Prior to this it was for the Member States to take, by virtue of Article 36 of the EEC Treaty, the measures needed to ensure the identification and purity of products used as additives.

9 In that respect it is necessary in the first place to recall the principles of the rules laid down by Directive 70/524.

10 Article 3 (1) of Directive 70/524 requires Member States to provide in their national legislation relating to feedingstuffs that only those additives which are listed in Annex I may be incorporated in feedingstuffs and only subject to the requirements set out therein.

11 Under Article 6 (1) of the directive, as amended by Directive 75/296, amendments to be made to the annexes to the directive on account of the growth of scientific and technical knowledge are to be adopted in accordance with the procedure laid down in Article 16a, which was inserted by Directive 73/103. That procedure involves the reference by the Chairman, either on his own initiative or at the request of a Member State, to the Standing Committee for Feedingstuffs and in particular requires the Commission to adopt the measures where they are in accordance with the Opinion of the Committee, delivered by a qualified majority.

12 Article 10 of the directive, as amended by Directive 75/296, requires Member States to prescribe that feedingstuffs containing certain additives may be marketed only if the nature of the additives and certain details thereof are specified on the package.

13 Finally, Article 13 of the directive requires Member States to ensure that feedingstuffs which conform to the provisions of the directive are subject, as regards the presence or absence of additives and as regards marking, to no marketing restrictions other than those provided for in the directive.

14 In the second place it is necessary to point out that among the abovementioned rules it is provided in Article 6 (3) of the directive, as amended by Directive 75/296, that the criteria for the characterization of the additives referred to in the directive, particularly the criteria of both composition and purity and the physicochemical and biological properties, may be fixed in accordance with the procedure laid down in Article 16a.

15 Thus the directive expressly provided for the adoption at a Community level of criteria of quality for the substances authorized as additives in feedingstuffs and fixed for the adoption of such criteria a special procedure which may in particular be implemented at the request of a Member State.

16 It follows that the directive was intended to harmonize all the material conditions for marketing feedingstuffs as regards the presence or absence of additives and as regards marking in that respect, including criteria of quality. Accordingly, the Member States no longer had the power to fix at national level such criteria of quality and if a Member State considered specific measures relating to the identification and purity of authorized substances to be necessary it had to have recourse to the Community procedure provided for that purpose.

17 That interpretation cannot be invalidated by the subsequent adoption of Directive 84/587. According to the second recital in the preamble thereto the amendments introduced by the directive were intended to be additional measures to be taken in connection with the production, marketing and distribution of additives and pre-mixtures of additives since experience had demonstrated that the current rules on the use of additives in feedingstuffs had not afforded the required degree of safety. None of the recitals in the directive mentions that the procedure for fixing criteria, in particular of composition and purity of additives, did not previously fall within the area which had been harmonized.

18 It must therefore be concluded that recourse by a Member State to Article 36 of the EEC Treaty was not justified in the area of measures intended to ensure the identification and purity of additives in feedingstuffs.

19 Accordingly, the answer to the first question put by the national court must be that Council Directive 70/524 of 23 November 1970, as amended up to the adoption of Council Directive 84/587 of 29 November 1984, provides for harmonization which precludes Member States from relying on Article 36 of the Treaty in order to impose, on the importation from other Member States of feedingstuffs containing additives, national measures intended to ensure the identification and the purity of the additives in question.

The requirement that additives should be registered

20 In view of the answer given to the first question there is no need to consider the second question.

The system of prior authorization

21 By its third question the national court seeks essentially to ascertain whether the system of prior authorization to which importers of feedingstuffs containing additives and national producers of such products are subject constitutes a measure having an effect equivalent to quantitative restrictions on imports within the meaning of Article 30 of the Treaty.

22 Article 30 of the Treaty provides that quantitative restrictions on imports and all measures having equivalent effect are to be prohibited. The Court has consistently held that all commercial rules of Member States are to be regarded as measures having an effect equivalent to quantitative restrictions if they are capable of hindering, directly or indirectly, actually or potentially trade within the Community.

23 Accordingly it is clear that rules which prohibit, except where prior administrative authorization is granted, the importation of feedingstuffs containing additives constitute measures having an effect equivalent to quantitative restrictions on imports within the meaning of Article 30 of the EEC Treaty, if they are capable of hindering, even potentially, trade between Member States.

24 Although the national court, followed in this respect by the Danish Government at the hearing, stated in its order that the administrative practice allows the automatic and speedy issue of authorizations, it must be stated a system which requires the issue of administrative authorizations necessarily involves the exercise of a certain discretion and is a source of legal uncertainty for traders.

25 The answer to the third question put by the national court must therefore be that Article 30 of the Treaty must be interpreted as meaning that a national measure which subjects the importation of feedingstuffs containing additives to prior authorization constitutes a measure having an effect equivalent to quantitative restrictions on imports within the meaning of Article 30 of the Treaty.

The degree of harmonization achieved by Directive 70/524 in relation to inspection measures applicable to traders

26 The fourth question is whether the harmonization prescribed by Directive 70/524, as amended up to the adoption of Directive 84/587, was such as to deprive Member States of recourse to Article 36 of the Treaty in regard to inspection measures applicable to traders in the sector of feedingstuffs containing additives.

27 Contrary to what Denkavit maintains, the harmonization in that respect achieved by Directive 70/524, as amended up to the adoption of Directive 84/587, did not extend to the measures applicable to the traders concerned in the sector of feedingstuffs containing additives. Article 15 of the directive was limited to requiring Member States to ensure that feedingstuffs put on the market were officially controlled, at least by check sampling.

28 On the other hand such an objective is pursued by amending Directive 84/527 which in its ninth recital states that it is appropriate 'that the production and use of antibiotics . . . prepared . . . for the purpose of incorporation in compound feedingstuffs be limited to those who have the competence and the appropriate installation and equipment for the manufacture of additives . . . and who are included on the list of manufacturers of a Member State'. Article 13 (3) accordingly provides that each Member State is to publish annually the list of manufacturers of additives who have, to the Member State's satisfaction, complied with the requirements of the directive.

29 In consequence, as Community law stood on the basis of Directive 70/524, as amended up to the adoption of Directive 84/587, Member States were entitled under Article 36 of the Treaty adopt, in regard to traders in the sector concerned, the necessary measures of health control.

30 The answer to be given to the national court must therefore be that Directive 70/524, as amended up to the adoption of Directive 84/587, did not provide, in the sector of feedingstuffs containing additives, for harmonization of such a nature as to deprive Member States of the power to have recourse to Article 36 of the Treaty as regards measures of health control applicable to the traders concerned.

The lawfulness of an annual levy connected with measures of control applicable to traders

31 By its fifth question the national court seeks essentially to ascertain whether an annual levy imposed in the same manner on importers of feedingstuffs containing additives and national manufacturers of such products and intended to cover the costs incurred by the State in checking samples taken pursuant to Directive 70/524 is compatible with Articles 9 and 95 of the Treaty and the provisions of Directive 70/524.

32 As has been stated above, Directive 70/524, as amended up to the adoption of Directive 84/587, does not prevent Member States from requiring traders to obtain an authorization. However, the exemption provided for in Article 36 of the Treaty with regard to measures of control in regard to traders is solely concerned with restrictions on imports or exports and measures having an equivalent effect. It may not be extended to customs duties or charges having an equivalent effect which, for their part, fall outside the compass of Article 36. It follows that the question whether such charges are permissible must be appraised in relation to Article 9 or, as the case may be, Article 95 of the Treaty.

33 In that respect the Court has consistently held that the prohibition laid down in Article 9 of the Treaty of any customs duty and charge having an equivalent effect in relations between Member States covers any charge levied on the occasion or by reason of importation specifically affecting an imported product to the exclusion of a similar domestic product. Such a charge however does not fall within that classification if, as in the present case, it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike, in which case it does not come within the scope of Article 9 but within that of Article 95 of the Treaty.

34 With regard to Article 95 Denkavit alleges that in relation to the annual levy the discrimination to the detriment of importers consists in the fact that there may be several buyers from a domestic producer without this involving him in additional charges whereas if a foreign producer has several importers each importer must again pay the charge in question.

35 That argument cannot be accepted where the burden of the charge in question is borne by traders as such, irrespective of the quantity of products imported or manufactured. As the Court held in its judgment of 28 January 1981 in Case 32/80 *Officier van Justitie* v *Kortmann* [1981] ECR 251, Article 95 is complied with where an internal tax applies in accordance with the same criteria, objectively justified by the purpose for which the tax was introduced, to domestic products and imported products so that it does not result in the imported product's bearing a heavier charge than that borne by the similar domestic product.

36 The answer to the fifth question must therefore be that an annual levy charged in like manner on importers and national producers of feedingstuffs containing additives and intended to cover the costs incurred by the State in checking samples taken pursuant to Directive 70/524 is compatible with Articles 9 and 95 of the Treaty and the provisions of that directive.

Costs

37 The costs incurred by the Commission of the European Communities, which has submitted its observations to the Court, are not recoverable. In so far as these proceedings are in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in reply to the questions referred to it by the Østre Landsret, Copenhagen, by order of 30 January 1987, hereby rules:

(1) Council Directive 70/524 of 23 November 1970, as amended up to the adoption of Council Directive 84/587 of 29 November 1984, provides for harmonization which precludes Member States from relying on Article 36 of the Treaty in order to impose, on the importation from other Member States of feedingstuffs containing additives, national measures intended to ensure the identification and the purity of the additives in question.

(2) Article 30 of the Treaty must be interpreted as meaning that a national measure which subjects the importation of feedingstuffs containing additives to prior authorization constitutes a measure having an effect equivalent to quantitative restrictions on imports within the meaning of Article 30 of the Treaty.

(3) Council Directive 70/524, as amended up to the adoption of Directive 84/587, did not provide, in the sector of feedingstuffs containing additives, for harmonization of such a nature as to deprive Member States of recourse to Article 36 of the Treaty as regards measures of health control applicable to the traders concerned.

(4) An annual levy charged in like manner on importers and national producers of feedingstuffs containing additives and intended to cover the costs incurred by the State in checking samples taken pursuant to Directive 70/524 is compatible with Articles 9 and 95 of the Treaty and the provisions of that directive.

Due Bahlmann O'Higgins

Delivered in open court in Luxembourg on 14 June 1988.

J.-G. Giraud
Registrar

O. Due
President of the Second Chamber