OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 18 November 2010[1]

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1. This reference for a preliminary ruling concerns the interpretation of European Union legislation adopted with a view to minimising the risk of the spread of bovine spongiform encephalopathy [2] and, more specifically, the conditions governing the implementation by the Member States, for a short period, from 15 to 31 December 2000, of Council Directive 90/425/EEC of 26 June 1990, [3] Commission Decision 94/381/EC of 27 June 1994, [4] Council Decision 2000/766/EC of 4 December 2000, [5] and Commission Decision 2001/9/EC of 29 December 2000. [6]

2. The problem raised by this case, albeit ostensibly highly technical, raises a delicate question in the consistently sensitive area of the protection of human health. May a Member State decide to bring forward the date of implementation and alter the scope of protection measures against BSE established by the European Community?

I — Relevant legislation

A — *European Union legislation*

3. The second recital in the preamble to Directive 90/425 is worded as follows:

'Whereas the harmonious operation of the common organisation of the market in animals and products of animal origin implies the dismantling of zootechnical and

2 — Hereinafter: 'BSE'.

3 — Directive 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).

4 — Decision concerning certain protection measures with regard to bovine spongiform encephalopathy and the feeding of mammalian derived protein (OJ 1994 L 172, p. 23), as amended by Decision 1999/129/EC of 29 January 1999 (OJ 1999 L 41, p. 14; 'Decision 94/381').

5 — Decision concerning certain protection measures with regard to transmissible spongiform encephalopathies and the feeding of animal protein (OJ 2000 L 306, p. 32).

6 — Decision concerning control measures required for the implementation of Decision 2000/766 (OJ 2001 L 2, p. 32).

veterinary barriers to the development of intra-Community trade in the animals and products concerned; whereas, in this respect, the free movement of animals and agricultural products is a fundamental feature of the common organisation of markets and should facilitate the rational development of agricultural production and the optimum use of the factors of production.'

4. The first paragraph of Article 1 of Directive 90/425 provides:

'Member States shall ensure that the veterinary checks to be carried out on live animals and products which are covered by the Directives listed in Annex A or on those referred to in the first paragraph of Article 21 and which are intended for trade are no longer carried out, without prejudice to Article 7, at frontiers but are carried out in accordance with this Directive.'

5. Article 10(1) of Directive 90/425 provides:

'Each Member State shall immediately notify the other Member States and the Commission of any outbreak in its territory, in addition to an outbreak of diseases referred to in Directive 82/894/EEC, of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health. The Member State of dispatch shall immediately implement the control or precautionary measures provided for in Community rules, in particular the determination of the buffer zones provided for in those rules, or adopt any other measure which it deems appropriate.

The Member State of destination or transit which, in the course of a check referred to in Article 5, has established the existence of one of the diseases or causes referred to in the first subparagraph may, if necessary, take the precautionary measures provided for in Community rules, including the quarantining of the animals.

Pending the measures to be taken in accordance with paragraph 4, the Member State of destination may, on serious public or animal health grounds, take interim protective measures with regard to the holdings, centres or organisations concerned or, in the case of an epizootic disease, with regard to the buffer zone provided for in Community rules.

The measures taken by Member States shall be notified to the Commission and to the other Member States without delay.'

6. Annex A to Directive 90/425 lists the veterinary and zootechnical legislation from which it is possible to establish, in accordance with Article 1 of the directive, which products and live animals fall within its scope.

7. Annex B to the directive, headed 'Animals and products not subject to harmonisation but trade in which will be subject to the checks provided for in this directive', refers to '[w]aste (pathogens)'.

8. The provisions of Article 1(1) and (2) of Decision 94/381 read as follows:

'1. Within 30 days of notification of the present Decision, Member States shall prohibit the feeding of protein derived from mammalian tissues to ruminant species.

2. However, Member States which enforce a system that makes it possible to distinguish between animal protein from ruminant and non-ruminant species shall be authorised, by the Commission under the procedure provided for by Article 17 of Directive 90/425/EEC, to permit the feeding of protein from species other than ruminants to ruminants.'

9. Article 2 of Decision 2000/766 provides:

'1. Member States shall prohibit the feeding of processed animal proteins to farmed animals which are kept, fattened or bred for the production of food.

2. The prohibition referred to in paragraph 1 shall not apply to the feeding of:

— fishmeal to animals other than ruminants, in accordance with control measures to be fixed in accordance with the procedure laid down in Article 17 of Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13),

…

— dicalcium phosphate and hydrolysed proteins obtained in accordance with the conditions to be fixed in accordance with the procedure laid down in Article 17 of Directive 89/662/EEC,

…'

10. Article 3(1) of that decision provides:

'1. With the exception of the derogations laid down in Article 2(2) the Member States shall:

(a) prohibit the placing on the market, the trade, the importation from third countries and the exportation to third countries of processed animal proteins intended for the feeding of farmed animals

which are kept, fattened or bred for the production of food,

(b) ensure that all processed animal proteins intended for the feeding of farmed animals which are kept, fattened or bred for the production of food are withdrawn from the market, distribution channels and from on-farm storage.'

11. Article 1(1) and (2) of Decision 2001/9 provide:

'1. Member States shall authorise the feeding of fishmeal to animals other than ruminants, only in accordance with the conditions laid down in Annex I.

2. Member States shall authorise the feeding of dicalcium phosphate to animals other than ruminants only in accordance with the conditions laid down in Annex II.'

12. Article 13(1) of Council Directive 90/667/EEC of 27 November 1990 [7] reads as follows:

'Directive 90/425/EEC shall apply, in particular with respect to the organisation and following-up of checks carried out by the Member State of destination and the protective measures to be applied.'

B — *National legislation*

13. Article 2 of the Temporary regulation prohibiting animal proteins in all feedingstuffs intended for farmed animals, [8] adopted on 8 December 2000, provides:

'1. Contrary to Article 2 of the Regulation prohibiting the use of animal meals in animal feedingstuffs, the preparation, processing, supply, taking delivery, delivery, transport, offering for sale, purchase and disposal of processed animal proteins intended for the feeding of farmed animals are prohibited.

2. Paragraph 1 shall not apply to the following products:

— fishmeal in feedingstuffs intended for animals other than ruminants, in accordance with checks to be established in accordance with the procedure laid down in Article 17 of Directive 89/662/EEC …,

7 — Directive laying down the veterinary rules for the disposal and processing of animal waste, for its placing on the market and for the prevention of pathogens in feedstuffs of animal or fish origin and amending Directive 90/425/EEC (OJ 1990 L 363, p. 51).

8 — *Tijdelijke regeling verbod dierlijke eiwitten in alle diervoerders landbouwhuisdieren* (*NederlandseStaatscourant* (Netherlands Official Gazette) [2000] No 239; 'the national temporary regulation').

— gelatine of non-ruminants for coating additives …,

— dicalcium phosphate and hydrolysed proteins obtained in accordance with the conditions fixed in accordance with the procedure laid down in Article 17 of Directive 89/662/EEC,

— milk and dairy products.'

14. Article 3 of the national temporary regulation provides:

'1. Without prejudice to Article 2, the following shall be prohibited from 1 January 2001:

(a) the feeding of processed animal proteins to farmed animals;

(b) the transport of processed animal proteins out of or into the Netherlands;

(c) the presence or storage of processed animal proteins on holdings where farmed animals are kept and on holdings which produce, trade, store or tranship feedingstuffs for farmed animals.

2. The holders or owners of processed animal proteins who, to the satisfaction of Our Minister, notify the National Livestock and Meat Inspectorate (Rijksdienst voor de keuring van Vee en Vlees) of the nature, quantity and location of the processed animal proteins in their keeping and immediately inform that inspectorate of any changes in the nature, quantity and location thereof shall be exempted from the prohibition referred to in paragraph 1(c) until 1 March 2001.'

15. Under Article 4 of the national temporary regulation, it entered into force on 15 December 2000.

II — Facts and procedure in the main proceedings

16. On 27 June 1994, the Commission adopted Decision 94/381 the main aim of which was to prohibit the feeding of protein derived from mammalian tissues to ruminants. However, Article 1(2) of that decision authorised Member States which enforce a system that makes it possible to distinguish between animal protein from ruminant and non-ruminant species to permit the feeding of protein from species other than ruminants to ruminants.

17. Having recorded cases of BSE in animals born after Decision 94/381 had entered into force, the Scientific Steering Committee adopted an opinion on 27 and 28 November 2000 acknowledging for the first time that there was a 'risk of cross-contamination of cattle feed with feed intended for other animals and which contains animal proteins possibly contaminated by the BSE agent' and recommending that new measures be adopted.

18. On 4 December 2000, the Council of the European Union accordingly adopted Decision 2000/766 which prohibited the feeding of processed animal proteins to farmed animals kept, fattened or bred for the production of food. That decision, under Article 4 thereof, was to enter into force on 1 January 2001 and apply for a period of six months. That prohibition was subject to various exceptions, including one concerning the feeding of fishmeal to animals other than ruminants and another concerning the feeding of dicalcium phosphate. The prohibition covered the placing on the market, the trade, the importation from third countries and the exportation to third countries of processed animal proteins [9] and included an obligation to withdraw them from the market, distribution channels and from on-farm storage. [10]

19. On 8 December 2000, four days later, the Netherlands Minister for Agriculture, Nature Management and Fisheries adopted the national temporary regulation. Article 2(1) of that regulation prohibited the preparation, processing, supply, taking delivery, delivery, transport, offering for sale, purchase and disposal of processed animal proteins intended for the feeding of farmed animals. Article 2(2) thereof laid down derogations from that prohibition for, among other things, fishmeal and dicalcium phosphate, but their application was subject to the adoption of the control measures laid down in Decision 2000/766.

20. Under Article 4 of the national temporary regulation, it was to enter into force on 15 December 2000, that is to say 15 days prior to entry into force of Decision 2000/766. It was notified to the Commission on 10 January 2001.

21. It is apparent from the explanatory memorandum of the national temporary regulation that the intention of its advance application was that existing and planned production processes should 'dry up', thus saving businesses the cost and effort involved in having to recall, from 1 January 2001, any

9 — Article 3(1)(a) of Decision 2000/766.

10 — Article 3(1)(b) of Decision 2000/766.

products which might have been sold and manufactured.

22. Finally, on 29 December 2000, the Commission adopted Decision 2001/9 which laid down the conditions governing the feeding of, among other things, fishmeal and dicalcium phosphate to animals.

23. The respondents in the main proceedings, which are manufacturers of animal feed, namely Denkavit Nederland BV, Cehave Landbouwbelang Voeders BV and Arie Block BV, or suppliers of raw materials for animal feed, namely Internationale Handelsmaatschappij 'Demeter' BV, [11] challenged, before the Rechtbank te 's-Gravenhage (District Court, The Hague, Netherlands), the validity of the national temporary regulation. They claimed primarily that, from 15 December 2000 to 1 January 2001, prohibitions concerning animal feedingstuffs which exceeded the measures prescribed by Decision 94/381 had been imposed on them. They maintained, in the alternative, that the national temporary regulation was unlawful on the ground that it imposed, for that period, prohibitions concerning dicalcium phosphate, fishmeal and animal feeds containing no animal proteins other than dicalcium phosphate and/or fishmeal.

24. They are also seeking to obtain compensation for the loss that the entry into force of the national temporary regulation has caused them by reducing prematurely the value of their animal protein stocks, use of which should ordinarily have been possible between 15 and 31 December 2000.

25. The Rechtbank te 's-Gravenhage upheld the primary claims of the respondents in the main proceedings. Noting that Article 4 of Decision 2000/766 provided for the decision to enter into force on 1 January 2001, the court inferred from that provision that the prohibitions should enter into force neither sooner nor later than 1 January 2001.

III — The questions referred for a preliminary ruling

26. In the appeal lodged by the Staat der Nederlanden (State of the Netherlands) against that judgment of the Rechtbank te 's-Gravenhage, the Gerechtshof 's-Gravenhage (Regional Court of Appeal, The Hague, Netherlands) has referred the following question to the Court of Justice for a preliminary ruling:

'Must Community law, and specifically Directive 90/425/EEC, Decision 94/381/EC and Decision 2000/766/EC, be interpreted as

11 — Hereinafter: 'the respondents in the main proceedings'.

meaning that any national prohibition, such as that laid down in Article 2 of the [national temporary regulation] which, with a view to affording protection against BSE, prohibits the production of and trading in processed animal proteins intended for feeding to farmed animals, is incompatible with those provisions if such a national prohibition

— entered into force on 15 December 2000 (and so before Decision 2000/766/EC) and

— also applied temporarily (until Decision [2001/9/EC] [12] of 29 December 2000 entered into force) to fishmeal and dicalcium phosphate?'

27. The Court requested that the respondents in the main proceedings, the Governments of the Member States which submitted observations, the Kingdom of the Netherlands, the Federal Republic of Germany and the Kingdom of Sweden, as well as the Commission reply to various questions at the hearing which was held on 7 September 2010.

12 — The question referred for a preliminary ruling made reference, in its second indent, to Decision 2000/766, but this is clearly a typographical error and should of course read 'Decision 2001/9/EC'.

IV — Preliminary observations

28. The respondents in the main proceedings submit that the question referred for a preliminary ruling should be answered in the affirmative. Legislation of the European Union must, they submit, be construed as precluding the national temporary regulation, whether it involves the advance prohibition of animal proteins or the temporary prohibition of fishmeal and dicalcium phosphate.

29. Conversely, the Member States which have submitted observations submit that the two parts of the question referred should be answered in the negative. The Commission concurs with that viewpoint but refers back to the referring court responsibility for reviewing whether the national temporary regulation was necessary and proportionate.

30. For reasons which will become clear as the arguments are presented below, I consider it appropriate to examine the question referred drawing the distinction, in the national temporary regulation, as moreover the referring court expressly did, between the advance prohibition of processed animal proteins and the temporary prohibition of fishmeal and dicalcium phosphate.

V — The Member State's powers to accelerate the prohibition of processed animal proteins

31. The Member States which have submitted observations and the Commission concur that European Union law did not preclude the adoption of the national temporary regulation, presenting two lines of reasoning in that regard. First, Union legislation was not exhaustive and therefore left intact the Member States' powers to adopt measures such as the national temporary regulation.[13] Secondly, the national temporary regulation could be considered to come within the scope of the interim protective measures referred to in the fourth subparagraph of Article 10(1) of Directive 90/425.[14] The respondents in the main proceedings maintain, first, that Directive 90/425 and Decision 94/381 achieved full harmonisation, thereby depriving the Member States of any power to adopt measures such as the national temporary regulation. Secondly, they submit that the substantive and procedural conditions governing the adoption of interim protective measures within the meaning of Article 10(1) of Directive 90/425 were not met.

32. It must be pointed out from the outset that adoption of the national temporary regulation cannot be caught simultaneously by those two sets of circumstances. The questions referred by the referring court lead me therefore to address in turn two entirely different issues. The first involves ascertaining whether, since there has been no harmonisation of the matter in European Union law, the Member States had power to adopt measures such as the national temporary regulation, in accordance with the EC Treaty, and more specifically, on the date of the facts at issue in the main action, with Article 30 EC.[15] Only if they did not have such authority, that is to say if the national temporary regulation was adopted in a harmonised context, would the second question arise, which is whether it could be considered to fall within the scope of Article 10(1) of Directive 90/425.

A — *Whether the Member States enjoy a residual power to prohibit the use of processed animal proteins*

33. As I have already shown, the respondents in the main proceedings submit that the legislation adopted by the European Union

13 — That position is advocated mainly by the Swedish Government, the Netherlands Government arguing it in the alternative. As shown below, the Commission also raises this point, albeit in a qualified manner.

14 — That point of view is advocated both by the Commission and by the Governments of the Member States which have submitted observations.

15 — See, in that regard, the twelfth recital in the preamble to Directive 90/425, which states that 'in view of the current state of harmonisation and pending Community rules, animals and products that are not the subject of harmonised rules should comply with the requirements of the State of destination provided that the latter are in conformity with Article 36 of the Treaty [which became Article 30 EC]'.

with regard to the feeding of animals was exhaustive and that the Member States could no longer, as from the adoption of Decision 94/381, adopt measures other than those prescribed by that decision. Since that decision authorised the feeding of processed animal proteins to non-ruminant species, the Member States had no right to prohibit them.

34. The Netherlands and Swedish Governments conversely maintain that the area in question was not exhaustively harmonised. As Decision 94/381 covered only the feeding of protein derived from mammalian tissues to ruminant species, the Member States had the authority to adopt measures relating to another subject.

35. The Commission also submits, albeit in a qualified manner, that, since Decision 94/381 prohibited only the feeding of protein derived from mammalian tissues to ruminant species, it could not be considered to have harmonised fully the measures to combat BSE at Community level. However, that view is advocated in connection with the arguments aiming to show that the national temporary regulation constitutes an interim protective measure within the meaning of the fourth subparagraph of Article 10(1) of Directive 90/425.

36. In that regard, the Court has had occasion to rule that Directive 90/425 brought about the complete harmonisation of the precautionary measures against the spread of diseases likely to constitute a serious hazard to animals or to human health, and defined precisely the respective obligations and tasks of the Member States and of the Commission in this field. [16]

37. In its judgment in *Commission* v *Portugal*, the Court stated that the Commission alone, under Article 10 of Directive 90/425, had the power to adopt the measures necessary to deal with any serious hazard to animals or to human health. The directive left Member States only with the option of taking the preventive measures provided for in the European Union rules if they detected a disease in the course of a check, or of taking, on serious health grounds, strictly limited protective measures pending the measures to be taken by the Commission. It had inferred from this that the system of precautionary measures thus established did not allow, among other things, a Member State to impose on a temporary basis a general ban on imports of animals from another Member State.

38. Directive 90/425 therefore had the objective of guaranteeing, with a view to the completion of the internal market, the free

16 — Case C-52/92 *Commission* v *Portugal* [1993] ECR I-2961, paragraphs 9 and 19.

movement of the live animals and products covered by the directives listed in Annex A to that directive, by arranging in a comprehensive and exhaustive manner, as is clear from the case-law cited above, the veterinary and zootechnical checks applicable in intra-Community trade. The system of precautionary measures established in Article 10 of Directive 90/425 thus deprived the Member States of their power to adopt independent prohibitions with regard to the animals and products falling within its scope.

39. This case is therefore not really concerned with the question whether the harmonisation achieved by Directive 90/425 was complete but rather with whether the products referred to in the national temporary regulation fell within its scope. In this respect it should be noted that, although the Court took care to point out in its judgment in *Commission* v *Portugal* that the harmonisation achieved in the relevant area was complete, that was to exclude the application, in the circumstances of the case, of Article 30 EC. In other words, the harmonisation at issue was considered to be complete in the sense – and, to my mind, in that sense alone – that the Member States could no longer justify adopting prohibitions or restrictive measures outside the system of precautionary measures established by Directive 90/425 for all the animals and products covered by that directive.

40. It is imperative to bear in mind that the aim of Directive 90/425, as stated in the second recital in its preamble, was to dismantle the zootechnical and veterinary barriers to the development of intra-Community trade in the animals and products of animal origin concerned in order to guarantee the harmonious operation of the common organisation of the market. In other words, the liberalisation of trade in animals and products constituted the rule, and the prohibition of such trade, in particular on public health grounds, constituted the exception, not vice versa.

41. It should, consequently, be established whether the animal proteins referred to in the national temporary regulation fell within the scope of Directive 90/425. If they did not, it must then be accepted that the Member States were entitled to adopt a measure such as that regulation, provided that the measure could be considered to be justified in the light of Article 30 EC. If they did fall within the scope of that directive, it would then be necessary to establish whether the Member States were entitled to adopt a measure such as the national temporary regulation.

42. That issue is relevant inasmuch as Decisions 94/381 and 2000/766 were adopted specifically on the basis of Article 10(4) of Directive 90/425, the former decision by the Commission and the latter by the Council. It

may therefore be inferred from this that, as far as those two institutions were concerned, animal proteins, whether from mammalian or non-mammalian species, did indeed fall within the scope of Directive 90/425. This is also shown clearly in the observations of the Commission which submits that the national temporary regulation comes within the interim protective measures that may be adopted by the Member States pursuant to the fourth subparagraph of Article 10(1) of Directive 90/425. But what was the situation exactly?

43. The fact of the matter is that it is much more difficult than it first appears to determine the scope of Directive 90/425. It is essential, in this regard, to bear in mind the fact that Directive 90/425 applied only to animals and products which were the subject of harmonised rules,[17] listed in Annex A thereto. However, Annex B to Directive 90/425 included '[animal] waste [processed as ingredients of animals feed]' among the animals and products not subject to harmonisation but trade in which was subject to the checks provided for in that directive. In other words, even if it were concluded that the products referred to in the national temporary regulation could not be considered to fall within the material scope of Directive 90/425, it would still be essential to raise the question whether they could none the less be regarded as animal waste processed as ingredients of animal feed and therefore fall within the operational scope of that directive. However, the first question to be raised in this regard is which specific products were envisaged by the national temporary regulation.

44. Decision 94/381 prohibited only the feeding of protein derived from mammalian tissues to ruminant species. For its part, Decision 2000/766 prohibited the feeding of all processed animal proteins to all farmed animals intended for the production of food. The national temporary regulation must therefore be considered to have extended the prohibition under Decision 94/381 to the feeding, on the one hand, of proteins derived from mammalian tissues to non-ruminant species and, on the other hand, of proteins derived from non-mammalian tissues to ruminant and non-ruminant species.

45. Neither the Commission nor the Member States which have submitted observations, nor the respondents in the main proceedings have taken a specific and detailed view on this point. Therefore, the processed animal proteins referred to in Decisions 94/381 and 2000/766 might ultimately be considered

17 — See the twelfth recital in the preamble to Directive 90/425.

to have been included in the material scope of Directive 90/425 by those two specific decisions, [18] without this having any legal repercussions. In fact, those two decisions have become definitive and, in any event, their legality has not been called into question at any time by any person whatsoever.

46. In actual fact, the situation at issue did, in my view, indeed fall within the scope of Directive 90/425, even though that is especially difficult to establish with clarity and precision in view of the complexity of the rules that may be applied to processed animal proteins, irrespective of whether those proteins are contemplated as animal waste or as ingredients in animal feed, or even whether the prohibition applying to them in this case is envisaged.

47. First of all, Article 13 of Directive 90/667 amending Annex A to Directive 90/425 provided that the products concerned were to be subject to the rules on veterinary checks and, as appropriate, to the protective measures laid down by Directive 90/425. Under Article 1 of Directive 90/667, the aim of the directive was to lay down, first, the animal and public health requirements for the disposal and/or processing of animal waste in order to destroy pathogens which might be present in such material and the production of feedingstuffs of animal origin in such manner as to prevent the presence of any pathogens therein and, secondly, the rules for the placing on the market of animal waste intended for purposes other than human consumption. Article 2(1) of that directive defined animal waste as 'carcases or parts of animals or fish, or products of animal origin not intended for direct human consumption, with the exception of animal excreta and catering waste'.

48. Subsequently, Article 7(2) of Council Directive 92/118/EEC of 17 December 1992 [19] also provided that Article 10 of Directive 90/425 was to apply to the products covered by the directive, that is to say to products of animal origin not subject, as regards animal health and public health requirements governing trade in and imports into

18 — The first recital in the preamble to Decision 2000/766, which reads 'Community rules for control of certain processed animal protein into ruminant feed entered into force in July 1994', could be construed to that effect.

19 — Directive laying down animal health and public health requirements governing trade in and imports into the Community of products not subject to the said requirements laid down in specific Community rules referred to in Annex A(I) to Directive 89/662/EEC and, as regards pathogens, to Directive 90/425/EEC (OJ 1993 L 62, p. 49).

the Community, to the specific Community legislation referred to in Annex A(I) to Directive 89/662 and, as regards pathogens, to Directive 90/425. Article 2(1)(e) of Directive 92/118, however, provided the first Community definition of processed animal protein intended for animal consumption, in the circumstances of this case as 'animal protein which has been treated so as to render it suitable for direct use as a feedingstuff or as an ingredient in a feedingstuff for animals' and as including, among other things, 'fishmeal'.

49. Finally, it should be pointed out that, among numerous measures governing feedingstuffs [20] and showing early harmonisation in the matter, Commission Decision 91/516/EEC of 9 September 1991 [21] definitely affords a degree of clarification on the issue with which we are concerned. After all, that decision did establish the list of ingredients the use of which was prohibited in compound feedingstuffs. However, animal proteins of mammalian origin were not included in the list of ingredients the use of which was prohibited in compound feedingstuffs prior to its amendment by Commission Decision 97/582/EC of 28 July 1997. [22] The latter decision notes, for the first time, the need to add to that list '[p]rotein derived from mammalian tissue as an ingredient in compound feeding stuffs for ruminants'. The sixth recital in the preamble to that decision states, in this respect, that the addition was essential 'for practical reasons and for the sake of legal consistency', on account, very specifically, of the prohibition contained in Decision 94/381.

50. It follows from the above reasoning that, until Decision 2000/766 was adopted on 4 December 2000, it was not possible, in my view, for a Member State to prohibit, within its residual powers, either the feeding of protein derived from mammalian tissues to non-ruminant species or the feeding of protein derived from non-mammalian tissues to ruminant or non-ruminant species, at the very least outside the system of precautionary measures established by Article 10 of Directive 90/425.

20 — Without claiming to be exhaustive, I can, for example, cite Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs (OJ 1979 L 86, p. 30) and Council Directive 96/25/EC of 29 April 1996 on the circulation of feed materials, amending Directives 70/524/EEC, 74/63/EEC, 82/471/EEC and 93/74/EEC and repealing Directive 77/101/EEC (OJ 1996 L 125, p. 35).

21 — Commission Decision 91/516/EEC of 9 September 1991 establishing a list of ingredients whose use is prohibited in compound feedingstuffs (OJ 1991 L 281, p. 23).

22 — Decision amending Decision 91/516 (OJ 1997 L 237, p. 39).

B — *The Member States' powers to prohibit the use of processed animal proteins on the basis of the system of precautionary measures established by Article 10 of Directive 90/425 which authorises the adoption of national interim protective measures*

51. Can the national temporary regulation none the less be considered to be caught by Article 10(1) of Directive 90/425?

52. The Netherlands, German and Swedish Governments assert that the national temporary regulation constituted an interim protective measure for the purposes of the fourth subparagraph of Article 10(1) of Directive 90/425 and that it met the necessary requirements in that regard. First, BSE presented such a serious risk to human or animal health that there were serious public or animal health grounds. Secondly, the Commission had not thus far adopted any measures on the date of entry into force of the national temporary regulation, so that it was adopted pending the measures to be taken. Thirdly, it is an interim protective measure. Fourthly, it was notified to the Commission, the delay in its notification having no bearing on its validity.

53. The Commission submits that Decision 2000/766 cannot be interpreted as prohibiting the Member States from adopting, before 1 January 2001, on the basis of the fourth subparagraph of Article 10(1) of Directive 90/425, interim protective measures against BSE concerning the production of and trading in processed animal proteins intended for feeding to farmed animals. The fact that the Kingdom of the Netherlands notified to the Commission the measures laid down in the national temporary regulation only after some delay, in breach of the fifth subparagraph of Article 10(1) of Directive 90/425, does not affect the power of that Member State to adopt those measures. It submits further that it is for the referring court to determine whether the regulation in question was justified and proportionate.

54. According to the Court's case-law, Member States must adopt interim protective measures in compliance with the objectives pursued by the EU rules in force and the general principles of EU law, such as the principle of proportionality, and the obligation to notify laid down in Article 10(1) of Directive 90/425. [23]

23 — Joined Cases C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 52.

55. It must therefore be examined, first, whether the national temporary regulation met the requirements laid down by Article 10(1) of Directive 90/425, interpreted in the light of the objectives pursued by that directive.

56. Assuming that this first question is answered in the affirmative, it will be necessary, secondly, to examine whether it complied with the general principles of EU law, and in particular the principle of proportionality. Thirdly and finally, it will be essential to consider the scope of the obligation to notify referred to in Article 10(1) of Directive 90/425 and the consequences of any failure to do so on the part of a Member State.

57. In any case the Court adopted that three-phase approach in its judgment in *Lennox*,[24] albeit in a different order.

1. Fulfilment of the requirements for initiating the system of precautionary measures under Article 10(1) of Directive 90/425

58. It must, first of all, be made clear that the discussion concerns, in essence, whether the national temporary regulation is caught by the fourth subparagraph of Article 10(1) of Directive 90/425. Only the Netherlands Government raised the question, in its observations, whether its regulation could also, either alternatively or simultaneously, come under the second subparagraph of Article 10(1) of Directive 90/425.

59. In this instance, I take the view that the national temporary regulation could not have been adopted in disregard of the conditions laid down in the fourth subparagraph of Article 10(1) of Directive 90/425, but it is certainly worth looking briefly at the distinction established there between the Member State of dispatch and the Member State of destination.

(a) The distinction between the Member State of dispatch and the Member State of destination

60. Those two subparagraphs, which distinguish between the Member State of dispatch, that is to say the state from which the animals or products are dispatched, and the Member State of destination, that is to say the state to which the animals or products are dispatched, allow a Member State to adopt national measures in either of those two capacities but on the basis of different conditions and detailed rules, so it is important, as a matter of course, to define the limits of the situations falling within their respective scope.

24 — Case C-220/01 *Lennox* [2003] ECR I-7091, paragraphs 71 to 82.

61. The Netherlands Government maintained in this regard that the distinction in question was irrelevant in this case as the aim of the national temporary regulation was not to regulate intra-Community trade but, more generally, to regulate the production of and trading in feedstuffs for animals. The national temporary regulation, it claims, was therefore adopted by the Kingdom of the Netherlands in its dual capacity as a Member State of dispatch and of destination. In any event, since the Member States had a greater freedom of action under the second subparagraph of Article 10(1) than under its fourth subparagraph, the reasons justifying their intervention as a Member State of destination would justify, *a fortiori*, their intervention as a Member State of dispatch.

62. I must make clear from the outset that I cannot concur entirely with the Netherlands Government's analysis. A national measure might be permissible under the second subparagraph of Article 10(1) of Directive 90/425 but not be permissible under the fourth subparagraph of Article 10(1) of that directive. The distinction may therefore prove to be decisive for a Member State.

63. In this case, however, the distinction is in fact of little importance having regard to the scope of the national temporary regulation. The prohibition contained in it affected both exports and imports of feedingstuffs and could therefore be viewed as a measure adopted both by a Member State of dispatch and by a Member State of destination. From that viewpoint, it can, however, be stated that compliance with the conditions governing the adoption of interim protective measures by a Member State of destination, laid down in the fourth subparagraph of Article 10(1) of Directive 90/425, is of particular importance for exporters established in the other Member States.

(b) The conditions governing the adoption of interim protective measures on the basis of the fourth subparagraph of Article 10(1) of Directive 90/425

64. The adoption of measures by a Member State pursuant to the fourth subparagraph of Article 10(1) of Directive 90/425 is subject to various conditions. First of all, under the first subparagraph of Article 10(1) of Directive 90/425, such intervention is possible only in the event of 'any outbreak … of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health'. Next, the fourth subparagraph of Article 10(1) of Directive 90/425 authorises the adoption, solely by 'Member State[s] of destination' only of 'interim protective measures'

which may cover only 'the holdings, centres or organisations concerned or, in the case of an epizootic disease, with regard to the buffer zone provided for in Community rules' and which are justified 'on serious public or animal health grounds'. Finally, those measures are deemed to be taken only '[p]ending the measures to be taken' in accordance with Article 10(4) of the directive.

65. Those various conditions cannot of course be regarded as equally important and may indeed be grouped together on the basis of the logical relationships they have with one another. In simplified terms, it could be said that the measures that may be adopted by Member States of destination must be based on two findings, namely the existence of a hazard and the existence of an urgent need, where no action has been taken by the EU authorities, and must remain proportionate.

66. Any action taken by Member States of destination pursuant to the fourth subparagraph of Article 10(1) of Directive 90/425 must primarily be based on the established existence of a risk, a hazard to human or animal health. Secondly, it must be precautionary, that is to say, it must respond to considerations of urgency by remedying a situation temporarily unregulated at Community level but soon to be so. Finally, it must be proportionate, that is to say, remain within the confines of what is necessary to attain the objective pursued, which is to respond as a matter of urgency to an identified risk.

67. That is certainly the sense of the requirement that interim protective measures must relate only to 'the holdings, centres, or organisations concerned', or, in the case of an epizootic disease, 'the buffer zone provided for in Community rules', which cannot be concerned with establishing a hazard or an urgent need.

68. In that regard, it must be observed that the question whether the scope of the national temporary regulation, which comprised a general prohibition affecting all channels for the production of and trading in feedingstuffs, did not exceed the confines of the fourth subparagraph of Article 10(1) of Directive 90/425 was not addressed either by the Commission or by the Member States which submitted observations, or by the respondents in the main proceedings. The Court itself has never taken a view on the matter.

69. It may be considered, however, that the lack of any discussion on that point is inconsequential as it is accepted that the review of compliance with that requirement is subsumed by the review of proportionality.

(i) Whether there is a hazard

70. The need for there to be a hazard is expressed, first of all, in the condition, laid down in the first subparagraph of Article 10(1) of Directive 90/425, relating to 'any outbreak … of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health', which applies to the adoption of Community protective measures as well as, in the absence of such measures, to the adoption of national interim protective measures. It is also expressed in the condition, laid down in the fourth subparagraph of Article 10(1) of Directive 90/425, which subjects action on the part of the Member States to the existence of 'serious public or animal health grounds'.

71. That twofold condition must, in this instance, be considered to be met, on those very grounds.

72. As the Commission has pointed out, the Court has held [25] that this condition is likely to be met 'when new information significantly alters the perception of the danger represented by the disease'.

73. Here, as it is apparent from the first three recitals in the preamble to Council Decision 2000/766, cases of BSE had been recorded in animals born in 1995, subsequent to the adoption, on 27 June 1994, of Decision 94/381, which comprised the first Community rules on checks on processed mammalian-derived proteins used to feed ruminant species. The opinion adopted on 27 and 28 November 2000 by the Scientific Steering Committee in this context and referring for the first time to a 'risk of cross-contamination of cattle feed with feed intended for other animals and which contains animal proteins possibly contaminated by the BSE agent' can be regarded as having significantly altered the perception of the danger represented by BSE.

74. The actual adoption of Council Decision 2000/766, to which the national temporary regulation expressly referred and was intended to implement, depended, therefore, in essence on establishing the need, as a precautionary measure, to prohibit on a temporary basis the feeding of all animal proteins to all animals. [26] The opinion of the Scientific Steering Committee, which justified the adoption of Decision 2000/766, could therefore likewise – as claimed by the Netherlands,

25 — Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraphs 28 to 32; Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraphs 51 to 53; and *Lennox*, paragraph 72.

26 — Recital 6 in the preamble to Decision 2000/766.

German and Swedish Governments and the Commission alike in their observations – justify the adoption of the national temporary regulation.

(ii) Whether there is an urgent need

75. The requirement that there be an urgent need is expressed in the condition that action on the part of the Member States of destination, first, must be 'precautionary' and, second, must be taken '[p]ending the measures to be taken'.

76. Could the national temporary regulation conceivably be adopted as a precautionary measure and in fact pursue a protective purpose?

77. The very purpose of Article 2 of the national temporary regulation was to ensure the advance implementation of protective measures established by the Council and transcribed in Article 3 of that regulation. Such a precipitate measure can definitely be taken as an expression of the concerns relating to the urgency of the situation.

78. It must be pointed out here that the argument of the respondents in the main proceedings, that the national temporary regulation did not pursue an objective of human or animal health protection but a purely organisational objective consisting in 'drying up' the existing production processes, cannot, to my mind, undermine that assessment. This is not a matter of determining whether the objectives, whether real or imagined, pursued by the Member State met the requirements of the EU rules on the existence of a hazard, but simply of establishing that there is an urgent need for the Member State to take action. The test to be applied in that regard is therefore relatively straightforward. It solely involves determining whether Community measures existed.

79. By contrast, it is difficult to argue that the national temporary regulation was adopted '[p]ending the measures to be taken', as Community measures had specifically been 'taken' four days earlier.

80. Called upon to deal with a similar issue regarding the equivalent provisions of Directive 89/662 [27] in its judgment in *Eurostock*, [28] the Court admittedly held that 'the adoption by the Commission of a decision which is not immediately applicable cannot, as such, be regarded as precluding a Member State

27 — The fourth subparagraph of Article 9(1) of Directive 89/662 is in identical terms to those of the fourth subparagraph of Article 10(1) of Directive 90/425. In this regard it must be noted that the two directives comprise similar provisions, Directive 90/425 supplementing the arrangements established by Directive 89/662 for livestock and goods falling outside its scope (see, to that effect, the thirteenth recital in the preamble to Directive 89/662).

28 — Case C-477/98 *Eurostock* [2000] ECR I-10695

from itself taking interim protective measures pursuant to the fourth subparagraph of Article 9(1) of Directive 89/662'. However, as the respondents in the main proceedings have pointed out, the facts at issue in *Eurostock* differ on an essential point from those at issue in this case.

81. In *Eurostock*, entry into force of the Community measure had been postponed on a number of occasions, for a period of almost three years from its adoption. Furthermore, the national measure had not been adopted until after entry into force of the Community measure had been postponed. In the present case, by contrast, the Community measure, adopted shortly after the hazard had been established, was to enter into force less than one month later, which is in fact what happened.

82. In any case, Advocate General Mischo adopted a conflicting position in his Opinion in Case C-1/00, [29] regarding the same provisions of Directive 89/662. Raising the question whether a Member State may adopt a national protective measure on the basis of the fourth subparagraph of Article 9(1) of Directive 89/662, for the purpose of strengthening a Community protective measure, adopted on the basis of that provision, he considered such action to be unacceptable. He accordingly stated that '[i]f a Member State is not satisfied with a Community protective measure, it must bring its objection before the Court for decision. It is not for it to act unilaterally'. Although that answer is perfectly clear, the situation at issue in this case is not entirely the same as that at issue in *Commission* v *France*. The aim of the national temporary regulation was not to strengthen the Community protective measure, but merely, at least as far as the advance prohibition was concerned, to bring forward and hasten its implementation.

83. For my part, I consider that in the circumstances of the main proceedings, the national temporary regulation cannot be considered to have been adopted in accordance with the conditions laid down by the applicable EU rules concerning the establishment of an urgent need. In clearer terms, it seems to me that the national temporary regulation was not adopted 'pending the measures to be taken' but well after those measures were 'taken' and therefore was contrary to the fourth subparagraph of Article 10(1) of Directive 90/425, and that it is for the court

29 — Opinion in Case C-1/00 *Commission* v *France* [2001] ECR I-9989, points 162 to 164.

hearing the case in the main proceedings to draw the appropriate conclusions.

2. Compliance with the obligation to notify the measures taken

84. In that regard it is imperative to focus on the fact that Decision 2000/766, which was adopted on 4 December 2000, following the opinion adopted by the Scientific Steering Committee on 27 and 28 November 2000, entered into force on 1 January 2001. The Community thus showed a degree of speed in its action. By comparison, it can be noted that Article 1 of Decision 94/381 had imposed on the Member States a period of thirty days, from its notification, within which to prohibit the feeding of protein derived from mammalian tissues to ruminant species. The national temporary regulation, for its part, was adopted on 8 December 2000, although the EU institutions had already taken the urgency of the situation into consideration, but did not enter into force until 15 December 2000, without the Netherlands Government – questioned on this point at the hearing – providing any information on the reasons for that interval.

85. In the light of the preceding arguments, it is not essential to examine the condition relating to observance of the principle of proportionality. On the other hand, in the interest of providing a helpful answer to the question raised by the referring court, it seems important to me to provide some clarification concerning the obligation to notify laid down in the fifth subparagraph of Article 10(1) of Directive 90/425.

86. In accordance with the fifth subparagraph of Article 10(1) of Directive 90/425, the measures taken by Member States, as states of dispatch as well as states of destination, must be notified to the Commission and to the other Member States without delay. In this instance, the national temporary regulation was adopted on 8 December 2000 but was not notified to the Commission until 10 January 2001. Can a 33-day interval of that kind reasonably be considered to comply with Directive 90/425? If not, what might the penalty be for failing to observe the period prescribed? Moreover, what inference should be made from the lack of information on notification to the other Member States?

87. Like the Netherlands and German Governments, the Commission essentially takes the view that, although that notification can hardly be considered to have been given 'without delay' within the meaning of Directive 90/425, that delay still does not affect the power of the Member State to adopt a measure such as the national temporary regulation nor, therefore, does it affect its legality.

88. In its judgment in *Lennox*, the Court considered a sixteen-day interval to be reasonable. Furthermore, it asked the Member State mainly concerned by the interim

protective measure at issue, adopted by another Member State, whether that measure had been notified to it. [30] On the other hand, it has never had to adjudicate on any penalty or on an unreasonable interval or on a failure to notify a measure to the other Member States, as prescribed by that provision. However, it is true that the Court has held that the failure to meet a requirement of that kind, in this instance the requirement laid down in the third subparagraph of Article 8(1)(a) of Directive 90/425, could not affect the power of the Member States to adopt the measures mentioned in those provisions. [31]

89. Clearly, it is not for the Court of Justice but for the competent courts of the Member State concerned to adjudicate on the legality of the national temporary regulation. At the very most the Court could, in an action for a declaration of failure to fulfil obligations, establish that the conduct of a Member State consisting in adopting interim protective measures without notifying them to the Commission or to the other Member States is incompatible with the directive. From that viewpoint, a Member State's failure to fulfil the obligation to notify laid down in the fifth subparagraph of Article 10(1) of Directive 90/425 could be likened to the failure to fulfil the obligation to notify measures transposing a directive, or even the duty of genuine cooperation underlying Article 10 EC.

90. However, does that division of jurisdiction between the Court of Justice and national courts mean that any infringement of that obligation is not subject to any penalty or that the Court is powerless to give a ruling in that regard?

91. A distinction should probably be made between, on the one hand, a total failure to notify or a delay in notification and, on the other hand, notification to the Commission and notification to the other Member States. Furthermore, in order to assess the significance of that obligation and to determine the consequences of its possible infringement, it should be placed in its context.

92. As the Netherlands Government has noted, the aim of that obligation to notify cannot be to obtain any prior authorisation from the Commission or from the other Member States; quite the opposite. The fact remains that its objective is to provide information essential to subsequent Community action, which is no less essential inasmuch as it alone is capable of achieving effectively the necessary balance between the protection of public or animal health across the Community territory and the free movement of the animals and goods concerned. Indeed, this is shown in Decision 2000/766 when it mentions in its

30 — *Lennox*, at paragraph 73.

31 — Case C-428/99 *van den Bor* [2002] ECR I-127, paragraphs 45 to 47.

recitals that safeguard measures have been adopted by the Member States. [32] From that point of view, notification of relevant information to the Commission is the first stage in a process facilitating the transition from an urgent situation, managed in a precautionary manner by a Member State, to a situation which has been brought under control, managed collectively at Community level. Such notification therefore constitutes the counterpart of the establishment of an urgent need which is a precondition for the adoption of interim protective measures by a Member State.

93. Notification of the relevant information to the other Member States is no less important as its aim is specifically to alert them to the hazard or risk underlying the urgent situation. Such notification therefore constitutes the counterpart to the finding of a hazard which is also a precondition for the adoption of interim protective measures by a Member State.

94. Here it is imperative to bear in mind that notification by the Kingdom of the Netherlands on 10 January 2001 was effected while, on the one hand, the provisions of Decision 2000/766 in conjunction with the provisions of Decision 2001/9 were fully in force and, on the other hand, the national temporary regulation was no longer in force. That notification on the adoption of the national temporary regulation, which was particularly important inasmuch as it altered the material and temporal scope of the Community measures which had just been taken, was therefore not only delayed but, above all, entirely pointless.

95. Accordingly, although it is not possible for the Court, in a preliminary ruling procedure, to penalise a failure on the part of a Member State to fulfil that specific obligation to inform in exercising its power to adopt interim protective measures, it may still focus on its importance, noting, for example, that it is for the national courts in particular to penalise failure by the Member States to fulfil their Community obligations.

96. In conclusion, and without it being necessary to examine whether the national temporary regulation was entirely compatible with the principle of proportionality, I take the view that the Kingdom of the Netherlands was not entitled to adopt a measure such as that at issue in the main proceedings prohibiting in advance the feeding of processed animal proteins to farmed animals.

32 — Recital 4 in the preamble to Decision 2000/766.

VI — Whether the Member State has the authority to prohibit on a temporary basis fishmeal and dicalcium phosphate

97. By the second part of its question, the referring court is asking the Court to give a ruling on whether EU law must be interpreted as precluding the extension by the national temporary regulation of the prohibition it comprised to cover fishmeal and dicalcium phosphate, having explained, first, that Article 2(2) of Decision 2000/766 laid down derogations from the prohibition of the feeding of fishmeal to animals other than ruminants and of dicalcium phosphate in particular and, secondly, that the use of those two products was subject to measures to be adopted in accordance with the procedure laid down in Article 17 of Directive 89/662 which were finally taken upon the adoption of Decision 2001/9.

98. The Member States which have submitted observations and the Commission have addressed the question referred to the Court for a preliminary ruling without making any distinction, in the national temporary regulation, between the advance prohibition of processed animal proteins and the temporary prohibition of fishmeal and dicalcium phosphate. They take the view, generally, that the two measures came within the compass of interim protective measures referred to in the fourth subparagraph of Article 10(1) of Directive 90/425.

99. It is certainly possible to examine the compatibility of the national temporary regulation in its entirety with Community law without making any distinction between those two aspects. However, there is a very clear difference between them. The advance prohibition of processed animal proteins met the requirements of Decision 2000/766, save with regard to the date of its entry into force. By contrast, the temporary prohibition of fishmeal and dicalcium phosphate failed to meet the requirements of that decision.

100. The Netherlands Government maintains, in that regard, that it could not possibly have foreseen the very strict conditions governing the use of fishmeal and dicalcium phosphate which were finally laid down in Decision 2001/9 and that, in the light of the established risks to public health and weighing up the various interests concerned, prohibiting their use, pending the adoption of the implementing measures, was the preferable approach.

101. That reasoning is, to my mind, unconvincing.

102. Article 2 of Decision 2000/766 excluded, without the slightest ambiguity, the feeding of fishmeal to non-ruminant species

and the use of dicalcium phosphate generally from the scope of the prohibition. Admittedly, that derogation actually took effect, as it were, only once the implementing measures which were to accompany it were taken, and therefore upon the adoption of Commission Decision 2001/9, which took place on 29 December 2000, subsequent to the entry into force of the national temporary regulation.

103. However, the only date of any real significance in this instance was the date of application of the prohibition, which necessarily determined the date of application of the derogations from that prohibition. In this case it is apparent that the dates of entry into force of Decisions 2000/766 and 2001/9 were the same and the dates of application of the prohibition and of the derogations therefrom coincided.

104. Application of the derogations from the advance prohibition laid down by the national temporary regulation, in force from 15 December 2000, was subject to the adoption of the implementing measures provided for in Decision 2000/766. The derogations concerning the feeding of fishmeal to non-ruminant species and the use of dicalcium phosphate did not, therefore, apply between 15 December 2000 and 1 January 2001.

105. In other words, the national temporary regulation comprised a prohibition against the feeding of fishmeal to non-ruminant species and against the use of dicalcium phosphate although the Community rules did not prohibit it and had clearly stipulated that this would not be prohibited.

106. Thus it appears not only that the temporary prohibition against the feeding of fishmeal to non-ruminant species and against the use of dicalcium phosphate is not only the object of the same criticism as that levelled above against the advance prohibition of processed animal proteins, but also that, since it directly contradicts a Community rule, it was adopted in breach of the principle of proportionality and of the duty to cooperate in good faith incumbent on the Member States under Article 10 EC.

VII — Conclusion

107. In conclusion, I propose that the Court should answer the question referred by the Gerechtshof 's-Gravenhage for a preliminary ruling as follows:

The law of the European Union, and specifically Council Directive 90/425/EEC, Commission Decision 94/381/EC and Council Decision 2000/766/EC, must be interpreted as precluding legislation such as that at issue in the main proceedings, since it alters the temporal and material scope of the prohibition laid down by Decision 2000/766/EC.