Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

18 July 2013 *

(Failure of a Member State to fulfil obligations — Regulation (EC) No 1829/2003 — Animal feed — Genetically modified feed — Production, placing on the market or use — National prohibition not yet in force)

In Case C-313/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 20 June 2011,

European Commission, represented by D. Bianchi and A. Szmytkowska, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Poland, represented by M. Szpunar acting as Agent,

defendant,

THE COURT (Fifth Chamber),

composed of A. Borg Barthet, acting for the President of the Fifth Chamber, M. Safjan and M. Berger (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission requests the Court to declare that, by prohibiting the production, placing on the market, and use in animal feed in Poland of genetically modified feed and genetically modified organisms intended for feed use, the Republic of Poland has failed to fulfil its

* Language of the case: Polish.

obligations under Articles 16(5), 19, 20 and 34 of Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ 2003 L 268, p. 1).

Legal context

European Union law

2 As stated in recitals 3, 4, 7 and 30 of the preamble to Regulation No 1829/2003, in order to protect human and animal health and to guarantee equal and fair competition, food and feed consisting of, containing or produced from genetically modified organisms ('GMOs'), (collectively, 'genetically modified food and feed') should undergo a safety assessment before being placed on the market within the European Union, under a single, efficient and transparent Community authorisation procedure.

3 Recital 31 of the preamble to that regulation states that, in order to ensure a harmonised scientific assessment of genetically modified foods and feed, such assessments should be carried out by the European Food Safety Authority.

4 Article 15 of that regulation, entitled 'Scope', provides, at paragraph 1, that the provisions concerning the authorisation relating to the genetically modified feed and the rules relating to supervision apply to:

'…

(a) GMOs for feed use;

(b) feed containing or consisting of GMOs;

(c) feed produced from GMOs.'

5 Article 16 of that regulation, entitled 'Requirements', provides at paragraphs 1(a), 2, 3 and 5:

'1. Feed referred to in Article 15(1) must not:

(a) have adverse effects on human health, animal health or the environment;

…

2. No person shall place on the market, use or process a product referred to in Article 15(1) unless it is covered by an authorisation granted in accordance with this Section and the relevant conditions of the authorisation are satisfied.

3. No product referred to in Article 15(1) shall be authorised unless the applicant for such authorisation has adequately and sufficiently demonstrated that it satisfies the requirements of paragraph 1 of this Article.

…

5. An authorisation as referred to in paragraph 2 shall not be granted, refused, renewed, modified, suspended or revoked except on the grounds and under the procedures set out in this Regulation.

…’

6 Articles 17 to 19 of the regulation govern the authorisation procedure. Article 19 provides, in particular, that the power to grant authorisations lies with the Commission.

7 Article 20 of Regulation No 1829/2003 governs the status of existing products and lays down the conditions under which those products, where they had been lawfully placed on the market before the date of application of Regulation No 1829/2003, may continue to be placed on the market, used and processed if certain conditions are met.

8 Article 34 of Regulation No 1829/2003 provides that emergency measures can be taken in accordance with the procedural conditions set out in Articles 53 and 54 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1) in the case of serious risk from a product to human health, animal health or the environment.

9 Articles 53 and 54 of Regulation No 178/2002 provide that, in such a case, the adoption of appropriate measures is a matter for the Commission alone and a Member State can adopt them only where the Commission has not done so.

Polish law

10 Article 15(1)(4) of the Law on animal feed of 22 July 2006 (Dz. U No 144, position 1045; ‘the APA law’), provides that the production, placing on the market and use in animal feed in Poland of genetically modified feed and GMOs intended for feed use are prohibited (‘the contested prohibition’).

11 Under Article 53 of the APA law, any person who breaches the contested prohibition is liable to a fine.

12 That prohibition was due to enter into force, under Article 65 of the APA law, two years after its publication, namely on 12 August 2008.

13 On 26 June 2008, the Polish legislature adopted the Law amending the APA (Dz. U No 144, position 899), which came into force on 12 August 2008 and which amended Article 65 of the APA law by postponing the date of entry into force of the contested prohibition to 1 January 2013.

Pre-litigation procedure

14 On 24 October 2006, after becoming aware of the date of entry into force of the APA law, the Commission sent a letter to the Republic of Poland in which it stated that the contested prohibition constituted an infringement of Regulation No 1829/2003 in so far as it affected the free placing on the market, movement and use of animal feed already approved under that regulation.

15 By letter of 28 November 2006, the Republic of Poland responded by pointing out the framework position adopted by the Polish Council of Ministers in the context of the social and political debate in Poland around genetically modified animal feed, in which the Polish Council of Ministers stated its opposition to that feed being permitted. The Republic of Poland informed the Commission, in particular, that there were several ongoing studies relating to the effect of that prohibition on the production and the supply of genetically modified feed as well as the possibility of replacing that feed and stating that the definitive decision concerning the contested provision had to be taken before the date of its entry into force, that is to say 12 August 2008.

16 On 23 March 2007, the Commission sent a letter of formal notice to the Republic of Poland, in which it stated that GMOs within the meaning of Regulation No 1829/2003 could be prohibited only in exceptional cases, the conditions of which were not satisfied in that instance. Therefore, by prohibiting the production, placing on the market, and use in animal feed in Poland of genetically modified feed and GMOs intended for feed use, the Republic of Poland had failed to fulfil its obligations under Regulation No 1829/2003.

17 On 22 May 2007, the Republic of Poland asked the Commission to postpone the deadline for responding to the letter of formal notice to 22 June 2007, stating that 'the risks associated with the use of genetically modified products to humans, animals and the environment are the cause of considerable concern'. It also stated that, in order to prepare its response, it had a responsibility to take into account the observations and opinion of a number of experts, making it necessary to carry out or conduct consultations, investigations and interviews as well as to analyse a large number of documents. The Commission accepted the request by letter of 31 May 2007.

18 By letter of 22 June 2007, the Republic of Poland responded to the letter of formal notice, putting forward, in essence, the same arguments set out in its letter of 28 November 2006.

19 As it was not satisfied with that response, the Commission issued a reasoned opinion to the Republic of Poland on 23 October 2007, requesting that it take the measures necessary within two months of receipt of that opinion. The date of receipt was also 23 October 2007.

20 Under reference to the difficulty for the Minister for Agriculture and Rural Development to take a decision in due time as regards the final position to adopt in relation to the alleged infringement, due to his recent nomination to that position, the Republic of Poland requested that the deadline for responding to the reasoned opinion be postponed to 13 December 2007. That request was rejected by the Commission on the ground that the applicable conditions were not satisfied.

21 In its response of 21 January 2008 to the reasoned opinion, the Republic of Poland gave notice of the repeal of Article 15(4) of the APA law.

22 Since it had not received any information concerning that repeal, by letter of 16 June 2008, the Commission requested that it be provided with information as quickly as possible as to the removal of the contested prohibition.

23 By letter of 26 June 2008, the Republic of Poland informed the Commission that the legislative work on the draft amendment to the APA law was in progress and that the contested prohibition was to enter into force not on 12 August 2008 but on 1 January 2012. In fact, the amendment adopted by the Polish legislature postponed that date to 1 January 2013.

24 In those circumstances, the Commission decided to bring the present action.

The action

Arguments of the parties

25 As a preliminary point, in response to the argument put forward by the Republic of Poland that, since the contested prohibition did not come into force until 1 January 2013 it was, in effect, possible to produce, to place on the market, and to use in animal feed, genetically modified feed in accordance with Regulation No 1829/2003, the Commission, relying in particular on Case C-185/96 *Commission* v

Greece [1998] ECR I-6601 and Case C-259/01 *Commission* v *France* [2002] ECR I-11093, claims that the adoption of the contested prohibition and the postponement of its entry into force was contrary to the principle of the legal certainty.

26 In that regard, the Commission states that, since the Republic of Poland had not repealed the contested prohibition, the animal feed producers concerned which were, in particular, obliged to find new sources of raw materials, found themselves in an uncertain legal position due to the risk of seeing the entry into force of that prohibition being postponed again.

27 In those circumstances, relying on the Court's case-law, the Commission notes that a Member State is in breach of European Union law not only where it retains a legislative provision at odds with European Union law, even though the provision in question has not been implemented, but also where it puts in place a legislative framework which is contrary to a directive, even if that legislative framework has not been applied in a specific case.

28 In addition, a Member State cannot justify a failure to comply with European Union law on the basis that no negative consequence has resulted from that failure, where it is apparent from numerous documents that the contested prohibition, once in force, will generate such consequences.

29 The Commission also argues that a Member State's freedom to choose the legislative approach does not imply the freedom to adopt legislation incompatible with European Union law.

30 In addition, the Commission states that it sent its reasoned opinion to the Republic of Poland before the contested prohibition was due to enter into force, which had been due to take place on 12 August 2008, and that, consequently, the Republic of Poland's change to the date of entry into force to 1 January 2013 did not in any way affect the substance of the infringement in the present case.

31 Next, as regards a possible justification based on public morality laid down in Article 36 TFEU, the Commission observes, first of all, that Regulation No 1829/2003 is a full harmonisation measure in the area of genetically modified feeds and GMOs intended for feed use. Accordingly, a national measure must be assessed not in the light of the provisions of primary law, but in the light of those of the harmonising measure.

32 Even where recourse is had to the emergency procedure provided for in Article 34 of Regulation No 1829/2003, which refers to the complex procedure laid down under Regulation No 178/2002, and which applies where there exists a serious risk to human health, animal health or to the environment, the adoption of appropriate measures is in any case a matter for the Commission alone and a Member State is empowered to adopt provisional protection measures only where the Commission has not done so.

33 Expressing doubts as to whether a Member State may, as in the present case, rely on the exceptions set out in Article 36 TFEU, the Commission claims in addition that the Republic of Poland has not in any event shown, as required by settled case-law, that the conditions permitting a derogation under Article 36 TFEU are satisfied.

34 In that regard, the Commission alleges that the Republic of Poland has not invoked public morality as a separate justification, but is instead confusing it with the justification based on the protection of health and the environment. In addition, the Republic of Poland has not shown a link between the contested prohibition and public morality, and the fact that no study in that regard has been submitted is, according to the Commission, contrary to the case-law of the Court according to which a Member State cannot rely on the views of a section of public opinion in order unilaterally to challenge a harmonising measure.

35 Finally, noting that the Court's case-law requires a Member State which relies on the measures provided for in Article 36 TFEU to comply with the principle of proportionality, the Commission claims that the contested prohibition is, in any event, manifestly disproportionate.

36 In response, the Republic of Poland contends that, in the present case, the simple fact that a national legislature adopted statutory provisions which have not entered into force and will not enter into force cannot be considered a breach of European Union law.

37 In that regard, the Republic of Poland contests the relevance of the case-law cited by the Commission in support of its arguments, stating that the judgments to which the Commission refers concern only situations in which the Court has held that there was a breach of European Union law arising from the national law in force in the Member States concerned, which is precisely not the case here.

38 It would be possible for the effect of that alleged breach to occur after the period for the coming into force laid down by the law in question has expired, and therefore after a significant lapse of time, but such a possibility would, according to the Republic of Poland, be hypothetical given that, until the expiry of that period, the contested prohibition might still be amended or repealed by the Polish legislature. Accordingly, the Commission cannot bring proceedings pursuant to Article 258 TFEU on the basis of breaches which are merely potential and hypothetical.

39 Noting the freedom of a Member State to choose its own legislative approach, in particular as regards the time frame for the entry into force of a provision, the Republic of Poland contends that the Commission's criticism of provisions which have not yet entered into force could lead to a situation in which the Commission might contest the legislative approaches adopted by a Member State in accordance with its legal system, even though, in fact, the legislation of the Member State concerned conforms with European Union law.

40 The Republic of Poland concludes that, to the extent that the national legislation in force guarantees the possibility to make, to place on the market and to use in animal feed genetically modified feed and GMOs intended for feed use, there is no risk of legal uncertainty as the Commission claims.

41 In addition, the Republic of Poland claims that that period for the measure's entry into force reflects the prudent approach that it follows in relation to the use of genetically modified products and that those provisions were notified in accordance with the procedure laid down in Articles 17 to 19 of Regulation No 1829/2003.

42 Finally, in its rejoinder, the Republic of Poland, for information purposes, declares that the APA law was to be amended, at the beginning of 2012, to provide, inter alia, for the extension until 1 January 2017 of the coming into force of the contested prohibition which, contrary to what the Commission contends, would not enter into force on 1 January 2013.

Findings of the Court

43 It should be noted, at the outset, that the Republic of Poland, as its principal plea in defence, relies on the fact that the contested prohibition had still not entered into force at the time when the period laid down in the reasoned opinion expired and that, therefore, there was not a breach of European Union law.

44 Although the Commission does not contest the provisions as to the entry into force of Article 15(1)(4) of the APA law, it does contend that through the mere adoption and publication of that provision, in its opinion, the Republic of Poland failed to fulfil its obligations as defined by Regulation No 1829/2003.

45 In this regard it is sufficient to observe that the Court has repeatedly held that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, inter alia, Case C-152/05 *Commission* v *Germany* [2008] ECR I-39, paragraph 15, and Case C-286/12 *Commission* v *Hungary* [2012] ECR, paragraph 41 and the case-law cited).

46 It must therefore be concluded, in accordance with that case-law, that the date which must be used by the Court for the purpose of determining whether the Republic of Poland was in breach of its obligations is 23 December 2007.

47 In the present case, it is common ground that, on that date, the contested prohibition had not entered into force since, in accordance with Article 65 of the APA law, it was to enter into force two years after its publication, namely on 12 August 2008, and therefore after the expiry of the period laid down in the reasoned opinion, meaning that the present action cannot be brought in respect of it.

48 The Commission's action could succeed only if Regulation No 1829/2003 nevertheless required the Republic of Poland to comply with certain obligations before 12 August 2008. In the context of the present case, such obligations would require, in particular, the Member States to refrain from adopting rules likely to produce negative effects contrary to the objectives of that regulation even before they came into force (see, to that effect, Case C-508/08 *Commission* v *Malta* [2010] ECR I-10589, paragraph 21). It is, however, clear that the Commission has not based any of the pleas put forward in support of its action on the existence of obligations resulting directly from that regulation.

49 In addition, as regards possible obligations resulting from other provisions of European Union law, the Commission, referring to several of the Court's judgments, claims that the contested prohibition was in breach of the principle of legal certainty.

50 In that regard, it is sufficient to observe that that case-law cited by the Commission concerns, first, situations in which the Court has held that there was a breach of European Union law arising from national law in force and, second, the transposition of directives. Since those situations are not identical to that of the present case, the Commission has not shown with sufficient precision that, in the particular circumstances of the present case, there was a breach of the principle of legal certainty.

51 Moreover, the Commission has also not pleaded the fact that a Member State is subject, in the context of the present case, to other obligations which it would have been in breach of in the present case, such as the obligation resulting, for example, from the principle of good faith enshrined in the first subparagraph of Article 4(3) TEU.

52 In the light of the above, and without it being necessary to rule on the other complaints raised by both the Commission and the Republic of Poland, the action brought by the Commission must be dismissed.

Costs

53 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Republic of Poland has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]