JUDGMENT OF THE COURT (Second Chamber)
20 June 1991 *

In Case C-39/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Verwaltungsgerichtshof (Higher Administrative Court) Baden-Württemberg for a preliminary ruling in the proceedings pending before that court between

Denkavit Futtermittel GmbH, Warendorf (Federal Republic of Germany)

and

Land Baden-Württemberg

on the validity and interpretation of Council Directive 79/373/EEC of 2 April 1979 (Official Journal 1979 L 86, p. 30) and Articles 30 and 36 of the EEC Treaty,

THE COURT (Second Chamber),

composed of: T. F. O'Higgins, President of the Chamber, G. F. Mancini and F. A. Schockweiler, Judges,

Advocate General: M. Darmon,
Registrar: V. Di Bucci, Administrator,

after considering the written observations submitted on behalf of:

— Denkavit Futtermittel GmbH, by V. Schiller, Rechtsanwalt, Cologne,

* Language of the case: German.

— Land Baden-Württemberg, by W. Ziegler, Ministerialrat at the Ministry for Rural Development, Food, Agriculture and Forestry of the Land Baden-Württemberg,

— the French Republic, by O. Pouzoulet, Assistant Director, and G. de Bergues, Principal Assistant Secretary, at the Department of Legal Affairs of the Ministry of Foreign Affairs,

— the Italian Republic, by Ivo M. Braguglia, Avvocato dello Stato,

— the Council of the European Communities, by Guus Houttuin, Administrator in its Legal Service, acting as Agent,

— the Commission of the European Communities, by J. Sack, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral submissions of Denkavit, of the Land Baden-Württemberg, represented by Joachim Hentze, Regierungsdirektor, and Toni Roth, Oberamtsrat, of the French Republic, and of the Council and the Commission of the European Communities at the hearing on 5 February 1991,

after hearing the Opinion of the Advocate General at the sitting on 5 March 1991,

gives the following

Judgment

1 By order of 16 January 1990, which was received at the Court on 12 February 1990, the Verwaltungsgerichtshof Baden-Württemberg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the validity and the interpretation of Article 5(4)(b) and (7) of Council Directive 79/373 of 2 April 1979 on the marketing of compound feedingstuffs (Official Journal 1979 L 86, p. 30) and of Article 30 and 36 of the EEC Treaty in order to

assess the compatibility with those provisions of the German legislation on compound feedingstuffs.

2 Those questions were raised in the course of proceedings between Denkavit Futtermittel GmbH (hereinafter referred to as 'Denkavit') and the Land Baden-Württemberg concerning the refusal by the authorities of that Land to allow Denkavit to market, on the territory of the Federal German Republic, compound feedingstuffs lawfully manufactured in the Netherlands, on the ground that Denkavit failed to comply with the terms of Paragraph 13 of the Futtermittelverordnung (Feedingstuffs Regulation) of 22 June 1988 (BGBl. I, p. 869, hereinafter referred to as 'the FMV'), which was adopted on the basis of the Futtermittelgesetz (Feedingstuffs Law) of 2 July 1975 (p. 1745). It follows from that paragraph of the FMV that compound feedingstuffs intended for stock farming must, as from 30 June 1988, bear an indication of all the ingredients of which they are composed 'in descending order of their proportion' (hereinafter referred to as the 'semi-open declaration').

3 Denkavit appealed against that refusal to the Verwaltungsgericht (Administrative Court) Stuttgart, claiming that the requirement laid down in the FMV was contrary to the provisions of Directive 79/373.

4 The Verwaltungsgerichtshof Baden-Württemberg, to which the Land Baden-Württemberg appealed against the decision of the Verwaltungsgericht Stuttgart, decided to stay the proceedings pending a preliminary ruling by the Court on the following questions:

1. Is Article 5(4) of Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs, read together with Article 5(7) thereof, to be interpreted as meaning:

   — that the Member States are entitled to introduce an obligation, which did not exist under national law at the time that the Directive entered into force, requiring the ingredients contained in compound feedingstuffs to be listed in descending order of their proportion in the compound feedingstuff ('semi-open declaration'), or

— that the Member States are merely entitled to maintain such an obligation if it already existed in national law at the time of the entry into force of the Directive?

2. If Directive 79/373/EEC permits the Member States not merely to maintain but also to introduce an obligation of that kind in regard to labelling:

(a) Would that be a 'measure having equivalent effect' to a quantitative restriction on imports within the meaning of Article 30 of the EEC Treaty?

(b) If it is such a measure, can the contested markings be regarded as necessary in the interest of consumer protection?

(c) If the contested markings are to be regarded as necessary in the interest of consumer protection, are they the method which results in the least hindrance to the free movement of goods?

3. If any hindrance to the free movement of goods caused by the contested markings cannot be justified under Article 30 of the EEC Treaty, can the restrictions on trade be justified as an exception under Article 36 on grounds of the protection of human and animal health?

5 In the order making the reference the Verwaltungsgerichtshof Baden-Württemberg states that, according to their wording, Paragraphs (4) and (7) of Article 5 of Directive 79/373 appear to permit the introduction of requirements which are more strict than those already applicable under national law when the directive entered into force. This possibility runs counter to the wording of the fifth recital in the preamble to the directive, which, on the basis of a teleological interpretation, appears to reserve to the Member States only the possibility of maintaining obligations as regards declarations which already existed when Directive 79/373 entered into force. With regard to the second and third questions, the Verwaltungsgerichthof Baden-Württemberg explains, first of all, that the introduction of

the requirement of a semi-open declaration in the Federal Republic of Germany was motivated, in particular, by the need to inform stock farmers of the type and quantity of raw materials in compound feedingstuffs. It then goes on to point to the impossibility of invoking Article 36 of the Treaty in view of the exhaustive rules adopted by the Council on the basis of Article 100 of the EEC Treaty.

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case and the legislation applicable in the main proceedings, the procedure 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.

7 As a preliminary point, it should be pointed out, firstly, that Directive 79/373 constitutes a stage in the process of harmonizing national laws which is intended to eliminate gradually all obstacles to the free movement of compound feedingstuffs within the Community. According to Article 15 of that directive, the Commission, on the basis of experience, is to submit to the Council proposals to amend the directive in order to achieve the free movement of compound feedingstuffs and to eliminate certain disparities, in particular with regard to the use of ingredients and labelling.

8 It should next be pointed out that, in the words of Article 5(4)(b) and (7) of Directive 79/373,

'4. Member States may require all or some of the following particulars only to be indicated:

(a) ...

(b) the ingredients;

. . .

7. Where the particulars of the ingredients are given, all the ingredients present shall be listed, either by giving the quantities of each ingredient or in descending order of their proportion in the compound feedingstuff. Member States may prescribe the use of one of these two forms of indication, but not both. Where no measures have been adopted pursuant to Article 10(b), Member States may group ingredients together by category or maintain existing categories and permit particulars of ingredients to be replaced by those relating to categories.'

9 It should also be remarked that, according to the fifth recital in the preamble to that directive,

'. . . pending the adoption of further provisions, it is necessary, given the existing practices in certain Member States, to provide temporarily for national administrations to require a fuller declaration of the composition of feedingstuffs, with regard to both analytical constituents and ingredients; . . . such declarations may be required only as provided for in this directive'.

10 Articles 8 and 9 are worded as follows:

'*Article 8*

In so far as their national laws so provide at the time of adoption of this directive, Member States shall be authorized to limit the marketing of compound feedingstuffs to those:

— obtained from certain ingredients, or

— free from certain ingredients.

Article 9

Member States shall ensure that compound feedingstuffs are not subject, for reasons concerning the provisions included in this directive, to marketing restrictions other than those provided for by this directive.'

The first question

11 By this question the national court is essentially seeking to ascertain whether Article 5(4) and (7) of Directive 79/373 constitutes a standstill clause which enables the Member State to subject the marketing of compound feedingstuffs to a semi-open declaration only if their national law already included such a requirement when the directive entered into force.

12 It must be pointed out, in the first place, that a possible standstill obligation cannot be inferred from the wording of Article 5(4)(b) and (7) of the directive. Those provisions do not contain any express formulation to that effect, unlike Article 8 of the same directive, by virtue of which the Member States are authorized to restrict the marketing of certain feedingstuffs 'in so far as their national laws so provide at the time of adoption of this directive'.

13 Nor does such a standstill obligation result from the fifth recital in the preamble to Directive 79/363, in which the Council confines itself to stating that only certain Member States require a declaration of the ingredients and that, pending the adoption of further provisions, it is necessary to provide for the possibility of requiring at the national level a fuller declaration of the composition of feedingstuffs with regard to both analytical constituents and ingredients.

14 The fact that there is no standstill clause in the provisions of Article 5(4)(b) and (7) is confirmed by the adoption, subsequent to the facts in the present case, of Council Directive 90/44/EEC of 22 January 1990 amending Directive 79/373 on the marketing of compound feedingstuffs (Official Journal 1990 L 27, p. 35), under which the Member States are required to introduce, on 22 January 1992, the semi-open declaration.

15 In the light of those considerations, the answer to the first question must be that Article 5(4)(b) and (7) of Directive 79/373 must be interpreted as meaning that it does not preclude a Member State from introducing into its legislation an obligation to indicate the ingredients used in descending order of their proportion, even if no such obligation existed in national law when the directive entered into force.

The second and third questions

16 Those questions fall into two parts. On the one hand, the national court wishes to know, essentially, whether, in the event of the introduction by a Member State of the semi-open declaration, that declaration constitutes a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty and, as the case may be, whether it is justified by the imperative requirement of consumer protection, recognized by the case-law of the Court, or on grounds of the protection of health and life of humans and animals under Article 36 of the Treaty. On the other hand, the national court doubts the validity of the provisions of Directive 79/373, which authorize the introduction by a Member State of the requirement of a semi-open declaration, in the light of Article 30 et seq. of the Treaty.

17 With regard to the first part of those questions, it should be stated at the outset that the requirement of the semi-open declaration, which applies without distinction to national and to imported products, has the effect of rendering more difficult the importation of compound feedingstuffs originating in other Member States which do not require such a declaration. As a result, and in accordance with the consistent case-law of the Court (see, in particular, the judgments in Case 8/74 *Dassonville* [1974] ECR 837 and in Case 120/78 *Rewe-Zentrale* [1979] ECR 649), the requirement of a semi-open declaration comes within the prohibition laid down in Article 30 of the Treaty.

18 It should next be pointed out that, according in particular to the judgment in Case 76/86 *Commission* v *Germany* [1989] ECR 1021, it follows from Article 30 et seq. of the Treaty that national rules, adopted in the absence of common or harmonized rules and applicable without distinction to national products and to products imported from other Member States where they are lawfully manufactured and marketed, are compatible with the Treaty only in so far as they are necessary on grounds relating to public interest listed in Article 36 of the Treaty or in order to satisfy imperative requirements relating, inter alia, to fair trading and consumer protection.

19 Finally, as the Court has explained, in particular in its judgment in Case 5/77 *Tedeschi* [1977] ECR 1555, recourse to Article 36 ceases to be justified only if, pursuant to Article 100, Community directives provide for the complete harmonization of national laws. It must therefore be accepted that where the approximation of the laws of the Member States has not yet been achieved in a given field the corresponding national laws may place obstacles in the way of the principle of free movement in so far as the obstacles in question are justified by one of the grounds set out in Article 36 of the Treaty or by imperative requirements.

20 In that respect, it should be borne in mind that, as the Court has already pointed out in its judgment in Case 73/84 *Denkavit Futtermittel* [1985] ECR 1013, Directive 79/373 is intended to enforce compliance with certain rules relating to the quality of compound feedingstuffs, to ensure that the health inspections are carried out on those products and to guarantee fair trading.

21 According to the order making the reference the requirement of the semi-open declaration was imposed in the Federal Republic of Germany in order, in particular, to ensure that stock farmers were made aware of the type and quantity of the raw materials contained in the compound feedingstuffs.

22 It follows from the fifth and sixth recitals in the preamble to Directive 90/44, which makes the semi-open declaration compulsory with effect from 22 January 1992, that the purpose of Directive 79/373 is to ensure that stock farmers are informed objectively and as accurately as possible as to the composition and use of

feedingstuffs and that the declaration of the ingredients in feedingstuffs constitutes, in certain cases, an important item of information for stock farmers.

23 In the light of those considerations it must be accepted that the requirement of the semi-open declaration is conducive to ensuring the protection of health and life of humans and animals, within the meaning of Article 36 of the Treaty, and, at the same time, consumer protection and fair trading.

24 Such a requirement must, however, be satisfied by means which are not disproportionate to the ends in view and which hinder as little as possible the importation of products which are lawfully manufactured and marketed in other Member States. The affixing to compound feedingstuffs of the mandatory indication of all the ingredients of which they are composed in descending order of their proportion, may be regarded as a means which is appropriate and proportionate to the aims pursued, since it is accepted that labelling is one of the means that least restricts the free movement of those products within the Community.

25 The answer to the first part of the second and third questions must therefore be that the obligation, imposed under the legislation of a Member State, to indicate the ingredients of compound feedingstuffs in descending order of their proportion is justified by the public interest in the protection of health of humans and animals, within the meaning of Article 36 of the Treaty, and also by the requirements of consumer protection and fair trading.

26 As regards the second part of those questions which relates to the validity of the provisions of Directive 79/373 with respect to Article 30 *et seq.* of the Treaty, reference should be made to the consistent case-law of the Court (see, in particular, the judgment in Case C-63/89 *Les Assurances du Crédit* [1991] ECR I-1799), according to which, in the exercise of the powers conferred on them with respect to the approximation of laws, the Community institutions must be recognized as enjoying a discretion in relation to the stages in which harmonization is to take place, having regard to the particular nature of the field subject to coordination.

27 As the Court has stated above, harmonization in the compound feedingstuffs sector is so far only incomplete. Accordingly, it is in no way established that, by permitting the Member States, through the provisions of Article 5(4) and (7) of Directive 79/373, to maintain or introduce the requirement of the semi-open declaration, the Council exceeded the limits of its discretion. It follows that the obstacles to free movement thus resulting from the disparities between the laws of the Member States must be accepted, since the declaration requirement contributes to the protection of health of humans and animals and to consumer protection and fair trading.

28 It follows that the answer to the second part of the second and third questions must be that consideration of the provisions of Article 5(4)(b) and (7) of Directive 79/373 has disclosed no factor of such a kind as to affect the validity of those provisions.

Costs

29 The costs incurred by the French and Italian Governments and by the Council and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof Baden-Württemberg, by order of 16 January 1990, hereby rules:

(1) Article 5(4)(b) and (7) of Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs must be interpreted as meaning that it does not preclude a Member State from introducing into its legislation an obligation to indicate the ingredients, in descending order of their proportion,

used in the compound feedingstuff, even if no such obligation existed in national law when the directive entered into force;

(2) An obligation, imposed pursuant to the legislation of a Member State, to indicate the ingredients, in descending order of their proportion, of compound feedingstuffs is justified by the public interest in the protection of the health of humans and animals, within the meaning of Article 36 of the Treaty, and also by the requirements of consumer protection and fair trading;

(3) Consideration of the provisions of Article 5(4)(b) and (7) of Directive 79/373 has disclosed no factor of such a kind as to affect the validity of those provisions.

O'Higgins Mancini Schockweiler

Delivered in open court in Luxembourg on 20 June 1991.

J.-G. Giraud
Registrar

T. F. O'Higgins
President of the Second Chamber