JUDGMENT OF THE COURT (Second Chamber)

16 July 2009 *

In Case C-165/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 15 April 2008,

Commission of the European Communities, represented by B. Doherty and A. Szmytkowska, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

* Language of the case: Polish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann (Rapporteur), P. Kūris, L. Bay Larsen and C. Toader, Judges,

Advocate General: J. Mazák,
Registrar: R. Grass,

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 Commission of the European Communities claims that the Court should declare that, by prohibiting the free circulation of genetically modified seed varieties and the inclusion of genetically modified varieties in the national catalogue of varieties, the Republic of Poland has failed to fulfil its obligations under Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1) in its entirety and, in particular, under Articles 22 and 23 thereof, and under Council Directive 2002/53/EC

of 13 June 2002 on the common catalogue of varieties of agricultural plant species (OJ 2002 L 193, p. 1) and, in particular, under Articles 4(4) and 16 thereof.

Legal context

Community legislation

Directive 2001/18

2 Directive 2001/18 was adopted on the basis of Article 95 EC. As stated in Article 1 of that directive, its objective, in accordance with the precautionary principle, is to approximate the laws, regulations and administrative provisions of the Member States and to protect human health and the environment both when genetically modified organisms ('GMOs') are deliberately released into the environment 'for any other purposes than placing on the market within the Community' and when GMOs are placed on the market within the Community as products or in products.

3 Recital 9 in the preamble to Directive 2001/18 states:

'Respect for ethical principles recognised in a Member State is particularly important. Member States may take into consideration ethical aspects when GMOs are deliberately released or placed on the market as or in products.'

4 Recitals 56 to 58 in the preamble to Directive 2001/18 state:

> '(56) When a product containing a GMO, as or in products, is placed on the market, and where such a product has been properly authorised under this Directive, a Member State may not prohibit, restrict or impede the placing on the market of GMOs, as or in products, which comply with the requirements of this Directive. A safeguard procedure should be provided in [the] case of risk to human health or the environment.
>
> (57) The Commission's European Group on Ethics in Science and New Technologies should be consulted with a view to obtaining advice on ethical issues of a general nature regarding the deliberate release or placing on the market of GMOs. Such consultations should be without prejudice to the competence of Member States as regards ethical issues.
>
> (58) Member States should be able to consult any committee they have established with a view to obtaining advice on the ethical implications of biotechnology.'

5 Part B of Directive 2001/18 concerns the conditions in accordance with which authorisations are to be issued for the deliberate release of GMOs for any purpose other than for placing on the market.

6 Part C of Directive 2001/18, which contains Articles 12 to 24 of that directive, concerns authorisations for the placing on the market of GMOs as or in products.

7 Article 22 of Directive 2001/18, which is entitled 'Free circulation', provides:

'Without prejudice to Article 23, Member States may not prohibit, restrict or impede the placing on the market of GMOs, as or in products, which comply with the requirements of this Directive.'

8 Article 23 of Directive 2001/18, which is entitled 'Safeguard clause', states:

'1. Where a Member State, as a result of new or additional information made available since the date of the consent and affecting the environmental risk assessment or reassessment of existing information on the basis of new or additional scientific knowledge, has detailed grounds for considering that a GMO as or in a product which has been properly notified and has received written consent under this Directive constitutes a risk to human health or the environment, that Member State may provisionally restrict or prohibit the use and/or sale of that GMO as or in a product on its territory.

The Member State shall ensure that in the event of a severe risk, emergency measures, such as suspension or termination of the placing on the market, shall be applied, including information to the public.

The Member State shall immediately inform the Commission and the other Member States of actions taken under this Article and give reasons for its decision, supplying its review of the environmental risk assessment, indicating whether and how the conditions of the consent should be amended or the consent should be terminated, and, where appropriate, the new or additional information on which its decision is based.

2. A decision shall be taken on the matter within 60 days in accordance with the procedure laid down in Article 30(2)....'

9 Article 29 of Directive 2001/18 provides:

'1. Without prejudice to the competence of Member States as regards ethical issues, the Commission shall, on its own initiative or at the request of the European Parliament or the Council, consult any committee it has created with a view to obtaining its advice on the ethical implications of biotechnology, such as the European Group on Ethics in Science and New Technologies, on ethical issues of a general nature.

This consultation may also take place at the request of a Member State.

...

3. The administrative procedures provided for in this Directive shall not be affected by paragraph 1.'

10 Article 36 of Directive 2001/18 states:

'1. Directive 90/220/EEC shall be repealed on 17 October 2002.

2. References made to the repealed Directive shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex VIII.'

Directive 2002/53

11 As is clear from Article 1(1) thereof, Directive 2002/53 concerns 'the acceptance for inclusion in a common catalogue of varieties of agricultural plant species of those varieties of beet, fodder plant, cereal, potato and oil and fibre plant the seed of which may be marketed under provisions of the Directives concerning respectively the marketing of beet seed ([Council Directive] 2002/54/EC [of 13 June 2002 on the marketing of beet seed (OJ 2002 L 193, p.12)]), fodder plant seed ([Council Directive] 66/401/EEC [of 14 June 1966 on the marketing of fodder plant seed (OJ, English Special Edition, 1965-1966, p. 132)]), cereal seed ([Council Directive] 66/402/EEC [of 14 June 1966 on the marketing of cereal seed (OJ, English Special Edition, 1965-1966, p. 143)]), seed potatoes ([Council Directive] 2002/56/EC [of 13 June 2002 on the marketing of seed potatoes (OJ 2002 L 193, p. 60]) and seed of oil and fibre plants ([Council Directive] 2002/57/EC [of 13 June 2002 on the marketing of seed of oil and fibre plants (OJ 2002 L 193, p. 74)]).' Under Article 1(2) of Directive 2002/53, the common catalogue of varieties is to be 'compiled on the basis of the national catalogues of the Member States'.

12 Article 4 of Directive 2002/53 lays down a certain number of conditions which the Member States must comply with for the acceptance of a variety. Article 4(4) provides:

'In the case of a genetically modified variety within the meaning of Article 2(1) and (2) of Directive 90/220/EEC, the variety shall be accepted only if all appropriate measures have been taken to avoid adverse effects on human health and the environment.'

13 Article 16 of Directive 2002/53 provides:

'1. Member States shall ensure that, with effect from the publication referred to in Article 17, seed of varieties accepted in accordance with this Directive or in accordance with principles corresponding to those of this Directive is not subject to any marketing restrictions relating to variety.

2. A Member State may, upon application which shall be dealt with under the procedure referred to in Article 23(2) or in Article 23(3) in the case of genetically modified varieties, be authorised to prohibit the use of the variety in all or in part of its territory or to lay down appropriate conditions for cultivating the variety in accordance, in cases provided for in [point] (c), with the conditions for using the products resulting from such cultivation:

(a) where it is established that the cultivation of the variety could be harmful from the point of view of plant health to the cultivation of other varieties or species; or

(b) where official growing trials carried out in the applicant Member States, Article 5(4) being applied correspondingly, show that the variety does not, in any part of its territory, produce results corresponding to those obtained from a comparable variety accepted in the territory of that Member State or, where it is well known that the variety is not suitable for cultivation in any part of its territory because of its type of maturity class. The application shall be lodged before the end of the third calendar year following that of acceptance;

(c) where it has valid reasons other than those already mentioned or which may have been mentioned during the procedure referred to in Article 10(2) for considering that the variety presents a risk for human health or the environment.'

14 Under Article 17 of Directive 2002/53:

'The Commission shall, on the basis of the information supplied by the Member States and as this is received, publish in the C series of the *Official Journal of the European Communities* under the title "Common Catalogue of Varieties of Agricultural Plant Species", a list of all varieties of which the seed and propagating material, under Article 16, are not subject to any marketing restrictions as regards variety, and also the information required under Article 9(1) concerning the person or persons responsible for maintenance of the variety …'

National legislation

15 Article 5(4) of the Law on Seeds of 26 June 2003 (Dz. U No 137, heading 1299), as amended by the Law of 27 April 2006 (Dz. U No 92, heading 639) ('the Law on Seeds') provides that 'genetically modified varieties shall not be included in the national catalogue'.

16 Article 57(3) of the Law on Seeds provides that 'the seeds of genetically modified varieties cannot be accepted on the market in the territory of the Republic of Poland'. Under Article 67(1) of that law, any person who places seeds on the market in breach of Article 57(3) is liable to a financial penalty.

Pre-litigation procedure

17 On 18 October 2006, following an initial exchange of correspondence with the Republic of Poland between 19 June 2006 and 19 July 2006, the Commission sent that Member State a letter of formal notice on the basis of Article 226 EC. The Commission stated in that letter that Articles 5(4) and 57(3) of the Law on Seeds ('the contested national provisions') infringe Directive 2001/18, in particular Articles 22 and 23 thereof, and Directive 2002/53, particularly Articles 4(4) and 16 thereof.

18 By letter of 20 December 2006, the Republic of Poland denied that it had failed to fulfil its obligations. It relied, inter alia, on the precautionary principle and on the risks of irreversible consequences — for biodiversity and the environment in general, and for the Polish agricultural sector in particular — which remain ongoing because of the vague evaluation principles and inadequate controls and safeguards laid down in Directive 2001/18 and the lacunae in its rules concerning the co-existence of cultures. The Republic of Poland also maintained that the varieties included in the common catalogue of varieties of agricultural plant species provided for in Directive 2002/53 have not been tested in a specifically Polish environment and in consequence do not offer sufficient guarantees as regards the absence of negative effects in the long term.

19 The Republic of Poland also referred to the fears expressed by the general public in Poland concerning the harm posed by GMOs to public health and the environment, and the fact that the Polish general public has shown itself to be strongly opposed to GMOs; additionally, it referred to the need to respect ethical principles, in accordance with recital 9 in the preamble to Directive 2001/18, claiming in that regard that the introduction into the Polish legal system of provisions to which most of the Polish people were opposed would be unethical.

20 On the view that that reply was not satisfactory, the Commission sent a reasoned opinion to the Republic of Poland on 29 June 2007, calling upon it to adopt, within two months of receiving that opinion, the measures necessary to comply with it.

21 In its reply, dated 28 August 2007, the Republic of Poland essentially repeated the arguments already put forward in answer to the letter of formal notice. Additionally, it submitted that the fact that, in 2006, the assemblies of the Polish administrative regions unanimously adopted resolutions declaring that the territories of the various administrative regions should be kept free of genetically modified crops and GMOs shows that the national provisions in dispute reflect public morality. The Republic of Poland went on to state that such measures are therefore authorised on the basis of Article 30 EC alone, there being no need to rely in that connection on the special procedures provided for under the secondary legislation relied on by the Commission.

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

The action

Arguments of the parties

23 In its application, the Commission submits that Article 57(3) of the Law on Seeds is incompatible with the system of free circulation established by Directive 2001/18 as a whole and with Articles 22 and 23 thereof, in particular. Under Article 22 of Directive 2001/18, it must be possible for any GMO with authorisation granted in accordance with the directive to be used freely throughout the Community. Article 23 of Directive 2001/18, which strictly limits the possibility of adopting safeguard measures in respect of individual GMOs following an analysis conducted on a case by case basis, means that the Member States cannot, in relation to an entire category of GMOs — a category, moreover, which has not been involved in the procedure laid down in that provision — impose a general prohibition on those GMOs being placed on the market in their territory.

24 Similarly, Article 16(1) of Directive 2002/53 requires the Member States to ensure that, with effect from the inclusion of a variety in the common catalogue of varieties of agricultural plant species, seed of that variety is not made subject to any marketing restrictions. At present, approximately 70 genetically modified varieties, authorised under Directive 2001/18, have been included in the common catalogue.

25 Furthermore, the Commission submits that Directive 2002/53, the aim of which is to lay down uniform quality requirements suitable for encouraging the free circulation of varieties, does not allow the Member States to impose a general prohibition on the inclusion of genetically modified varieties in their national catalogue. Where a GMO is authorised, especially following the detailed scientific investigation required under Directive 2001/18, it can no longer be regarded as posing a risk to human health or to the environment capable of justifying, under Article 4(4) of Directive 2002/53, a refusal to include that GMO in the national catalogue of varieties.

26 With regard to the objections raised by the Republic of Poland during the pre-litigation procedure, the Commission argues that the fears expressed by that Member State in relation to the alleged shortcomings of Directive 2001/18 with respect to the protection of the environment and of human health cannot influence the way in which the provisions of that directive fall to be construed and, in any event, are unfounded. According to the Commission, the procedures laid down in Directive 2001/18 ensure that, in accordance with the precautionary principle, each individual GMO undergoes a rigorous assessment of the potential risks for the environment and human health, and at the same time provide effective control and safeguard mechanisms.

27 As it is, the general reference to ethical principles in the reply to the letter of formal notice is not accompanied by any specific ethical argument related to the release of GMOs. Furthermore, it is clear from Recital 9 in the preamble to Directive 2001/18 that ethical considerations do not fall outside the scope of that directive and, in consequence, a prohibition on products authorised under Directive 2001/18 cannot be decided independently of the procedures laid down in that directive. According to the Commission, it is moreover settled case-law that Article 30 EC may no longer be

relied upon where Community provisions regulate the area in question in a detailed and harmonised manner, which is the position in the case of Directives 2001/18 and 2002/53 as regards trade in GMOs.

28 In its defence, the Republic of Poland challenges the admissibility of the action on the ground that the Commission's complaints are too vague to enable it to identify the precise subject-matter of the action or, accordingly, to prepare effectively its defence. Even though the Commission claims, inter alia, that the Court should declare that the Republic of Poland has infringed Directives 2001/18 and 2002/53 'in their entirety', particular provisions being specified in the application apparently only by way of example, it does not provide any explanation in that regard.

29 As regards the substance, the Republic of Poland contends that, contrary to the Commission's submissions, the case-law confirms that an action under Article 30 EC ceases to be possible only where Community harmonisation has introduced the measures necessary for achieving the specific objective which Article 30 EC seeks to foster. As it is, ethical considerations specifically play no part in Directives 2001/18 and 2002/53, which seek exclusively to protect the environment and human health. Furthermore, Article 29(1) of Directive 2001/18, reflecting recital 57 in the preamble thereto, expressly preserves the competence of the Member States to regulate the ethical issues related to GMOs.

30 In the present case, the adoption of the contested national provisions was inspired by the Christian and Humanist ethical principles adhered to by the majority of the Polish people.

31 In that connection, the Republic of Poland goes on to put forward a Christian conception of life which is opposed to the manipulation and transformation of living organisms created by God into material objects which are the subject of intellectual property rights; a Christian and Humanist conception of progress and development which urges respect for creation and a quest for harmony between Man and Nature; and, lastly, Christian and Humanist social principles, the reduction of living organisms

to the level of products for purely commercial ends being likely, inter alia, to undermine the foundations of society.

32 In its reply, the Commission contends that the action is inadmissible. Its complaints and arguments have been clearly set out in identical terms in the letter of formal notice, the reasoned opinion and the application.

33 So far as Directive 2001/18 is concerned, apart from Articles 22 and 23 thereof, expressly mentioned because they constitute the cornerstone of the system of free circulation established, it is that system and the very spirit of that directive, as well as all the provisions laid down therein, which are infringed. By contrast, as regards Directive 2002/53, the Commission states that its action specifically concerns Articles 4(4) and 16 thereof and not the directive as a whole.

34 As regards the substance, the Commission reaffirms that the issues relating to the authorisation and marketing of GMO seed have undergone exhaustive harmonisation, Directive 2001/18 — and, in particular, Article 29 thereof — reflecting the consideration given to ethical issues, and in consequence it is no longer possible for a Member State to have recourse to Article 30 EC.

35 Furthermore, the Commission harbours doubts as to the circumstances which led the contested national provisions to be adopted. First, the Republic of Poland has not produced any evidence capable of establishing that, in adopting the prohibitions concerned, it was inspired by the ethical and religious considerations relied upon before the Court. Secondly, the detailed reasons of a religious and ethical nature set out in the defence were not mentioned during the pre-litigation procedure, in the course of which the Republic of Poland relied principally on considerations relating to the environment and public health.

36 Moreover, according to the Commission, a Member State cannot unilaterally call into question a Community harmonisation measure on the basis of the perceptions of a section of public opinion.

37 In its rejoinder, the Republic of Poland contends that the explanations provided by the Commission in order to demonstrate the admissibility of the action — in which it argues that the system established by Directive 2001/18 has been compromised, and the very spirit of that directive disregarded — are inadmissible, being both too late and too vague. Those explanations are, in any event, without foundation, if only because Directive 2001/18 establishes a number of systems relating to the placing on the market of GMOs, their deliberate release or, lastly, their unintended release.

38 As regards the substance, the Republic of Poland contends that, where a directive ignores essential aspects characterising a category of goods, the harmonisation undertaken cannot be regarded as complete. In the present case, the logical consequence of the argument put forward by the Commission is that the ethical issues related to GMOs, the importance of which is nevertheless recognised by the Community legislature in the recitals to Directive 2001/18 and in its provisions, can no longer be taken into consideration either in the context of the procedures laid down in that directive or in exercise of the competence retained by the Member States.

39 In view of their ethical objectives, the contested national provisions really fall to be examined solely in the light of Articles 28 EC and 30 EC and not by reference to Directives 2001/18 and 2002/53. However, since the Commission has not alleged the infringement of Article 28 EC or disputed the compliance of the national provisions with the requirements — in particular, that of proportionality — laid down in Article 30 EC, the debate before the Court must be confined to the question whether a Member State is entitled to rely on ethical considerations in relation to trade in GMOs.

40 Furthermore, the Republic of Poland maintains that the Commission, upon which the burden of proof lies as regards the alleged failure to fulfil obligations, has failed to establish that the explanations based on ethical considerations put forward by that Member State are incorrect. Contrary to the Commission's suggestions, a Member

State is free to decide the order of importance in which it presents before the Court the grounds put forward as a defence during the pre-litigation procedure and to develop certain arguments more than others.

41 The Republic of Poland also emphasises that it is well known that, at the time of the vote on the contested national provisions, most members of the Polish Parliament belonged to political parties for which the Roman Catholic faith is a fundamental value, so that it is not at all surprising that they were inspired by Christian and Humanist values, which are prevalent and are shared by the electorate, rather than by considerations relating to the environment or public health, which are scientifically complex and more difficult to understand.

Findings of the Court

The subject-matter of the action and admissibility

42 As a preliminary point, it should be noted that, under Article 38(1)(c) of the Rules of Procedure of the Court of Justice and the related case-law, an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare a defence and the Court to rule on the application. It follows that the essential points of law and of fact on which an action is based must be indicated coherently and intelligibly in the application itself and that the heads of claim must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (Case C-475/07 *Commission* v *Poland* [2009], paragraph 43, and the case-law cited).

43 The Court has also held that, in an action brought under Article 226 EC, the application must set out the complaints coherently and with precision, so that the Member State and the Court can know exactly the full extent of the alleged infringement of Community law, a condition which must be satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged (see, in particular, *Commission* v *Poland*, paragraph 44 and the case-law cited).

44 In the present case, and as regards, first of all, the part of the action relating to Directive 2002/53, it is sufficient to recall that, notwithstanding the relatively ambiguous terms used in the application to describe the form of order sought in that regard, the Commission has confirmed in its rejoinder that the action sought a declaration that the Republic of Poland had failed to fulfil its obligations only with respect to the provisions expressly identified in the description of the form of order sought, namely Articles 4(4) and 16 of Directive 2002/53. Furthermore, since the Commission has clearly set out, both during the pre-litigation procedure and in its application, the reasons for its view that the contested national provisions infringe those two provisions, and as the Republic of Poland has therefore had at its disposal all the time necessary to be able to prepare an effective defence in that connection, that part of the action cannot be held inadmissible.

45 Secondly, as regards the admissibility of that part of the action relating to Directive 2001/18, it must be held that the Commission has set out its complaints in a manner which is easily understood and sufficiently precise with respect to Articles 22 and 23 of that directive. On the other hand, it has failed to explain with the requisite clarity the reasons for its view that the Republic of Poland has failed to fulfil all its obligations under that directive.

46 First, the Commission's application merely reproduces the provisions of Article 2(2) of Directive 2001/18 containing a definition of GMOs and those of Articles 19(1) and (2), 22 and 23(1), in Part C of that directive, relating to the placing of GMOs on the market. That application goes on to provide detailed arguments only with respect to Articles 22 and 23, before concluding that the contested national provisions are not compatible

'with the system of free circulation established by that directive as a whole and, in particular, Articles 22 and 23 thereof'.

47 As the Republic of Poland rightly argues, such a laconic statement does not provide any explanation as to the reasons why Directive 2001/18 — which contains, inter alia, a Part B concerning the deliberate release of GMOs for any purpose other than for placing on the market, and a Part D laying down provisions relating to confidentiality, labelling and the exchange of information — was infringed 'in its entirety', as claimed in the submissions set out in the application.

48 It follows from the foregoing that, in so far as the action relates to Directive 2001/18, it is admissible only as regards the alleged infringement of Articles 22 and 23 of that directive, but not in so far as it seeks a declaration that Directive 2001/18 was infringed 'in its entirety'.

Substance

49 In its defence and its rejoinder, the Republic of Poland concentrated its arguments wholly on the ethical or religious considerations on which the contested national provisions are based.

50 Without disputing that the prohibitions laid down in the contested national provisions would infringe Directives 2001/18 and 2002/53 if it were to be confirmed that they are intended solely to regulate trade in genetically modified seed varieties and their inclusion in the common catalogue of varieties of agricultural plant species, the Republic of Poland contends that that is not the position in the present case. In so far as those national provisions pursue ethical objectives which are unrelated to the objectives which characterise those directives, namely the protection of the environment and of

human health, and free circulation, they are actually outside the scope of those directives, which means that the obstacles to the free circulation of GMOs to which they give rise, potentially in breach of Article 28 EC, may in some circumstances be justified under Article 30 EC.

51 In that connection, however, the Court considers that, for the purposes of deciding the present case, it is not necessary to rule on the question whether — and, if so, to what extent and under which possible circumstances — the Member States retain an option to rely on ethical or religious arguments in order to justify the adoption of internal measures which, like the contested national provisions, derogate from the provisions of Directives 2001/18 or 2002/53.

52 In the present case, it is sufficient to hold that the Republic of Poland, upon which the burden of proof lies in such a case, has failed, in any event, to establish that the true purpose of the contested national provisions was in fact to pursue the religious and ethical objectives relied upon, which for the Commission is a matter of doubt.

53 It should be borne in mind that, according to settled case-law, it is for the Member States to show that the conditions permitting a derogation from Article 28 EC are satisfied (see, to that effect, Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 62). Thus, in particular, where a Member State against which infringement proceedings are brought relies, in its defence, on a justification based on Article 30 EC, the Court is required to examine a justification of that kind only in so far as it is common ground or properly established that the national legislation concerned does in fact pursue the purposes that the defendant Member State attributes to it (see, to that effect, Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraph 35; Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871, paragraph 71; and Case C-141/07 *Commission* v *Germany* [2008] ECR I-6935, paragraph 47).

54 As regards, more specifically, the justification based on the protection of public morality relied on by the Republic of Poland in the present case, it must be held, first, that the relevant evidentiary burden is not discharged by statements as general as those put forward by that Member State during the pre-litigation procedure and consisting in references to fears regarding the environment and public health and to the strong opposition to GMOs manifested by the Polish people, or even to the fact that the administrative regional assemblies adopted resolutions declaring that the administrative regions are to be kept free of genetically modified cultures and GMOs.

55 Clearly, in those circumstances, public morality is not really being invoked as a separate justification, but as an aspect of the justification relating to protection of human health and the environment, which is precisely the concern of Directive 2001/18 in the present context (see, to that effect, Case C-1/96 *Compassion in World Farming* [1998] ECR I-1251, paragraph 66).

56 However, a Member State cannot rely in that manner on the views of a section of public opinion in order unilaterally to challenge a harmonising measure adopted by the Community institutions (see *Compassion in World Farming*, paragraph 67). As the Court observed in a case specifically concerning Directive 2001/18, a Member State may not plead difficulties of implementation which emerge at the stage when a Community measure is put into effect, such as difficulties relating to opposition on the part of certain individuals, to justify a failure to comply with obligations and time-limits laid down by Community law (see Case C-121/07 *Commission* v *France* [2008] ECR I-9159, paragraph 72).

57 Secondly, and as regards the more specifically religious or ethical arguments put forward by the Republic of Poland for the first time in the defence and rejoinder submitted to the Court, it must be held that that Member State has failed to establish that the contested national provisions were in fact adopted on the basis of such considerations.

58 The Republic of Poland essentially referred to a sort of general presumption according to which it can come as no surprise that such provisions were adopted in the present case. First, the Republic of Poland relies on the fact that it is well known that Polish society attaches great importance to Christian and Roman Catholic values. Secondly, it states that the political parties with a majority in the Polish Parliament at the time when the contested national provisions were adopted specifically called for adherence to such values. In those circumstances, according to that Member State, it is reasonable to take the view that the Members of Parliament, who do not, as a general rule, have scientific training, are more likely to be influenced by the religious or ethical ideas which inspire their political actions, rather than by other considerations, in particular, those linked to the complex scientific assessments relating to the protection of the environment or of human health.

59 However, such considerations are not sufficient to establish that the adoption of the contested national provisions was in fact inspired by the ethical and religious considerations described in the defence and the rejoinder, especially since the Republic of Poland had, in the pre-litigation procedure, based its defence mainly on the shortcomings allegedly affecting Directive 2001/18, regard being had to the precautionary principle and to the risks posed by that directive to both the environment and human health.

60 In those circumstances, for the purposes of deciding the action brought by the Commission, it must be declared — as the Commission submits — that general prohibitions such as those laid down in the contested national provisions infringe the obligations of the Republic of Poland under Articles 22 and 23 of Directive 2001/18 and Articles 4(4) and 16 of Directive 2002/53.

61 First, it should be recalled that Articles 22 and 23 of Directive 2001/18 place the Member States under an obligation not to prohibit, restrict or impede the placing on the market of GMOs, as or in products, which comply with the requirements of that directive, save where, in accordance with the specific provisions laid down in that respect by Article 23 of that directive, they rely on the possibility of adopting the safeguard measures provided for thereunder. Furthermore, a national measure which unilaterally imposes a general prohibition on the marketing of GMO seed, such as the

prohibition laid down in Article 57(3) of the Law on Seeds, clearly infringes the provisions of Articles 22 and 23 of Directive 2001/18.

62 Such a general prohibition also clearly infringes Article 16(1) of Directive 2002/53, which places the Member States under an obligation not to make seed varieties accepted in accordance with that directive subject to any marketing restrictions relating to variety, unless they rely on the exceptions — not applicable in the present case — set out in Article 16(2). It is common ground in that regard, as the Commission states, that a certain number of varieties which have been accepted in accordance with Directive 2002/53 and which accordingly appear in the common catalogue of varieties of agricultural plant species, referred to in Article 17 thereof, are genetically modified varieties.

63 Secondly, it is clear, in particular from Article 4(4) of Directive 2002/53, that the inclusion of genetically modified varieties in the national catalogue of varieties cannot be the subject of a general prohibition such as that laid down in Article 5(4) of the Law on Seeds. It emerges, in particular, from Article 4(4) of Directive 2002/53 that any refusal to include a variety in the national catalogue solely because it is genetically modified is justified only if there has been a failure to take all appropriate measures to prevent adverse effects on human health and the environment, which — as the Commission rightly submitted — cannot, in particular, be the case where a variety has been authorised under Directive 2001/18.

64 In the light of all the foregoing, it must be held that, by prohibiting the free circulation of genetically modified seed varieties and the inclusion of genetically modified varieties in the national catalogue of varieties, the Republic of Poland has failed to fulfil its obligations under Articles 22 and 23 of Directive 2001/18 and Articles 4(4) and 16 of Directive 2002/53.

65 However, as is clear from paragraph 48 of this judgment, the action must be dismissed as inadmissible in so far as it seeks a declaration that the Republic of Poland has failed to fulfil its obligations under Directive 2001/18 considered in its entirety.

Costs

66 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads of claim, the Court may order that the costs be shared or that the parties bear their own costs. In the present case, although the Republic of Poland has been unsuccessful with respect to most of its pleas, account should be taken of the fact that the Commission's action has been declared partly inadmissible. Having regard to the circumstances of the present case, the Republic of Poland should be ordered to pay, in addition to its own costs, two-thirds of the costs incurred by the Commission. The Commission should bear one-third of its own costs.

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

1. **Declares that, by prohibiting the free circulation of genetically modified seed varieties and the inclusion of genetically modified varieties in the national catalogue of varieties, the Republic of Poland has failed to fulfil its obligations under Articles 22 and 23 of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, and under Articles 4(4) and 16 of Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species.**

2. **Dismisses the action as to the remainder.**

3. **Orders the Republic of Poland to bear its own costs and to pay two-thirds of the costs incurred by the Commission.**

4. **Orders the Commission to bear one-third of its own costs.**

[Signatures]