JUDGMENT OF THE COURT

5 December 2000 *

In Case C-477/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Court of Appeal in Northern Ireland (United Kingdom) for a preliminary ruling in the proceedings pending before that court between

Eurostock Meat Marketing Ltd

and

Department of Agriculture for Northern Ireland,

on the interpretation of Article 9 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), Commission Decision 97/534/EC of 30 July 1997 on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies (OJ 1997 L 216, p. 95) and Article 36 of the EC Treaty (now, after amendment, Article 30 EC),

* Language of the case: English.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón (Rapporteur), R. Schintgen and F. Macken, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Eurostock Meat Marketing Ltd, by A. O'Caoimh SC and C. Carney, Barrister, instructed by Robert A. Mullan & Son, Solicitors,

— the United Kingdom Government, by R. Magrill, of the Treasury Solicitor's Department, acting as Agent, assisted by K. Parker QC and B. McCloskey, Barrister,

— the German Government, by W.-D. Plessing, Ministerialrat in the Federal Ministry for Financial Affairs, and C.-D. Quassowski, Regierungsdirektor in the same ministry, acting as Agents,

— the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, *Chargé de Mission* in the same directorate, acting as Agents,

— the Netherlands Government, by M.A. Fierstra, Head of the Department for European Law in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by P. Oliver, Legal Adviser, and G. Berscheid, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Eurostock Meat Marketing Ltd, represented by M. Lavery QC, of the United Kingdom Government, represented by R. Magrill and K. Parker, of the German Government, represented by W.-D. Plessing, of the Netherlands Government, represented by M.A. Fierstra, and of the Commission, represented by P. Oliver and G. Berscheid, at the hearing on 7 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 13 April 2000,

gives the following

Judgment

1 By order of 9 November 1998, received at the Court on 21 December 1998, the Court of Appeal in Northern Ireland referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions on the interpretation of Article 9 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), Commission Decision

97/534/EC of 30 July 1997 on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies (OJ 1997 L 216, p. 95) and Article 36 of the EC Treaty (now, after amendment, Article 30 EC).

2 Those questions have been raised in proceedings between Eurostock Meat Marketing Ltd ('Eurostock') and the Department of Agriculture for Northern Ireland ('the Department') concerning the importation of bovine heads from Ireland into Northern Ireland.

Legal framework

The Community legislation

3 The production and marketing of fresh meat are governed by Council Directive 64/433/EEC of 26 June 1964 on health conditions for the production and marketing of fresh meat, in the version modified and updated by Council Directive 91/497/EEC of 29 July 1991 (OJ 1991 L 268, p. 69), as amended by Council Directive 95/23/EC of 22 June 1995 (OJ 1995 L 243, p. 7, hereinafter 'Directive 64/433').

4 According to the fourth recital in its preamble, Directive 64/433 is intended to standardise health requirements for meat in slaughterhouses and cutting rooms and during storage and transportation.

5 Article 3(1)(A) and (B) of Directive 64/433 provides:

'1. Each Member State shall ensure that:

A. carcases, half carcases or half carcases cut into no more than three wholesale cuts, and quarters:

(a) have been obtained in a slaughterhouse ... [which is] approved and supervised ...;

(b) come from a slaughter animal inspected *ante mortem* by an official veterinarian ...;

(c) have been treated under satisfactory hygiene conditions...;

(d) have been inspected *post mortem* by an official veterinarian...;

(e) bear a health mark ...;

...

B. cuts or pieces smaller than those referred to in section A, or boned meat whether or not wrapped:

(a) are boned or cut or wrapped in a cutting plant... [which is] approved and supervised ...;

...'

6 The eighth recital in the preamble to Directive 64/433 provides that, 'in the context of trade between the Member States, the rules laid down in Council Directive 89/662/EEC ... should also be applied'.

7 Article 18 of Directive 64/433 provides:

'The rules laid down in Directive 89/662/EEC shall apply in particular to checks at origin, to the organisation of and follow-up to the checks to be carried out by the Member State of destination, and to the protective measures to be implemented.'

8 Directive 89/662 is designed to eliminate veterinary checks at the Community's internal frontiers.

9 The principle laid down by that directive is to strengthen the veterinary checks carried out by the State of dispatch, with only spot checks being carried out in the State of destination.

10 The 13th recital in the preamble to Directive 89/662 is worded as follows:

'Whereas, however, with regard to certain epizootic diseases, different health situations still prevail in the Member States and whereas, pending a Community approach on the methods to combat these diseases, the question of checking intra-Community trade in livestock should for the time being be left to one side and a documentary check should be permitted during transport; whereas, in view of the current state of harmonisation and pending Community rules, goods 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'.

11 Accordingly, Article 9 of Directive 89/662 provides as follows:

'1. Each Member State shall immediately notify the other Member States and the Commission of any outbreak in its territory, other than 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 origin 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.

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 establishments concerned or, in the case of an epizootic disease, with regard to the area of protection 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.

2. ...

3. ...

4. The Commission shall in all cases review the situation in the Standing Veterinary Committee at the earliest opportunity. It shall adopt the necessary measures for the products referred to in Article 1 and, if the situation so requires, for the originating products or products derived from those products in accordance with the procedure laid down in Article 17. The Commission shall monitor the situation and, by the same procedure, shall amend or repeal the decisions taken, depending on how the situation develops.

5. ...'

12 During the bovine spongiform encephalopathy crisis, the Commission adopted Decision 97/534.

13 Article 2 of that decision prohibits the use of specified risk material for any purpose. As regards bovine animals, that material is defined in Article 1 as 'the skull, including the brain and eyes, tonsils and spinal cord' of bovine animals aged over 12 months.

14 Article 4(1) of Decision 97/534 provides:

'Specified risk material shall be stained with a dye on removal and either:

(a) destroyed by incineration;

or

(b) provided that the colour of the dye is detectable after processing, processed and subsequently incinerated, buried, burned as fuel or otherwise disposed of by a similar method which precludes the risk of transmission of a [transmissible spongiform encephalopathy].'

15 Article 5 provides that Member States are to carry out regular official controls, particularly in slaughterhouses, cutting plants, storage facilities and

animal waste processing plants, and to take measures to avoid cross-contamination.

16 The 19th recital in the preamble to Decision 97/534 is worded as follows:

'Whereas there are no effective controls or tests which can determine whether or not particular tissues have been used in the manufacturing of products; whereas, therefore, in order to ensure that the tissues and fluids in question have not been used in the manufacture of products which are marketed in the Community, it is essential to ensure that those tissues are removed and stained at the point of production, and subsequently destroyed by incineration, following rendering where necessary; whereas such measures will also ensure that those tissues are excluded from food, feed, medical and pharmaceutical products and cosmetic products'.

17 According to Article 10, Decision 97/534 was to apply from 1 January 1998.

18 However, the date on which it was to become applicable was successively postponed to 1 April 1998 by Commission Decision 97/866/EC of 16 December 1997 amending Decision 97/534 (OJ 1997 L 351, p. 69), to 1 January 1999 by Council Decision 98/248/EC of 31 March 1998 amending Decision 97/534 (OJ 1998 L 102, p. 26), to 31 December 1999 by Council Decision 98/745/EC of 17 December 1998 amending Decision 97/534 (OJ 1998 L 358, p. 113) and, finally, to 30 June 2000 by Council Decision 1999/881/EC of 14 December 1999 amending Decision 97/534 (OJ 1999 L 331, p. 78).

The national legislation

19 In 1996, following a recommendation by the Spongiform Encephalopathy Advisory Committee ('SEAC'), an independent scientific body set up to advise the United Kingdom Government, the Northern Ireland legislation was amended so as to define specified risk material as encompassing 'the head (including the brain but excluding the tongue), spinal cord, spleen, thymus, tonsils and intestines of a bovine animal six months old or over which has died in the United Kingdom or been slaughtered there'.

20 In 1997, SEAC recommended the adoption of measures to allow checks to be carried out for the presence of specified risk material in bovine matter imported from Member States or third countries other than those in which there was no known risk of bovine spongiform encephalopathy.

21 On 29 December 1997, several days after the date on which Decision 97/534 was to become applicable had been postponed for the first time by Decision 97/866, the Department enacted the Specified Risk Material (Northern Ireland) Order 1997 ('the 1997 Order') as part of its programme to deal with the risk of bovine spongiform encephalopathy.

22 Article 6(1) of the 1997 Order provides:

'A person shall not import into Northern Ireland from any place outside the United Kingdom, the Channel Islands and the Isle of Man —

(a) any class I specified risk material, except where it is to be transported directly to licensed premises; or

(b) any food or feedingstuff listed in Schedule 1, except a food or feedingstuff which —

(i) does not contain any class I specified risk material; and

(ii) is accompanied by a certificate in the form set out in Schedule 2 issued by the appropriate veterinary authority of the place from which the food or feedingstuff was despatched.'

23 'Class I specified risk material', for the purposes of Article 6(1) of the 1997 Order, includes the skull, including the brain and eyes, tonsils and spinal cord, of an animal which was slaughtered or died outside the United Kingdom at an age greater than 12 months. That definition mirrors the definition of specified risk material set out in Article 1 of Decision 97/534. It does not include cheek meat.

24 On 16 December 1997, the United Kingdom notified the contents of the 1997 Order to the Commission pursuant to Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8). When the Commission made it clear that the notification in question would not be effective for the purposes of compliance with Directive 89/662, the 1997 Order was notified to the Commission a second time on 20 January 1998, in the manner specified by the latter directive.

The main proceedings and the questions referred for a preliminary ruling

25 Eurostock, which carries on business at Newry in Northern Ireland, is engaged in the meat trade and in particular the removal from bovine heads of cheek meat and the preparation of that cheek meat for human consumption. The company has been engaged for 13 years in the deboning of bovine heads imported from Ireland and exports the meat extracted therefrom to other parts of the United Kingdom and, since 1987, to France.

26 After the extraction from the bovine head of cheek meat for human consumption, the remainder of the skull is treated by Eurostock as if it were classified as specified risk material.

27 On 9 January 1998, pursuant to Article 14 of the 1997 Order, the Department seized and condemned a consignment of bovine heads which had been imported by Eurostock from Ireland. That consignment was accompanied by health certificates issued pursuant to Council Directive 64/433 to the effect that the meat in question was fit for human consumption. The condemnation of the bovine heads was effected without any prior inspection of the heads and on the ground that the consignment in question had been imported in contravention of Article 6(1) of the 1997 Order, in that it contained specified risk material.

28 On 10 February 1998, Eurostock brought proceedings before the Queen's Bench Division of the High Court of Justice in Northern Ireland (United Kingdom), challenging the 1997 Order primarily on the ground that it constituted a measure having an effect equivalent to a quantitative restriction on the free movement of goods, contrary to Article 30 of the EC Treaty (now, after amendment, Article 28 EC) and that it was a measure which was neither justified nor authorised under Community law.

29 The Department contended, on the other hand, that the 1997 Order was authorised under Article 9(1) of Directive 89/662 as a national measure enacted pending the adoption by the Commission of Community measures based on Article 9(4) of Directive 89/662, inasmuch as the Commission, having adopted Decision 97/534, had subsequently postponed the date on which it was to become applicable, with a view to its amendment or replacement by another measure.

30 By order of 1 April 1998, the High Court held that the 1997 Order was unlawful. It considered that the Department was not entitled to rely on Article 9(1) of Directive 89/662 and that the 1997 Order was not an interim protective measure within the meaning of that provision, namely a measure taken pending the adoption by the Commission of the measures to be taken in accordance with Article 9(4) of that directive. According to the High Court, it was uncertain whether any measures would be taken by the Commission and even less certain whether such measures would be of similar effect to the 1997 Order.

31 Upon appeal by the Department to the Court of Appeal in Northern Ireland, that court decided to stay proceedings and to refer the following questions to the Court:

'(1) May a Member State take interim protective measures in accordance with Article 9(1) of Council Directive 89/662/EEC when the Commission has made Decision 97/534/EC under Article 9(4) of the said Directive but postponed the coming into effect of that Decision?

(2) If the answer to Question 1 is Yes, before the Member State may take such interim protective measures what, if any, degree of certainty, probability or possibility is required that the Commission will put into effect the said Decision?

(3) On the correct interpretation of Article 4(1) of Commission Decision 97/534/EC:

(a) must specified risk material be removed and stained at the point of production; and

(b) is the point of production for those purposes the place at which the animals are slaughtered?

(4) If the answer to Question 1 is No, may a Member State none the less justify under Article 36 of the Treaty on the grounds of the protection of human health measures including a prohibition on the importation from another Member State of:

(a) specified risk material within the meaning of the said Decision; or

(b) bovine heads containing such specified risk material?'

The first and second questions

32 It is appropriate to consider the first two questions together, on the basis that they essentially seek to establish whether a Member State may prohibit, by way of an interim protective measure within the meaning of the fourth subparagraph of Article 9(1) of Directive 89/622, the importation of bovine heads containing material presenting risks as regards bovine spongiform encephalopathy, where the Commission has adopted, pursuant to Article 9(4) of that directive, a decision such as Decision 97/534, requiring the removal of, and prohibiting the use of, such material but where the date on which the measures provided for by that decision are to become applicable has been postponed.

Observations of the parties

33 Eurostock submits that the answer to that question should be that a Member State may not take such measures in such circumstances. It points out that, according to the 11th recital in the preamble to Directive 89/662, protective measures are primarily the responsibility of the State of dispatch and that, in the present case, the bovine heads were subjected to veterinary control and certification pursuant to Directive 64/433 at the point of dispatch in Ireland, where they were given a health mark and a health certificate.

34 It further considers that, having regard to the principle of the free movement of goods and the fact that derogations from that principle must be construed narrowly, the provisions of Council Directive 89/662 cannot be interpreted as conferring on the Member States the same discretion as that enjoyed by the Commission under that directive. Moreover, since the Commission had adopted Decision 97/534, there was no situation in which 'the measures to be taken' could be said to be 'pending' within the meaning of the fourth subparagraph of

Article 9(1) of Directive 89/662. Such a situation would have come about only if a change of circumstances had arisen after the adoption of Decision 97/534.

35 Eurostock also points out that the 1997 Order is wider in scope than Decision 97/534 and that, at the time of its adoption, the United Kingdom found itself in a minority at a meeting of the Standing Veterinary Council and disagreed with Decision 97/534 on the ground that its ambit was not wide enough.

36 According to Eurostock, specified risk material may be extracted in a cutting plant or elsewhere. It observes in that regard that Decision 97/534 prohibits neither the transportation of bovine heads from a slaughterhouse to a cutting plant nor the importation of cheek meat. The fact that bovine heads may cross a border between the slaughterhouse and the cutting plant does not increase the risk posed by cheek meat by comparison with such meat extracted after transportation to a cutting plant located in the same Member State as the slaughterhouse and then imported into Northern Ireland.

37 The United Kingdom, French and Netherlands Governments and the Commission propose, on the contrary, that the answer to the question should be that, in the circumstances described, a Member State may take interim protective measures.

38 For the purposes of assessing whether national measures may be adopted after a Community decision has been adopted but before it enters into force, the French Government refers to the judgment in Case C-129/96 *Inter-Environnement Wallonie* v *Région Wallonne* [1997] ECR I-7411, paragraphs 45 and 46, in which it was held that, during the period allowed for transposition of a directive, Member States must refrain from taking any measures liable seriously to compromise the result prescribed by the directive. When applied to the circumstances of the present case, that principle means that a Member State

may take a measure compatible with a Community decision which has already been adopted but which has not yet become applicable, provided that its operative part adheres as closely as possible to the Community decision and the date of expiry of the national measure coincides with the date on which the Community decision is to take effect.

39 The French Government states that such national measures may be necessary in the light of the precautionary principle affirmed by the Court in Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265. Indeed, where the date on which a Community decision is to become applicable is repeatedly postponed, a Member State runs the risk of being challenged under that principle at national level.

40 Lastly, the French Government points out that the application of the measures in question was not opposed by the Commission.

41 The Netherlands Government considers that, until such time as the Community measures adopted under Article 9(4) of Directive 89/662 become applicable, the Member States remain competent to take protective measures in accordance with the fourth subparagraph of Article 9(1) of that directive, provided that the conditions prescribed by that provision are fulfilled. In its view, the wording of Decision 97/534 is such as to require specified risk material to be removed and stained at the first available opportunity, and that that opportunity is afforded at the place where the animals are slaughtered. In response to the fourth question, it considers that national measures such as those envisaged in that question are justified under Article 36 of the Treaty; and it stated at the hearing that a Member State may conceivably be prompted to adopt a position going further than that adopted by the Commission in Decision 97/534.

42 The United Kingdom Government considers that a Member State may take interim protective measures under either Article 9(1) of Directive 89/662 or Article 36 of the Treaty as long as the best scientific opinion regarding the

existence of a significant risk posed by specified risk material, as taken into account in Decision 97/534, has not been seriously called in question by another respected scientific authority.

43 As regards the prohibition on imports applying to the entire head, it points out that the brain and the spinal cord give rise to the most serious risk of transmission of the disease and of cross-contamination of tissues. According to a SEAC opinion, the very act of slaughtering cattle by stunning and pithing or beheading creates a risk of contamination of tissues in the head, on account of the leakage of cerebrospinal fluid, particularly onto the cheeks. That risk is increased if the meat is not extracted immediately, and is even greater if the head is transported. The United Kingdom Government states that the Scientific Steering Committee proposed in its report of 9 December 1997 that the entire head, apart from the tongue, should be classified as high risk material, precisely on account of the possibility of contamination by highly infectious tissues during slaughtering.

44 On a purposive construction of Decision 97/534, Article 5 of which requires Member States to 'take measures to avoid cross-contamination', it must be acknowledged that Member States have the power to prohibit the importation of products containing specified risk material which has not been removed following slaughter and which has been transported over a significant distance. By the same token, it is clear from the 19th recital in the preamble to Decision 97/534, which refers to the need to ensure the removal and staining of tissues 'at the point of production', that that term means the place at which the animal is slaughtered.

45 The Commission states, as a preliminary point, that it had intended to replace Decision 97/534 with a new regime covering a longer list of specified risk material in accordance with a recommendation issued on 9 December 1997 by the Scientific Steering Committee. It therefore itself initially postponed the date on which Decision 97/534 was to become applicable, with a view to carrying out the requisite studies. In the absence of a favourable opinion from the Standing

Veterinary Committee, the subsequent decisions deferring the date on which Decision 97/534 was to become applicable were adopted by the Council. The Commission states that it issued a declaration protesting against the blocking of its proposal by the Council, in which it '[renewed] its recommendations to the Member States to adopt or maintain in the meanwhile all the necessary measures having regard to their respective situations concerning transmissible spongiform encephalopathies, which include bovine spongiform encephalopathy'. It further points out that it has submitted a proposal (1999/C 45/02) for a European Parliament and Council Regulation laying down rules for the prevention and control of certain transmissible spongiform encephalopathies (OJ 1999 C 45, p. 2). For higher risk regions, which would have included Great Britain and Northern Ireland in December 1997 and January 1998, that proposal classifies the entire head of bovine animals, excluding the tongue but including the cheeks, as specified risk material.

46 In view of that situation, the Commission maintains that it would be unrealistic and nonsensical to say that measures have been 'taken' within the meaning of the fourth subparagraph of Article 9(1) of Directive 89/662, when those measures have not become applicable. It points out the extremely serious danger arising from bovine spongiform encephalopathy and observes that the United Kingdom did not enact the 1997 Order until after the Commission had been forced to postpone the application of its measures by Decision 97/866.

47 In the Commission's view, the imposition of an import ban on the entire head was logical, even though the cheeks were not specified risk material, since there was no other practical means of preventing imports of parts of the head that were a danger to public and animal health. Traders remained at liberty, however, to import the cheek meat alone.

48 According to the Commission, the 1997 Order did not constitute a means of arbitrary discrimination within the meaning of Article 36 of the Treaty and was justified, having regard, in particular, to the recommendations of the World

Health Organisation ('WHO'), the International Office of Epizootics ('IOE'), the Scientific Veterinary Committee and the Scientific Steering Committee.

49 The German Government's observations relate solely to the question concerning the place at which specified risk material is to be removed. It states that Decision 97/534 does not preclude the transportation, subject to observance of the necessary safeguards, of bovine heads from slaughterhouses to cutting plants. That follows from the interpretation of Article 4(1) of Decision 97/534, which is to be construed in conjunction with other Community meat hygiene legislation, including, in particular, Directive 64/433.

50 It states that, according to Article 3(1)(A) of that directive, only carcasses, half carcasses or quarters may be taken from a slaughterhouse. On grounds of hygiene, further cutting of the meat is not permitted in the slaughterhouse. This means that, where the point of production is a slaughterhouse, only specified risk material which is accessible without further cutting at the time of preparation of the carcase may be removed. Such material includes the tonsils, the spinal cord and the spleen. On the other hand, the skull — including the brain — may not be removed at the 'point of production' constituted by the slaughterhouse. That must be done in the cutting plant. It follows that the recovery of head muscle is permissible, pursuant to Article 3(1)(B) of Directive 64/433, only in cutting plants.

51 At the hearing, the German Government pointed out that, under Directive 64/433, fresh meat may be put into circulation between Member States only if it is considered to be fit for consumption, as attested by the health marking provided for by that directive. The effect of Directive 64/433, construed in conjunction with Decision 97/534, is that a product may be marked only after the specified risk material has been removed from the head. In other words, entire

heads of bovine animals cannot bear a health mark and cannot therefore be exported to another Member State.

Findings of the Court

52 It should be noted, at the outset, that there are two directives which are applicable to intra-Community trade in fresh bovine meat.

53 According to Article 1 of Directive 64/433, that directive lays down the health conditions applicable to the production and marketing of fresh meat intended for human consumption, in particular that of bovine animals. It prescribes various measures concerning slaughterhouses and cutting plants, meat which is to be regarded as unfit for human consumption and inspections by official veterinarians of the Member States.

54 Directive 89/662, which was adopted with a view to the establishment of the internal market, is designed to eliminate veterinary checks at the Community's internal frontiers by concentrating on checks to be carried out at the place of dispatch and organising those that can be carried out at the place of destination. Thus, Article 1 of Directive 89/662 provides that Member States are to ensure that the veterinary checks to be carried out on products of animal origin which are covered by certain directives, including Directive 64/433, are no longer carried out at frontiers but in accordance with Directive 89/622.

55 Article 13 of Directive 89/622 added a new article to Directive 64/433. The essential contents of that new article are set out in the current Article 18 of

Directive 64/433, which contains a reference to Directive 89/622 as regards, in particular, the protective measures to be implemented.

56 It is therefore by reference to Article 9 of Directive 89/662 that the conformity with Community law of a protective measure adopted by a Member State is to be examined where it results, in particular, in a refusal to permit imports of bovine meat covered by Directive 64/433.

57 As is apparent from the fourth subparagraph of Article 9(1) of Directive 89/662, the Member State of destination may, on serious public or animal-health grounds, take interim protective measures pending the measures to be taken by the Commission in accordance with Article 9(4).

58 In that connection, the adoption by the Commission of a decision which is not immediately applicable cannot, as such, be regarded as precluding a Member State from itself taking interim protective measures pursuant to the fourth subparagraph of Article 9(1) of Directive 89/662.

59 Article 9 of Directive 89/662 is in fact designed to set up a Community-wide protective system to replace possibly disparate interim protective measures taken in an emergency by Member States in order to counter serious risks. However, it is not until the Community rules are adopted, enter into force and become applicable to the products concerned that there is a risk of conflict between those rules and the interim protective measures previously adopted by the Member States.

60 The situation would be different if the date on which the Community protective measure became applicable were to be postponed for the express reason that no measures were needed at all, at either national or Community level, before that date. In such circumstances, the deferral of the application of the Community legislation would have to be construed as precluding the adoption by Member States of interim protective measures pending the date on which the Community measure became applicable.

61 It is in the light of those circumstances and considerations that the question whether the decisions of the Commission and the Council prohibiting the use of material presenting risks with regard to transmissible spongiform encephalopathies are to be construed as precluding the adoption by a Member State of interim protective measures such as the 1997 Order must be determined.

62 The wording of Decision 97/534 in no way suggests that no protective measure is necessary pending the application of that decision, initially scheduled for 1 January 1998.

63 On the contrary, the sixth recital in its preamble refers to the recommendations of a group of WHO experts, to the effect that countries should not permit tissues that are likely to contain the bovine spongiform encephalopathy agent to enter any food chain (human or animal).

64 The seventh recital mentions the conclusions of the Scientific Veterinary Committee pointing out the difficulty in removing by heat treatment the bovine spongiform encephalopathy agent present in material with high infectivity.

65 The 12th and 13th recitals state that the United Kingdom is considered to be a country with a high incidence of bovine spongiform encephalopathy and that it should therefore be authorised to keep in force the existing national measures, which accord with the IOE recommendations advocating the removal of specified material and a ban on trade in tissues in addition to the measures recommended by the Scientific Veterinary Committee.

66 The 14th recital states that there is in certain Member States a significantly higher risk of exposure to transmissible spongiform encephalopathies and that those Member States should be permitted to take additional action regarding the removal of risk material emanating from animals slaughtered on their territory.

67 The 23rd recital states that no Member State can be regarded as free from a potential risk from transmissible spongiform encephalopathies.

68 Lastly, the 24th recital provides for Decision 97/534 to be reviewed in the light of new scientific information concerning the risk of exposure to transmissible spongiform encephalopathies resulting from infectivity in, *inter alia*, tissues or materials not yet covered by that decision.

69 It is sufficiently apparent from the recitals in the preamble to Decision 97/534 that the risk posed by specified risk material existed long before that decision was

adopted, that several international scientific committees had previously recommended the removal of that material, that the Commission approved the measures already adopted by certain Member States and that it regarded Decision 97/534 as a minimum emergency measure the scope of which could be extended in the light of new scientific information.

70 It follows that that decision cannot be construed as prohibiting the adoption by Member States, before 1 January 1998, of protective measures concerning the removal of specified risk material.

71 The date on which the measures prescribed by Decision 97/534 were to become applicable was postponed by Commission Decision 97/866 and by Council Decisions 98/248 and 98/745. The reason given for the adoption of Decision 97/866 is the need for more time to review the implications of Decision 97/534 for a wide range of products and to consider new scientific advice. The reasons given in respect of Decisions 98/248 and 98/745 are the developments after the adoption of Decision 97/534, necessitating further detailed examination of the content of the measures laid down by that decision.

72 It is not apparent from the recitals in the preambles to those decisions that the level of risk posed by specified risk material has decreased compared with that described in Decision 97/534, or that the postponement of the date on which the measures laid down in that decision were to become applicable is justified on account of their not being necessary. Nor, in the absence of any express statement, can Decisions 97/866, 98/248 and 98/745 be interpreted as precluding the adoption by a Member State of interim protective measures regarding the removal of specified risk material before the date fixed by those decisions for application of the measures prescribed in Decision 97/534.

73 Consequently, as at the date of enactment of the 1997 Order, no Community protection scheme established in accordance with Article 9(4) of Directive 89/662 was applicable or prohibited the adoption by a Member State of protective measures pursuant to the fourth subparagraph of Article 9(1) of that directive.

74 It is necessary, therefore, to examine whether the conditions referred to in the fourth subparagraph of Article 9(1) of Directive 89/662 were fulfilled and whether a national measure such as the 1997 Order respects the principle of proportionality.

75 It is apparent from the situation described in the recitals in the preamble to Decision 97/534, summarised in paragraphs 63 to 68 of this judgment, that, at the time at which the 1997 Order was enacted, bovine spongiform encephalopathy constituted a serious danger to public health.

76 Scientists were recommending the removal of specified risk material and were advising that countries should not permit tissues likely to contain the bovine spongiform encephalopathy agent to enter any food chain (human or animal).

77 In the light of those factors, a national measure such as the 1997 Order, prohibiting imports of any specified risk material — that is to say, the skull, including the brain and eyes, tonsils and spinal cord, of bovine animals over 12 months old — and also of any food containing such specified risk material, must be regarded as justified under the fourth subparagraph of Article 9(1) of Directive 89/662 and cannot be seen as disproportionate in the light of the risk of possible transmission of bovine spongiform encephalopathy.

78 Thus, it was permissible to prohibit imports of bovine heads, since they contained material with very high infectivity and the slaughtering and transport methods used gave rise to a serious risk of contamination of healthy tissues, especially on account of leakage of cerebrospinal fluid onto cheek meat.

79 It follows that the answer to be given to the first two questions referred for a preliminary ruling must be that a Member State may prohibit imports of bovine heads containing material presenting risks as regards bovine spongiform encephalopathy, by way of an interim protective measure within the meaning of the fourth subparagraph of Article 9(1) of Directive 89/662, where the Commission has adopted, pursuant to Article 9(4) of that directive, a decision such as Decision 97/534 requiring the removal of, and prohibiting the use of, such material but where the date on which the measures laid down by that decision are to become applicable has been postponed.

The third and fourth questions

80 Having regard to the foregoing, there is no need to answer the third and fourth questions.

Costs

81 The costs incurred by the United Kingdom, French, German and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Court of Appeal in Northern Ireland by order of 9 November 1998, hereby rules:

A Member State may prohibit imports of bovine heads containing material presenting risks as regards bovine spongiform encephalopathy, by way of an interim protective measure within the meaning of the fourth subparagraph of Article 9(1) 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, where the Commission has adopted, pursuant to Article 9(4) of that directive, a decision such as Commission Decision 97/534/EC of 30 July 1997 on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies, requiring the removal of, and prohibiting the use of, such material but where the date on which the measures laid down by that decision are to become applicable has been postponed.

Rodríguez Iglesias	Gulmann	La Pergola
Wathelet	Skouris	Edward
Puissochet	Jann	Sevón
Schintgen		Macken

Delivered in open court in Luxembourg on 5 December 2000.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President