JUDGMENT OF THE COURT (Second Chamber)

22 June 2011 *

In Case C-346/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof 's-Gravenhage (Netherlands), made by decision of 18 August 2009, received at the Court on 28 August 2009, in the proceedings

Staat der Nederlanden

v

Denkavit Nederland BV and Others,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas (Rapporteur), U. Lõhmus and A. Ó Caoimh, Judges,

* Language of the case: Dutch.

Advocate General: P. Cruz Villalón,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 7 September 2010,

after considering the observations submitted on behalf of:

— Denkavit Nederland BV and Others, by H. Ferment, advocaat,

— the Netherlands Government, by C. Wissels and M. de Ree, acting as Agents,

— the German Government, by M. Lumma, J. Möller and N. Graf Vitzthum, acting as Agents,

— the Swedish Government, by A. Falk and A. Engman, acting as Agents,

— the European Commission, by F. Jimeno Fernández and B. Burggraaf, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 November 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the law of the European Union on the feeding of processed animal proteins to animals and more particularly of the following measures:

— Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29);

— Commission Decision 94/381/EC of 27 June 1994 concerning certain protection measures with regard to bovine spongiform encephalopathy and the feeding of mammalian derived protein (OJ 1994 L 172, p. 23);

— Council Decision 2000/766/EC of 4 December 2000 concerning certain protection measures with regard to transmissible spongiform encephalopathies and the feeding of animal protein (OJ 2000 L 306, p. 32), and

— Commission Decision 2001/9/EC of 29 December 2000 concerning control measures required for the implementation of Decision 2000/766 (OJ 2001 L 2, p. 32).

2 The reference has been made in proceedings between the Netherlands State and Denkavit Nederland BV and Others ('Denkavit and Others'), which are various companies producing feedstuffs for animals and a company which distributes raw materials for such feedstuffs. Those proceedings concern the conformity with the law of the European Union of a national temporary regulation imposing, with a view to establishing protection against bovine spongiform encephalopathy ('BSE'), a prohibition on the production of and trading in processed animal proteins in feedstuffs for farmed animals, where that prohibition, first, was enacted and entered into force after the adoption, but before the entry into force of a decision of the European Union requiring such a prohibition and, second, was applied, before that decision entered into force, to fishmeal and dicalcium phosphate, although those products were eligible for exemption from the prohibition imposed by that decision.

Legal context

European Union legislation

Directive 90/425

3 According to the second recital in the preamble to Directive 90/425, it is appropriate to dismantle the zootechnical and veterinary barriers to the development of intra-Community trade in animals and products of animal origin in order to promote the harmonious operation of the common organisation of the market in animals and products of animal origin.

4 According to the tenth recital, protective measures must be provided for to that effect and, especially for reasons of effectiveness, responsibility in this area must rest firstly with the State of dispatch.

5 The twelfth recital in the preamble to Directive 90/425 states that, pending Community rules, animals and products that are not the subject of harmonised rules should comply with the requirements of the State of destination provided that the latter are in conformity with Article 36 of the EEC Treaty (which became Article 36 of the EC Treaty, which itself became, after amendment, Article 30 EC).

6 The first paragraph of Article 1 of that directive provides:

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

7 Article 10(1) of that directive is worded as follows:

'Each Member State shall immediately notify the other Member States and the Commission of any outbreak in its territory, in addition to an outbreak of diseases referred to in Directive 82/894/EEC, of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health.

The Member State of dispatch shall immediately implement the control or precautionary measures provided for in Community rules, in particular the determination of the buffer zones provided for in those rules, or adopt any other measure which it deems appropriate.

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

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

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

8 Under Article 10(4), the Commission is to adopt, in accordance with the comitology procedure laid down in Article 17, the necessary measures for animals, products and derived products. It is to monitor the situation and, by the same procedure, amend or repeal the decisions taken, depending on how the situation develops.

Directive 90/667/EEC

9 Article 13(1) of Council Directive 90/667/EEC of 27 November 1990 laying down the veterinary rules for the disposal and processing of animal waste, for its placing on the market and for the prevention of pathogens in feedstuffs of animal or fish origin and amending Directive 90/425 (OJ 1990 L 363, p. 51) reads thus:

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

Directive 92/118/EEC

10 Article 2(1) of Council Directive 92/118/EEC of 17 December 1992 laying down animal health and public health requirements governing trade in and imports into the Community of products not subject to the said requirements laid down in specific Community rules referred to in Annex A(I) to Directive 89/662/EEC and, as regards pathogens, to Directive 90/425/EEC (OJ 1993 L 62, p. 49), is worded as follows:

'For the purposes of this Directive:

…

(e) *processed animal protein intended for animal consumption* means animal protein which has been treated so as to render it suitable for direct use as a feedingstuff or as an ingredient in a feedingstuff for animals. It includes fishmeal, meatmeal, bonemeal, hoofmeal, hornmeal, bloodmeal, feathermeal, dry greaves and other similar products including mixtures containing these products;

…'

11 Under Article 7(2) of that directive, Article 10 of Directive 90/425 applies to the products covered by that former directive.

Decision 94/381

12 The Commission adopted Decision 94/381 on the basis of Directive 90/425, and in particular of its Article 10(4).

13 Under Article 1(1) of that decision, Member States were to prohibit the feeding of protein derived from mammalian tissues to ruminant species. Article 1(2) provided, however, that Member States which enforced a system that makes it possible to distinguish between animal protein from ruminant and non-ruminant species were to be authorised, by the Commission under the procedure provided for by Article 17 of Directive 90/425, to permit the feeding of protein from species other than ruminants to ruminants.

Decision 2000/766

14 On 4 December 2000, the Council of the European Union adopted Decision 2000/766 on the basis of Directive 90/425, and, in particular, of its Article 10(4) and of Council Directive 97/78/EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries (OJ 1998 L 24, p. 9) and, in particular, of its Article 22.

15 Under Article 2 of that decision:

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

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

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

— gelatine of non-ruminants for coating additives within the meaning of Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs (OJ 1970 L 270, p. 1),

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

— milk and milk products to farmed animals which are kept, fattened or bred for the production of food.'

16 Article 3 of that decision provided:

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

(a) prohibit the placing on the market, the trade, the importation from third countries and the exportation to third countries of processed animal proteins intended for the feeding of farmed animals which are kept, fattened or bred for the production of food,

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

2. Member States shall ensure that animal waste as defined by Directive [90/667] is collected, transported, processed, stored or disposed of in accordance with that Directive …'

17 Decision 2000/766 entered into force, in accordance with its Article 4, on 1 January 2001 and was applicable until 30 June 2001.

Decision 2001/9

18 Decision 2001/9, adopted by the Commission on 29 December 2000, laid down the detailed conditions for applying the exception to the prohibitions relating to fishmeal, dicalcium phosphate and hydrolysed proteins under Article 2(2) of Decision 2000/766. Decision 2001/9 entered into force on 1 January 2001.

19 Article 1(1) and (2) of Decision 2001/9 provided:

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

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

National legislation

20 The temporary regulation prohibiting animal proteins in all feedingstuffs intended for farmed animals (Tijdelijke regeling verbod dierlijke eiwitten in alle diervoerders landbouwhuisdieren, 'the national temporary regulation'), adopted on 8 December 2000 by the Minister van Landbouw, Natuurbeheer en Visserij (Minister for Agriculture, Nature Management and Fisheries, *Nederlandse Staatscourant* 2000, No 239),

referred, in its cited legal base, to Directive 90/425 and Decision 2000/766. Its Article 2 provided:

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

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

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

— gelatine of non-ruminants for coating additives …,

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

— milk and dairy products.'

21 Article 3 of that regulation is in the following terms:

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

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

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

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

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

22 Under Article 4 of that regulation, it entered into force on 15 December 2000.

The dispute in the main proceedings and the question referred for a preliminary ruling

23 At the level of the European Union, measures have been taken since 1994 to combat the spread of BSE. Those measures were adopted on the basis, in particular, of Directive 90/425.

24 On the 27 June 1994, the Commission adopted Decision 94/381, the aim of which was to prohibit the feeding of protein derived from mammalian tissue to ruminants.

25 Having recorded cases of BSE in animals born after Decision 94/381 had entered into force, the Scientific Steering Committee established by Commission Decision 97/404/EC of 10 June 1997 (OJ 1997 L 169, p. 85) ('the Scientific Steering Committee') issued, on 27 and 28 November 2000, an opinion acknowledging for the first time that there was a risk of cross-contamination of cattle feed with feed intended for other animals and which contains animal proteins possibly contaminated by the BSE agent and recommending that new measures be adopted.

26 On 4 December 2000, the Council, seeking further to minimise the risk of the spread of BSE, adopted Decision 2000/766. By that decision, the feeding of processed animal proteins to all farmed animals was prohibited from 1 January 2001 for a maximum period of six months. That decision required the prohibition of the placing on the market, the trade, the importation from third countries and the exportation to third countries of processed animal proteins and their withdrawal from the market, distribution channels and from on-farm storage. Those prohibitions were subject to various exceptions concerning, in particular, the feeding of fishmeal to animals other than ruminants and the feeding of dicalcium phosphate.

27 Four days later, on 8 December 2000, the Minister van Landbouw, Natuurbeheer en Visserij adopted the national temporary regulation prohibiting, in Article 2(1) thereof, the preparation, processing, supply, taking delivery, delivery, transport, offering for sale, purchase and disposal of processed animal proteins intended for feeding to farmed animals.

28 Article 2(2) thereof laid down exceptions to that prohibition for, among other things, fishmeal and dicalcium phosphate. The application of those exceptions was subject to the adoption of control measures to be fixed in accordance with the procedure laid down in Article 17 of Directive 89/662.

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

30 On 29 December 2000, the Commission adopted Decision 2001/9 laying down the conditions under which the feeding of, among other things, fishmeal and dicalcium phosphate to animals was authorised. That decision entered into force at the same time as Decision 2000/766, that is on 1 January 2001.

31 Denkavit and Others brought an action before the Rechtbank 's-Gravenhage (District Court, The Hague), seeking a declaration that Article 2 of the national temporary regulation was vitiated by illegality.

32 Denkavit and Others claimed before that court that the Netherlands State had acted illegally in their regard, primarily, by imposing, during the period from 15 December 2000 to 1 January 2001, prohibitions in respect of feedstuffs for animals more restrictive than those required by Decision 94/381 or, alternatively, by imposing during that period, prohibitions in respect of feedstuffs for animals containing animal proteins other than fishmeal and dicalcium phosphate.

33 The Rechtbank 's-Gravenhage upheld that action on the ground that in the light of the wording of Decision 2000/766, its aim was that the prohibitions concerned should enter into force precisely on 1 January 2001, neither before nor after. In that court's view, the Netherlands State had therefore acted illegally in imposing prohibitions from 15 December 2000.

34 The Netherlands State appealed to the Gerechtshof 's-Gravenhage (Regional Court of Appeal, The Hague), which considered that the dispute before it raised questions concerning the interpretation of certain provisions of European Union law.

35 In those circumstances, the Gerechtshof 's-Gravenhage decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Must Community law, and specifically Directive 90/425/EEC, Decision 94/381/EC and Decision 2000/766/EC, be interpreted as meaning that any national prohibition, such as that laid down in Article 2 of the [national temporary regulation] which, with a view to affording protection against BSE, prohibits the production of and trading in processed animal proteins intended for feeding to farmed animals, is incompatible with [Community law] if such a national prohibition

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

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

The question referred for a preliminary ruling

36 By its question, the referring court is asking, in essence, whether European Union law, in particular Directive 90/425 and Decisions 94/381 and 2000/766, precludes national legislation which, with a view to affording protection against BSE, imposed a temporary prohibition on the production of and trading in processed animal proteins for feeding to farmed animals, where that prohibition, first, was enacted and entered into force after the adoption, but before the entry into force of a decision of the European Union requiring such a prohibition and, second, was applied, before that decision entered into force, to fishmeal and dicalcium phosphate, although those products were eligible for exemption from the prohibition imposed by that decision.

37 As a preliminary point, it is appropriate to recall that, as regards the combat against the spread of diseases likely to constitute a serious hazard to animals or to human health, such as BSE, the Court has already held that Article 10 of Directive 90/425 brings about the complete harmonisation of the precautionary measures against such diseases and defines precisely the respective obligations and tasks of the Member States and of the Commission in this field (see, to that effect, Case C-52/92 *Commission* v *Portugal* [1993] ECR I-2961, paragraph 19).

38 In fact, the Commission is, under that provision, to adopt the necessary measures after reviewing the situation in the Standing Veterinary Committee. Member States may, if they detect a disease in the course of a check, only take the preventive measures provided for in the Community rules and, on serious public or animal health grounds, may take strictly limited interim protective measures pending the measures to be taken by the Commission (see, to that effect, *Commission* v *Portugal*, paragraph 9).

39 It follows from the twelfth recital in the preamble to Directive 90/425 that the directive applies to animals and products which have been made subject to the harmonised rules set forth in Annex A to that directive.

40 As the Advocate General pointed out in paragraph 39 of his opinion, it is appropriate, consequently, to determine whether the products covered by the national temporary regulation, namely processed animal proteins intended for feeding to farmed animals, fell, at the time of the adoption of that regulation, within the scope of Directive 90/425.

41 In that regard, the EU legislation on feedstuffs for animals has evolved into a complex and advanced harmonisation. As the Advocate General pointed out in paragraphs 47 to 49 of his opinion, processed animal proteins have been the object of several instruments of harmonisation, as animal waste, as ingredients in feedstuffs for animals or as being subject to prohibition.

42 Indeed, following the adoption of Directive 90/667, Annex A to Directive 90/425 was amended so that the products covered by Directive 90/667, namely animal waste, should be subject to the precautionary measures established by Directive 90/425.

43 Next, under Article 7(2) of Directive 92/118, the precautionary measures required by Article 10 of Directive 90/425 applied to the products of animal origin covered by Directive 92/118, namely the products of animal origin not subject, as regards the animal and public health requirements governing trade in and imports into the European Community, to the specific Community rules referred to in Annex A(I) to Directive 89/662 and, as regards pathogens, in Directive 90/425.

44 Decision 94/381 was adopted on 27 June 1994 with the aim of prohibiting the feeding of proteins derived from mammalian tissue to ruminants.

45 In addition, by Commission Decision 91/516/EEC of 9 September 1991 establishing a list of ingredients whose use is prohibited in compound feedingstuffs (OJ 1991 L 281, p. 23), as amended by Commission Decision 97/582/EC of 28 July 1997 (OJ 1997 L 237, p. 39), such prohibition was imposed as regards protein products from mammalian tissue used as ingredients in compound feedingstuffs for ruminants.

46 Finally, the feeding of processed animal proteins to all farmed animals, including non-ruminants which are kept, fattened or bred for the production of food was prohibited by Decision 2000/766.

47 Furthermore, the legal basis of that decision, the validity of which has not been called into question, was Article 10 of Directive 90/425.

48 It follows from all those considerations that, at the time of the adoption of the national temporary regulation, a Member State was not entitled to prohibit, otherwise than within the system of safeguards established by Article 10 of Directive 90/425, the production of or trading in processed animal proteins intended for feeding to farmed animals.

49 It is therefore necessary to establish whether the national temporary regulation can be regarded as a precautionary measure under that provision.

50 Under the first subparagraph of Article 10(1) of Directive 90/425, each Member State must immediately notify the other Member States and the Commission of the outbreak of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health.

51 As regards the question whether there was, at the time when the national temporary regulation was adopted, an outbreak of a zoonosis, disease or other cause likely to constitute a serious hazard to animals or to human health within the meaning of that provision, that condition is likely to be met when new information significantly alters the perception of the danger represented by the disease (Case C-220/01 *Lennox* [2003] ECR I-7091, paragraph 72 and the case-law cited).

52 The national temporary regulation was enacted ten days after the publication of an opinion of 27 and 28 November 2000 of the Scientific Steering Committee ('the Scientific Steering Committee's opinion') which pointed out a risk of cross-contamination of cattle feed with feed intended for other animals which contains animal proteins possibly contaminated by the BSE agent. That opinion recommended that consideration be given to a temporary prohibition on animal proteins in feedstuffs for animals.

53 Given that, since 1994, various measures had been taken against BSE but new cases of the disease had regularly appeared and that, therefore, the extent and significance of the risk of the spread of the disease were still uncertain, the Scientific Steering Committee's opinion significantly altered the perception of the danger represented by BSE and, therefore, justified the adoption of precautionary measures under Article 10(1) of Directive 90/425.

54 The Netherlands Government submits that the national temporary regulation was adopted by the Kingdom of the Netherlands in its capacity as both Member State of dispatch and Member State of destination.

55 It is true that Article 10(1) of Directive 90/425 provides for several types of measures. Under the second subparagraph of that provision, the Member State of dispatch is immediately to 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 to adopt any other measure which it deems appropriate. Under the fourth subparagraph of that provision, pending the measures to be taken in accordance with Article 10(4), the Member State of destination may, on serious public or animal health grounds, take interim protective measures with regard to the holdings, centres or organisations concerned or, in the case of an epizootic disease, with regard to the buffer zone provided for in Community rules.

56 The Netherlands Government submits that the distinction thus drawn in Article 10(1) of Directive 90/425 between the Member State of dispatch and the Member State of destination is not relevant in this case. In its submission, the national temporary regulation regulates not intra-Community trade but, more generally, the production of and trading in feedstuffs for animals, so that the regulation was adopted by the Kingdom of the Netherlands in its capacity as both the Member State of dispatch and the Member State of destination.

57 The other Governments which submitted observations and the Commission submit, on the contrary, that the Kingdom of the Netherlands adopted the national temporary regulation in its capacity as the Member State of destination.

58 In that regard, given that the temporary national regulation was intended to regulate not only production of, but also trading in feedingstuffs in general, including the taking delivery and purchase thereof, that regulation was likely to affect, at least, imports of those products.

59 It is therefore necessary to consider whether the national temporary regulation can be regarded as a protective measure adopted by a Member State of destination on the basis of the fourth subparagraph of Article 10(1) of Directive 90/425.

60 As regards the condition relating to the existence of serious public or animal health grounds within the meaning of that provision, that condition, as noted in paragraph 51 of the present judgment, is likely to be met when new information significantly alters the perception of the danger represented by the disease.

61 Here, as is apparent from the first three recitals in the preamble to Decision 2000/766, cases of BSE had been recorded in animals born in 1995, that is subsequent to the adoption on 27 June 1994 of Decision 94/381, which comprised the first Community rules on checks on processed mammalian-derived proteins used to feed ruminant species. As held in paragraph 53 of the present judgment, the Scientific Steering Committee's opinion noting, for the first time, a risk of cross-contamination of cattle feed with feed intended for other animals and which contains animal proteins possibly contaminated by the BSE agent, significantly altered the perception of the danger represented by that disease.

62 The adoption of Decision 2000/766, to which the national temporary regulation expressly referred, depended therefore, in essence, on establishing the need, as a precautionary measure, to prohibit on a temporary basis the feeding of animal proteins to all farmed animals kept, fattened or bred for the production of food. The Scientific

Steering Committee's opinion, which justified the adoption of that decision, could therefore likewise justify the adoption of the national temporary regulation, as the Netherlands, German and Swedish Governments and the Commission submit.

63 Under the fourth subparagraph of Article 10(1) of Directive 90/425, interim protective measures may be adopted pending the measures to be adopted by the Commission under Article 10(4).

64 The national temporary regulation was enacted on 8 December 2000, that is four days after the Council adopted Decision 2000/766, which was specifically intended to prohibit animal proteins from being fed to animals from 1 January 2001.

65 Thus, the measures at European Union level had been adopted but not yet entered into force when the Kingdom of the Netherlands enacted the national temporary regulation.

66 In that regard, the Court has already held that the adoption by the Commission of a decision which is not immediately applicable cannot, as such, be regarded as precluding a Member State from itself taking interim protective measures pursuant to the fourth subparagraph of Article 9(1) of Directive 89/662 (Case C-477/98 *Eurostock* [2000] ECR I-10695, paragraph 58). The interim protective measures at EU level at issue in *Eurostock* are equivalent to those referred to in the fourth subparagraph of Article 10(1) of Directive 90/425.

67 A Member State may therefore adopt national prohibitions such as those enacted by the national temporary regulation if the situation in that Member State is so urgent as to justify the immediate adoption of such measures on serious grounds of public or animal health.

68 However, it is for the referring court, which alone has jurisdiction to determine the facts of the case before it, to establish whether the situation in the Netherlands at the time of the adoption of the national temporary regulation was of such urgency.

69 Were that court to conclude that such was the case and that the national temporary regulation could, in principle, be treated as an interim protective measure complying with the fourth subparagraph of Article 10(1) of Directive 90/425, it would still have to establish whether the principle of proportionality had been observed (see, to that effect, Joined Cases C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 46 and the case-law cited).

70 It follows from all the foregoing that the law of the European Union, in particular Directive 90/425 and Decisions 94/381 and 2000/766, does not preclude national legislation which, with a view to affording protection against BSE, imposed a temporary prohibition on the production of and trading in processed animal proteins for feeding to farmed animals if the situation in the Member State concerned was so urgent as to justify the immediate adoption of such measures on serious grounds of public or animal health. It is for the referring court to establish whether that condition was met and the principle of proportionality observed.

Costs

71 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

The law of the European Union, in particular Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market, Commission Decision 94/381/EC of 27 June 1994 concerning certain protection measures with regard to bovine spongiform encephalopathy and the feeding of mammalian derived protein and Council Decision 2000/766/EC of 4 December 2000 concerning certain protection measures with regard to transmissible spongiform encephalopathies and the feeding of animal protein, does not preclude national legislation which, with a view to affording protection against bovine spongiform encephalopathy, imposed a temporary prohibition on the production of and trading in processed animal proteins for feeding to farmed animals if the situation in the Member State concerned was so urgent as to justify the immediate adoption of such measures on serious grounds of public or animal health. It is for the referring court to establish whether that condition was met and the principle of proportionality observed.

[Signatures]