OPINION OF ADVOCATE GENERAL LENZ
delivered on 11 June 1992 *

Mr President,
Members of the Court,

A — Introduction

1. This request for a preliminary ruling from the Arrondissementsrechtbank, Breda, involves criminal proceedings brought against a livestock dealer who had in stock a number of bovine animals which had been treated with the hormone Ethinyloestradiol 17 Alpha. The criminal liability relates to the keeping or holding in stock of animals which have been treated with hormones. In that regard, neither the means whereby those hormones were administered nor the manner in which the person concerned came to have the animals in stock are of relevance.

2. Article 2 of Directive 81/602/EEC [1] prohibits in principle the administration of certain substances having a hormonal and thyrostatic action. The provision also prohibits the placing on the market of animals and their meat treated in this manner. The administration of the banned substances is permitted only for therapeutic purposes pursuant to derogating provisions (Articles 4 and 5 of Directive 81/602/EEC, Article 7 of Directive 88/146/EEC [2] and Directive 88/299/EEC, [3] which was adopted to give effect to that provision).

3. In view of the fact that the provisions of Community law do not expressly prohibit the keeping in stock of treated animals, the question arises whether national provisions imposing a ban, failure to comply with which attracts criminal liability, are compatible with Community law. It is in order to be able to answer that question that the national court has referred the matter to the Court of Justice.

4. Reference is made to the Report for the Hearing for the detailed facts and the arguments of the parties.

B — Analysis

5. Consideration of the problem referred by the national court necessitates an examination of whether a criminal law prohibition of the keeping in stock of animals treated with hormones can be regarded as a measure under the third paragraph of Article 189 of the EEC Treaty for the implementation of the Community law prohibition of those hormones pursuant to Directives 81/602 and 88/146, or whether it is a prohibition which goes beyond the provisions of Community law and in certain circumstances is therefore not permissible. It might be impermissible because in areas governed under Community

* Original language: German.

1 — Council Directive of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action, OJ 1981 L 222, p. 32.

2 — Council Directive of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action (OJ 1988 L 70, p. 16), which replaces Directive 85/649/EEC (OJ 1985 L 382, p. 228).

3 — Council Directive of 17 May 1988, OJ 1988 L 128, p. 36.

law by directives, further reaching national measures are not permitted [4] or because Member States are precluded from adopting unilateral measures in areas subject to a common organization of the market. [5] Finally, the impermissibility may also stem from the fact that the prohibition is at variance with the general provisions of the Treaty.

6. (a) The Netherlands Government has submitted that the prohibition of keeping in stock animals treated with hormones follows from Directive 81/602, since, in view of the general prohibition of the administration of certain hormonal and thyrostatic substances, in conjunction with the prohibition of trade in treated animals, it is inconceivable for possession of treated animals to be lawful.

7. The Commission, for its part, takes the view that the prohibition in question represents a reasonable extension of the relevant Community law provisions.

8. Leaving aside the exceptions to the prohibition of hormones under Community law, [6] the prima facie assumption is that any person in possession of animals treated with hormones has infringed the Community law prohibitions, whether through the active administration of hormones or by the fact of purchasing such animals in the course of trade. In so far as this premiss is valid, the possession of the animals objectively presupposes conduct in breach of Community law. No account is taken in this context of other ways of acquiring such animals which, according to the summary of the facts, are not relevant in this case.

9. Even in the context of the acquisition in the circumstances described, the criminal law prohibition of the keeping in stock of treated animals may go beyond the prohibitions existing under Community law in one respect, namely as regards responsibility and accountability for the wrongful acts. What Community law prohibits is active conduct, whether in the form of administration of hormones or in that of placing treated animals or their meat on the market. The ban on possession engenders criminal liability for the passive presence of such animals, irrespective of the manner in which the person concerned came to be in possession of them. Liability thus relates to the mere holding of the animals in stock, regardless of whether the holder has in any way acted at variance with Community law. Conceivably, therefore, criminal proceedings may be brought against a person who acquired treated animals in good faith.

10. It is only in so far as the prohibition under criminal law goes beyond the prohibition under Community law that I perceive problems of Community law. Since acquisition of the animals is objectively possible only through participation in conduct contrary to Community law, and since

4 — Judgment in Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR 1629, at paragraph 33.

5 — Judgment in Case 216/84 *Commission* v *France* [1988] ECR 793, at paragraph 18; judgment in Case 407/85 *3 Glocken GmbH and Another* v *USL Centro-Sud and Another* [1988] ECR 4233, at paragraph 26, and judgment in Case 274/87 *Commission* v *Germany* [1989] ECR 229, at paragraph 21.

6 — Cf. Articles 4 and 5 of Directive 81/602.

acquisition is a logical precondition for holding the animals in stock, the connection between the conduct contrary to Community law and the objective national prohibition of holding treated animals in stock is established through the subjective element of knowledge regarding the circumstances of acquisition. Only in the absence of this subjective element does the national measure catch a situation which does not reveal a direct connection with the Community law prohibition.

11. Imputability of conduct, however, is normally a precondition of criminal liability. The general principle of law *nulla poena sine culpa* makes it clear that personal fault is a prerequisite for criminal liability.

12. The detailed rules on criminal liability are a matter for the Member States: 'In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible'. [7]

13. In so far as we can proceed on the basis that an innocent purchaser will not be criminally liable, the national prohibition of the holding or keeping of treated animals in stock does not go beyond the general prohibitions laid down by Community law. Rather, it is to be understood as constituting a means for bringing about the objectives of the directive which Member States are free to choose (third paragraph of Article 189 of the EEC Treaty).

14. The accused in the main proceedings submitted before the Court of Justice that the Community law provisions allowed hormonal and thyrostatic substances to be administered under certain circumstances or at least presupposed their administration, and hence the keeping of such animals could not in itself be prohibited. What was more important was to ensure that treated animals were not placed on the market without controls. Potential danger to the health of consumers could thus be avoided.

15. It must first be pointed out that Directive 81/602, which establishes the general prohibition of certain substances with hormonal and thyrostatic effect, provides for exceptions in Articles 4 and 5. Article 4 of the directive is the basic provision for the adoption of derogating provisions on therapeutic grounds. Member States may, subject to compliance with the conditions set out in Article 4, directly authorize the administration of a number of hormonal substances.

16. Article 5, on the other hand, contains the basic provision allowing the Council, acting on a proposal from the Commission, to adopt a unanimous decision on the administration of hormonal substances for fattening purposes. A 1984 proposal for a directive amending Directive 81/602 [8] contained a provision which would have permitted the hormones referred to for fattening purposes. [9] The directive was never adopted.

7 — Judgment in Case 203/80 *Casati* [1981] ECR 2595, at paragraph 27.

8 — Document 84/C170/03, OJ 1984 C 170, p. 4.

9 — Seventh recital in the preamble and Article 1.

Instead, Directive 85/649 [10] (subsequently replaced by Directive 88/146) [11] imposed a prohibition on the use of hormonal substances for fattening purposes. [12]

17. The administration of hormones covered by Directive 81/602 is therefore permissible only pursuant to the derogation contained in Article 4 and the implementing provisions adopted under it. Articles 5 and 7 of Directive 88/146 must be construed as such implementing provisions. Article 5 of Directive 88/146 imposes a prohibition, which is to be monitored by the Member States, of trade between one Member State and another in treated animals and their meat. Article 7 of Directive 88/146 allows for derogations to be adopted from this absolute prohibition of trade and thereby refers expressly to Article 4 of Directive 81/602. Directive 88/299, [13] which regulates in detail the trade in animals intended for reproduction and their meat, implements the enabling provision in Article 7 of Directive 88/146.

18. This set of rules thus does not depart from the general prohibition of the administration of hormonal and thyrostatic substances and the prohibition of trade under Directive 81/602. It merely sets out the details of the trade permitted pursuant to the derogating provisions.

19. The reference by the accused party to Article 2(1)(b) of Directive 88/299, which presupposes that trade in treated animals and their meat is permitted subject to the specified limits, does not conflict with the finding that there is a fundamental prohibition of the use of hormones, since Article 2(1)(b) of Directive 88/299 is also a provision adopted in implementation of the derogation pursuant to Directive 81/602. The subject is the trade in animals intended for reproduction and their meat, which is authorized as an exception. [14]

20. The same holds true of the reference by the accused to Regulation No 2377/90 [15] laying down a Community procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of animal origin. In the first place, that regulation refers to residues of veterinary medicinal products in general, and is in no way confined to certain substances with hormonal and thyrostatic action. Secondly, the maximum limits are precisely to be laid down only pursuant to the procedure introduced by the regulation. Finally (and this is in my opinion the most cogent argument), the first paragraph of Article 15 of Regulation No 2377/90 expressly provides that:

'This regulation shall in no way prejudice the application of Community legislation prohibiting the use in livestock farming of certain substances having a hormonal action.'

21. The accused believes that, on the basis of that provision, it may be concluded from

10 — Council Directive of 31 December 1985, OJ 1985 L 382, p. 228.

11 — Council Directive of 7 March 1988, OJ 1988 L 70, p. 16.

12 — See the third recital in the preamble to Directive 88/146.

13 — Council Directive of 17 May 1988, OJ 1988 L 128, p. 36.

14 — The first sentence of Article 2 of Directive 88/299.

15 — Council Regulation of 26 June 1990, OJ 1990 L 224, p. 1.

the fact that a number of substances are prohibited that *a contrario* other substances are permitted.

22. The accused is right in so far as the presence of all pharmacological substances is not absolutely prohibited. Otherwise there would be no need to lay down maximum limits. Normal or compulsory immunizations are not affected by the regulation (cf. Article 1(2) of Regulation No 2377/90). However, the question of law which the Court must address concerns the interpretation of the general prohibition of hormones contained in Directives 81/602 and 88/146, a prohibition which according to Article 15 of Regulation No 2377/90 remains unaffected by the regulation.

23. Against the accused's submission that the Community law prohibitions are concerned only to prevent trade in treated animals and their meat, since the keeping of animals does not in itself represent a danger to the health of consumers, it may be argued that there is a prohibition under Community law of the administration of certain substances, which has been breached (by whomsoever) through the presence of treated animals. The future use to which an animal is put cannot undo, with retroactive effect, the unlawful treatment to which it was subjected, or cause such treatment to be regarded as lawful.

24. The conclusion must be that not every instance of possession of treated animals is prohibited but that in view of the scheme of the Community provisions animals may be treated and placed on the market only pursuant to the derogating provisions.

25. In examining the compatibility of the law of Member States with Community directives, the premiss is that Member States are in principle not entitled to introduce further reaching requirements or prohibitions in the area covered by the directive [16] since otherwise the objectives of harmonization, including the easing of conditions of trade, would be jeopardized. This 'debarring effect' is the explanation for enabling provisions such as Article 10 of Directive 86/469, [17] which expressly allows Member States to examine animals and their meat where there is a suspicion that residues are present, even though the directive itself actually regulates the examination of animals and fresh meat.

26. Directive 81/602 contains no such enabling provision, with the result that the Member States' prohibitions may not go beyond those under Community law. It follows that animals treated pursuant to the derogating provisions of Community law must also be regarded under the law of the Member States as having been lawfully treated. There cannot be any question of a prohibition of conduct which is permitted under Community law.

27. This conclusion must be expressed unambiguously in the legislation of the Member State concerned. It is for the national court to determine whether that is the case. If that condition is not satisfied, the

16 — Case 148/78 *Ratti* [1979] ECR 1629, at paragraph 33 of the judgment.

17 — Council Directive of 16 September 1986 concerning the examination of animals and fresh meat for the presence of residues, OJ 1986 L 275, p. 36. The same scheme is to be found in the Treaty provisions relating to Community environmental policy (Article 130t of the EEC Treaty).

national court must, if necessary, refuse to apply the national rules. The court dealing with the case must examine all these circumstances of its own motion.

28. As the administration of hormones permitted under Community law is possible only in compliance with detailed control procedures and guarantees, [18] there should be no practical obstacle to taking account of such matters in judicial proceedings.

29. (b) The examination of unilateral measures taken by a Member State in the context of a common organization of a market leads to the same result. The Court has ruled on numerous occasions [19] that

'once the Community has established a common market organization in a particular sector, the Member States must refrain from taking any unilateral measure which consequently falls within the competence of the Community.' [20]

30. Since 1968 trade in beef and veal has been subject to a common organization of the market. [21]

31. The fact that the Community prohibitions of hormones were introduced at a later date and by means of separate directives [22] can hardly lead to the conclusion that they were adopted outside the scope of the organization of the market in beef and veal and for that reason cannot be judged according to the principles of the common organization of agricultural markets. The basic prohibition of trade in treated meat and the provisions governing trade in such meat under the derogating conditions must in any event be regarded as falling within the scope of the organization of the market in beef and veal.

32. It cannot be argued against this that the general ban on the administration of certain substances having a hormonal and thyrostatic action goes beyond the matters regulated by the common organization of the market in beef and veal.

33. On a schematic approach also, therefore, the Member States are precluded under the principles of the common organization of agricultural markets from imposing more extensive unilateral prohibitions.

34. An absolute prohibition of keeping in stock animals treated with hormones could undermine the circumscribed possibility of marketing treated animals and their meat. For that reason, the keeping and trading

18 — Directive 88/146, OJ 1988 L 70, p. 16.

19 — See judgments in Case 216/84 *Commission* v *France* [1988] ECR 793, at paragraph 18; Case 407/85 *3 Glocken* [1988] ECR 4233, at paragraph 26; Case 274/87 *Commission* v *Germany* [1989] ECR 229, at paragraph 21.

20 — Paragraph 18 of the judgment in Case 216/84, cited above.

21 — Regulation (EEC) No 805/68 of the Council of 27 June 1968, OJ, English Special Edition 1968 (I), p. 187.

22 — Directives 81/602 and 88/146.

of animals permitted under derogating provisions of Community law must also be permitted by the laws of the Member States. In judicial proceedings, the court seised of the case must therefore consider of its own motion potential exculpatory factors.

35. (c) Finally, it remains for me to examine whether an unconditional prohibition of the keeping in stock of treated animals imposed by the law of a Member State infringes general provisions of the Treaty. One possibility might be a breach of the EEC Treaty provisions on the free movement of goods. [23] However, the Community law provisions of relevance to an assessment of the present case [24] were all adopted in the context of the Common Agricultural Policy and based on Article 43 of the EEC Treaty. Since the common policies under the Treaty take precedence over general provisions, it is unnecessary to examine the rules on the free movement of goods.

Costs

36. For the parties to the main proceedings, a reference for a preliminary ruling is in the nature of a step in the main action. A decision on costs is therefore a matter for the national court. The costs incurred by the Netherlands Government and the Commission are not recoverable.

C — Conclusion

37. On the basis of the foregoing considerations I propose the following answer to the question referred by the national court:

On a proper construction of Directives 81/602/EEC and 88/146/EEC, a prohibition imposed by national criminal law of the keeping in stock of cattle treated with hormones is in principle compatible with those directives in so far as it takes account of the derogating provisions contained therein; this is a matter which the national court must examine and establish of its own motion.

23 — See Article 30 et seq. of the EEC Treaty.

24 — Directive 81/602: Directive 85/358; Directive 86/469, on which Directive 88/299 is based; Regulation No 805/68; and Regulation No 2377/90.