OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 13 December 2001 [1]

I — Introduction

1. In this reference for a preliminary ruling the Court is asked to answer the question whether a national ban on the presence of a pathogenic micro-organism — *Listeria monocytogenes* — in smoked fishery products for human consumption is compatible with Community law. The Bezirksgericht Innere Stadt Wien (Inner City of Vienna District Council) has requested an interpretation of Council Directive 91/493/EEC of 22 July 1991 laying down the health conditions for the production and the placing on the market of fishery products ('the Directive'). [2] The response to this question requires an examination of the compatibility of such 'zero tolerance' with Articles 28 and 30 EC regarding the free movement of goods.

II — Legal background

A — *Community law*

2. The Directive sets out the essential requirements for the hygienic handling of fresh and processed fishery products at all stages of production, storage and transport. [3] These essential requirements are in part laid down in some detail and in part comprise general rules requiring further elaboration.

3. According to Article 3(1)(d) of the Directive, fishery products caught in their natural environment may only be placed on the market if they have undergone a health check in accordance with Chapter V of the Annex. The second part of that chapter lays down special conditions for, inter alia, microbiological analyses. As regards these microbiological analyses, Chapter V, sec-

1 — Original language: Dutch.

2 — OJ 1991 L 268, p. 15.

3 — See the fourth recital in the preamble.

tion II, point 4, states that in accordance with the procedure laid down in Article 15 of the Directive the Commission or the Council can establish microbiological criteria, should this be necessary in order to protect public health.

4. Article 6(1) of the Directive requires the Member States to ensure that persons responsible for establishments take all necessary measures to observe the health rules, in particular with regard to the identification of critical points and the establishment and implementation of methods for monitoring and checking such critical points. Under Article 6(3) of the Directive, rules for the application of those principles are to be established in accordance with the procedure laid down in Article 15 of the Directive.

5. On the basis in particular of Article 6(3) of the Directive, the Commission adopted on 20 May 1994 Decision 94/356/EC laying down detailed rules for the application of Council Directive 91/493/EEC as regards own health checks on fishery products ('the Decision'). [4]

6. Under Article 2(1) of the Decision a 'critical point' within the meaning of Article 6(1) of the Directive is 'any point, step or procedure at which control can be applied and a food safety hazard can be prevented, eliminated or reduced to acceptable levels'. In identifying the critical points the provisions of Chapter I of the Annex to the Decision are applicable.

7. Point 6 of Chapter I of the Annex provides for the establishment of a list of the hazards and risk control measures. Point 6(a) of Chapter I states that 'hazard' should be understood to mean 'a potential to cause harm to health and is anything covered by the hygiene objectives of Directive 91/493/EEC'. More specifically it can concern 'unacceptable contamination' of a biological nature, including by micro-organisms, and 'unacceptable' survival or multiplication of pathogenic micro-organisms. According to point 6(b) of Chapter I the measures regarding risk control cover measures to prevent a hazard, to eliminate it or to reduce its impact or occurrence to an 'acceptable level'. Furthermore, one measure may be used to control a variety of risks. To illustrate this it is stated that 'pasteurisation or controlled heat treatment may provide sufficient assurance of reduction of the level of both *salmonella* and *listeria*'.

4 — OJ 1994 L 156, p. 50.

B — *National law*

8. According to Paragraph 51 of the Lebensmittelgesetz 1975 ('the LMG')[5] the Bundesminister für Gesundheit und Umweltschutz (Federal Minister for Health and Environmental Protection) is responsible for the publication of the Austrian Foodstuffs Manual, the Codex Alimentarius Austriacus ('the manual'). The manual sets out technical designations, definitions, methods of analysis and assessment criteria as well as guidelines for the placing on the market of goods that are subject to the LMG. National case-law has established that the manual does not have legislative character but is an authoritative source of reference in matters of consumer protection.

9. Paragraph 52(1) of the LMG requires the so-called Codex Commission to be set up to advise the Federal Minister on matters covered by the LMG and on the preparation of the Codex Alimentarius Austriacus. According to Paragraph 53 the Codex Commission appoints the Permanent Hygiene Committee, a consultative body representing various interest groups.

10. Paragraph 8a of the LMG provides that foodstuffs and consumer products are harmful to health if they are capable of endangering or damaging health. Paragraph 56(1)(1) states that anyone who places on the market foodstuffs or products for consumption that are harmful to health is to be prosecuted. Under Paragraph 57(1) negligent conduct in this respect is also punishable.

11. The Directive and the Decision have been incorporated into Austrian law by the Verordnung der Bundesministerin für Frauenangelegenheiten und Verbraucherschutz über Hygienebestimmungen für das Inverkehrbringen von Fischerzeugnissen ('Fischhygieneverordnung')[6] (Regulation of the Federal Minister for Women and Consumer Protection on health requirements for the placing on the market of fishery products).

III — Facts and the question referred for a preliminary ruling

12. The court which referred the question has described the facts and background of the main action as follows.

5 — BGBl. No 86/1975, as amended.

6 — BGBl. No 260/1997.

13. W. Hahn or the representatives of the company Nordsee GmbH are suspected of negligently placing on the market foodstuffs harmful to human health. Between the end of 1998 and the beginning of 1999, in particular, a series of samples was taken at the headquarters and various branches of Nordsee GmbH, or in supermarkets to which the company had delivered fishery products. The samples were taken partly in routine checks by food inspectors and partly as a result of complaints from affected parties following symptoms of food poisoning. The foodstuffs which were later rejected as unfit consisted of smoked fish products (choice smoked salmon, smoked salmon from Denmark and the North Sea, both sliced and in rolls).

14. None of the goods exhibited any particular characteristics in the sensory examination (in terms of appearance, smell and taste); the expiry date had not been reached. However, the foodstuffs concerned were found to be contaminated with *Listeria monocytogenes*, shown in each case to be present in a sample of 25 g. The qualitative examination in each case was not followed by a quantitative examination. The foodstuffs were declared unfit and criminal proceedings were instigated.

15. The referring court explains that on 9 February 1998 the competent Hygiene Committee adopted a method for determining the presence of *Listeria monocytogenes*: in a sample with a stable original weight of 25 grams, of products which either had not been further treated but stabilised by other means — for instance, by smoking, the addition of salt or vacuum packaging — or which were uncooked and ready to eat or which had been heat-treated, a negative finding can only be expressed as 'not detectable in 25 g' (zero tolerance). When there is evidence of *Listeria monocytogenes*, the food must be classified as harmful to health.

16. The national court also stated that scientific investigations have concluded that such zero tolerance is not justifiable. This is based particularly on the fact that *Listeria monocytogenes* are very widespread in the environment and in food, whereas the incidence of illness is very small. Moreover, during the treatment of foodstuffs, even under conditions of good manufacturing practice, it appears impossible to achieve the total absence of *Listeria monocytogenes*.

17. Regardless of this fact, the competent Hygiene Committee decided on 30 March 1998 to retain its decision on zero tolerance. The decision was subsequently qualified to the extent that, in products that have not been heat-treated but have been chemically preserved, a tolerance limit of up to 100 *listeria* per gram is not considered to be harmful to health.

18. The national court considers the question of whether a legal provision may lay down a policy of zero tolerance for *Listeria monocytogenes*, or whether in accordance with the Directive the risk must be reduced to an 'acceptable level', to be decisive in the criminal proceedings. Consequently, the Bezirksgericht Innere Stadt Wien made an order on 21 March 2000, which was received at the Registry of the Court of Justice on 30 March 2000, requesting a preliminary ruling on the following question:

'Is Council Directive 91/493/EEC of 22 July 1991 laying down the health conditions for the production and placing on the market of fishery products, which has been implemented in national law by the Verordnung der Bundesministerin für Frauenangelegenheiten und Verbraucherschutz über Hygienebestimmungen für das Inverkehrbringen von Fischerzeugnissen ("Fischhygieneverordnung", BGBl. No 260/1997), to be interpreted generally as precluding the application of provisions of national law which, in respect of fishery products which are not chemically preserved (in particular, smoked salmon), lay down zero tolerance as regards the contamination of such foodstuffs with *Listeria monocytogenes*?'

19. Written observations were submitted by Mr Hahn, the Staatsanwaltschaft Wien (Vienna Public Prosecutor's Office), the Republic of Austria and the Commission. On 23 October 2001 an oral hearing took place, at which Mr Hahn and the Commission explained their positions.

IV — Analysis

A — *Introduction*

20. The heart of the question posed by the Bezirksgericht is whether Community law allows a Member State to maintain zero tolerance for *Listeria monocytogenes* in fishery products that have not been chemically preserved, in particular smoked salmon.

21. In their observations Mr Hahn, the Republic of Austria and the Commission discuss both secondary Community law and the Treaty provisions relating to the free movement of goods. Mr Hahn has suggested to the Court that the Directive and, alternatively, Articles 28 and 30 EC are to be interpreted in such a way as to preclude national provisions laying down the contested zero tolerance. The Republic of Austria and the Commission are of the opinion that Community law is compatible with such zero tolerance.

22. As will be made apparent below, I am in agreement with the views expressed by the Republic of Austria and the Commission. In my opinion, the application of zero tolerance for *Listeria monocytogenes* in smoked fishery products at issue in these proceedings is within the scope of the Directive and complies with the Treaty rules regarding the free movement of goods.

B — *Admissibility*

23. First, however, we must consider the argument of the Staatsanwaltschaft Wien that Austrian law contains no rule 'on the basis of which fishery products that have not been chemically preserved (in particular smoked salmon) are subject to zero tolerance in event of contamination of these foodstuffs with *Listeria monocytogenes*'. According to the Staatsanwaltschaft, the manual lays down in general terms when fishery products are harmful to public health. It is based upon generally accepted expert reports that do not bind the courts and do not preclude them from taking their own evidence. Nor are they bound by the opinion of the Permanent Hygiene Committee. According to the Staatsanwaltschaft the request from the Bezirksgericht is therefore purely a question of fact.

24. By implication, therefore, the Staatsanwaltschaft asks the Court to declare that it has no jurisdiction to rule, since the main proceedings do not concern a question of law. In my view this argument fails. It is sufficient to point out that the Bezirksgericht has stated that the question as to the legitimacy under Community law of zero tolerance for *Listeria monocytogenes* is a determining factor for the criminal proceedings concerned, regardless of the legal character of the provision in question according to national law. Should zero tolerance not be permissible under Community law, the defendant cannot in this case be held criminally liable, according to the national court. Consequently, the interpretation of Community law requested is linked to the subject-matter of the main proceedings and relates to a genuine dispute. The Court is therefore competent to answer the question referred. [7]

7 — See for instance Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraphs 30 and 31).

C — *Consideration of zero tolerance in the light of secondary Community law*

25. Mr Hahn argues that the position of the Austrian authorities that the presence of *Listeria monocytogenes* in 25 grams would automatically endanger health is in contradiction with the wording of the Directive and the provisions implementing the Decision. If *Listeria monocytogenes* should not be present at all in fishery products, that would undoubtedly have been expressed by incorporating zero tolerance in those rules. The two standards adopted by the European legislature however, according to Mr Hahn, are on the one hand an 'unacceptable' degree and on the other hand (particularly in connection with *Listeria monocytogenes*) reduction to an 'acceptable level'. [8] It can thus be concluded that the mere presence of *Listeria monocytogenes* cannot lead to the withdrawal from the market of certain fishery products. Furthermore, the Austrian measure is based on a fiction in terms of foodstuffs law, the presence of *Listeria monocytogenes* in 25 grams being equated with danger to public health.

26. I consider rather that the Commission and the Austrian Government are correct in observing that secondary Community law does not provide for complete harmonisation with regard to limit values to combat the contamination of smoked fishery products with *Listeria monocytogenes*. That is shown by the absence of such specific values in the Community legislation and by the wording and scheme of the Directive.

27. The Directive itself contains no microbiological criteria, but provides in Chapter V, part II, point 4, that the Community legislature is competent to establish microbiological criteria in accordance with the comitology procedure laid down in Article 15. To date this procedure has only been used to adopt microbiological criteria for cooked crustaceans and molluscan shellfish. [9] Point 1 (pathogens) of the Annex to Decision 93/51 provides that the limit for 'salmonella spp.' is that it is to be 'absent in 25 g'. In addition, point 1 states that 'pathogens and toxins thereof which are to be sought according to the risk evaluation must not be present in quantities such as to affect the health of consumers'. The Commission has stated in this regard that *Listeria monocytogenes* undoubtedly belongs to these two groups. However, these criteria apply only to the relatively restricted group of cooked crustaceans and molluscan shellfish and not to smoked salmon or other smoked fishery products.

8 — See in particular point 6(a) and (b) of Chapter I of the Annex to the Decision, as cited in point 7 of this Opinion.

9 — Commission Decision 93/51/EEC of 15 December 1992 on the microbiological criteria applicable to the production of cooked crustaceans and molluscan shellfish (OJ 1993 L 13, p. 11). This decision is based on Chapter IV, section IV, point 7(c) of the Annex to the Directive.

28. Moreover, the Community legislature has to date laid down specific microbiological limits only for *Listeria monocytogenes* in certain milk-based products. For cheese and hard cheese the criterion is 'absent in 25 g', for other milk products 'absent in 1 g'. [10]

29. The Community legislature is thus competent to establish specific limits, including zero tolerance, relating to the presence of *Listeria monocytogenes*, but for smoked fishery products such specific implementing measures have not yet been adopted. This is also apparent from the fact that in a recent recommendation relating to foodstuffs controls the Commission expressly stated that specific microbiological standards for smoked fish are still lacking at Community level. [11] The Commission has also let it be known in its written observations that in the meantime, on the basis of the 23 September 1999 Opinion of the Scientific Committee on Veterinary Measures Relating to Public Health on *Listeria monocytogenes* which I shall discuss presently, it is preparing a draft decision that is partly based on the Directive and in which specific microbiological standards for smoked fish will be considered.

30. Furthermore, Mr Hahn's argument that 'acceptable' for the purposes of point 6(a) and (b) of Chapter I of the Annex to the Decision can in no way be interpreted as covering zero tolerance is in my view manifestly unsustainable. On the basis of these provisions the Member States may require establishments to limit hazards and risks to 'acceptable' levels by establishing microbiological criteria. The degree to which contamination, infection or hazard might be acceptable is related to the maximum amount permissible, beyond which the product is no longer considered fit to eat. The provisions cited do not in fact provide for standardisation on the basis of a minimum value. The Decision does not therefore preclude Member States from considering only zero tolerance to be acceptable for certain risks.

31. In the absence of exhaustive Community rules the Member States may continue to apply national law, although in doing so they must comply with the general provisions of the EC Treaty. A regulation such as that concerned in the main proceedings must therefore also be examined in the light of Articles 28 and 30 EC. [12]

10 — Annex C, Chapter II(A)(1), to Council Directive 92/46/EEC of 16 June 1992 laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products (OJ 1992 L 268, p. 1).

11 — See point 6.1 of the Commission Recommendation of 18 April 2001 concerning a coordinated programme for the official control of foodstuffs for 2001 (OJ 2001 L 120, p. 41).

12 — See for example to that effect Case 304/84 *Claude Muller and Others* [1986] ECR 1511, paragraph 14, and more recently Case C-67/97 *Bluhme* [1998] ECR I-8033, paragraphs 11 to 13.

D — *Zero tolerance considered in the light of Articles 28 and 30 EC*

32. In this respect it is indisputable that the threat of criminal proceedings under Paragraph 56(1) of the LMG together with the concept of risk for health under the LMG and the consequences of the policy of zero tolerance established by the Hygiene Committee effectively constitute a ban on the placing on the market of fishery products such as smoked salmon which contain *Listeria monocytogenes*. The ban is an obstacle to trade under Article 28 EC. It may in any case directly, actually or potentially restrict the import into Austria of products lawfully manufactured and marketed in other Member States. [13] The order for reference states in this connection that the fishery products which were declared unfit came partially from Denmark and the North Sea. [14]

33. Since Community harmonisation of limit values for *Listeria monocytogenes* in fishery products is not yet complete, the question arises as to whether such a measure is justified under Article 30 EC on the ground of protection of human health.

34. According to the established case-law of the Court the health and the life of humans rank foremost among the assets and interests protected by Article 30 EC, and in the absence of full harmonisation it is for the Member States to decide to what degree they wish to protect the health and life of humans. In so doing they have a wide discretion but must take into account the requirements of the free movement of goods. In particular, a national rule or procedure will not be covered by the derogation under Article 30 EC if public health can be protected as effectively by measures less restrictive of intracommunity trade. [15] The Court derives this principle of proportionality from the final sentence of Article 30 EC, according to which restrictive measures based on the general interest may not constitute 'a means of arbitrary discrimination or a disguised restriction on trade between Member States'. [16]

35. The Court has clarified this basic principle, in particular when reviewing national legislation on additives. This case-law has been extensively referred to by the parties in their written observations and in the oral procedure. [17] The Austrian Gov-

13 — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5. See also Case 97/83 *Melkunie* [1984] ECR 2367, paragraph 11.

14 — It is not known whether the imported products were lawfully marketed in another Member State. As far as can be deduced from the order for reference the issue did not arise in the main proceedings.

15 — See for example Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747, paragraphs 26 and 27, and Case C-205/89 *Commission* v *Greece* [1991] ECR I-1361, paragraph 8.

16 — Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 18.

17 — For example Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, paragraphs 13 to 18.

ernment also briefly referred to *Melkunie* [18] and *Heijn* [19] in its written observations. It appears to me that those two judgments, far more than the so-called additives case-law, provide the key to the response to the Bezirksgericht.

36. The Court has already commented, in *Melkunie*, on the compatibility with Articles 28 and 30 EC of national provisions limiting the presence of pathogenic micro-organisms in foodstuffs. Two requirements imposed on pasteurised dairy products by the Netherlands legislation on consumer goods were at the centre of the main proceedings. First, active coliform bacteria were not to be detectable in 1 ml of pasteurised diary products. In few words the Court concluded that that zero tolerance must be considered to be justified within the meaning of Article 30 EC. It appeared from the documents before the Court that the presence of active coliform bacteria in a dairy product meant that there was a real risk of pathogenic micro-organisms being present. The presence of the micro-organisms was regarded as being a direct indication that the product might be a source of real danger to human health. [20]

37. Secondly, the Netherlands legislation on consumer goods stated that the number of active micro-organisms must not exceed 50 000 per ml (in the case of whipping cream that number must not exceed 200 000). In this regard the Court stated that as scientific knowledge stood it was not possible to establish with any certainty the precise quantity of such micro-organisms that would present a health risk in pasteurised dairy products. Consequently, it was for the Member States, taking into account the rules regarding the free movement of goods, to decide at what level they wished to protect the health and life of humans. On that basis the Court concluded that national legislation seeking to ensure that at the time of consumption the dairy product in question does not contain non-pathogenic micro-organisms in a quantity which might constitute a risk to the health of some particularly vulnerable consumers must be considered to be compatible with the requirements of Article 30 EC. [21]

38. The *Heijn* judgment confirms that the Member States are vested with a wide discretion should they, in the absence of Community rules in the field, take measures which can be justified as being necessary for the protection of public health within the meaning of Article 30 EC. In this case the Court deemed Netherlands legislation banning the marketing of apples lawfully placed on the market in Italy, due to the presence of 1 mg/kg of vinchlozoline, a pesticide residue, to be justified. It is well known that pesticides can constitute a major risk to human and animal health. In view of the fact that the quantities

18 — Cited in footnote 13.

19 — Case 94/83 *Heijn* [1984] ECR 3263.

20 — *Melkunie* (cited in footnote 13), paragraph 15.

21 — *Melkunie* (cited in footnote 13), paragraph 18.

absorbed by the consumer, in particular in the form of residues in foodstuffs, can neither be predicted nor controlled the Court decided that 'strict measures to reduce the risks faced by the consumer were justified'. Thus Member States may adopt regulations that vary from one country to another according to the national conditions, and they may permit different levels of the same pesticide in different foodstuffs. [22]

39. I shall therefore go on to consider, taking note of the results of recognised international scientific research, whether the absence of *Listeria monocytogenes* in smoked fishery products is objectively necessary for the protection of public health. Although in *Heijn* and *Melkunie* the Court did not expressly refer to it, on the basis of the second sentence of Article 30 EC the adopted measure also needs to be assessed for proportionality. [23]

40. On the basis of current scientific knowledge it is clear that the presence of *Listeria monocytogenes* in foodstuffs can pose a real public health risk. Data on this is contained in the documents before the Court. The referring court states that *Listeria monocytogenes* is a pathogen that causes infection in humans and animals leading to listeriosis. This disease affects predominantly children, older people and immunocompromised individuals. It frequently develops into septicaemia (blood-poisoning), or meningitis (an acute inflammation of the tissue covering the brain and spinal cord also known as cerebro-spinal meningitis). In pregnant women, it can lead to premature labour and miscarriage.

41. That is also apparent from recent international research, as the Scientific Committee on Veterinary Measures Relating to Public Health stated in its Opinion of 23 September 1999 on *Listeria monocytogenes*, which the Commission annexed to its written comments. [24] The Opinion contains a number of relevant findings and recommendations, which are based on a detailed review of the literature. While the incidence of the disease is relatively low (2 to 15 cases per million inhabitants), the fatality rate is reported to be between 20% and 40%, and may approach 75% in immunocompromised individuals. This image of *Listeria monocytogenes* as a bacterium that can occasionally cause disease, but can have particularly drastic

22 — *Heijn* (cited in footnote 19), paragraphs 15 and 16.

23 — Advocate General VerLoren van Themaat and Advocate General Lenz refer explicitly to the principle of proportionality in their Opinions in *Melkunie* and *Heijn* respectively.

24 — The Opinion was given at the request of the Commission and does not have a document reference number.

consequences for certain susceptible groups, is confirmed in a joint report that was drawn up in July 2000 at the request of the FAO and the World Health Organisation. [25]

42. *Listeria monocytogenes* can be transferred to numerous foodstuffs including fish. A recent Recommendation from the Commission regarding the official control of foodstuffs is based on past experience with regard to the bacteriological quality of smoked fish. The Recommendation states that a considerable percentage of smoked fish may be contaminated by pathogenic micro-organisms, including *Listeria monocytogenes*. The adoption of new techniques of production and processing may increase the risk of bacteriological contamination. The Commission considers that '*Listeria monocytogenes* is known to cause foodborne outbreaks of listeriosis in humans, with potentially fatal consequences for susceptible categories of the population and therefore actions shall be taken to reduce the risk of human listeriosis from food consumption.... in particular smoked fish'. [26]

43. The need for measures to prevent the contamination of smoked fishery products with *Listeria monocytogenes* in order to protect public health is therefore beyond question. However, the parties differ in their opinions with regard to the competence of a Member State to totally exclude the presence of *Listeria monocytogenes* in the foodstuffs in question.

44. Mr Hahn has argued that a total ban on marketing fishery products that contain *Listeria monocytogenes* is not compatible with the principle of proportionality. The need for zero tolerance cannot be objectively established, and the Austrian authorities have apparently taken no action to objectively substantiate the limits that a marketing ban adopted for public health reasons would require. In Austria it is merely assumed that there is a causal link between the use of the fishery products in question and the occurrence of disease.

45. Mr Hahn does not deny that the precautionary principle is gaining importance within the Community, but he considers that it is clear that *Listeria monocytogenes* represents a danger to health only for a limited section of the population, and that even for this group there are doubts as regards the existence of risk below the level of 100 *Listeria monocytogenes* per gram. Whilst these susceptible groups need to be aware of their higher sensitivity to certain

25 — See the Report of the Joint FAO/WHO Expert Consultation on Risk Assessment of Microbiological Hazards in Foods, report of ad hoc expert consultations which took place in Rome from 17 to 21 July 2000 (http://www.fao.org/WAICENT/FAOINFO/ECONOMIC/ESN/pagerisk/riskpage.htm; http://www.who.int/fsf/mbriskassess/index.htm).

26 — See the Recommendation of the Commission of 18 April 2001 (cited in footnote 11), paragraph 6.1.

foodstuffs, the relevant information could be supplied in the form of targeted consumer information, a means that Mr Hahn considers perfectly apt in view of the Community's wish to make better use of communication measures in combating food hazards.

46. The Commission and the Austrian Government disagree with that, and are of the opinion that zero tolerance is compatible with the principle of proportionality. The Commission refers to the current scientific debate regarding the precise microbiological standards for pathogenic bacteria, in particular *Listeria monocytogenes*, in various foodstuffs. In the Commission's view the principle of proportionality does not inevitably mean that higher standards such as zero tolerance are not necessary, or that lower standards are to be regarded as measures having equivalent effect that restrict intracommunity trade to a lesser degree. The Commission considers that, until the provisional scientific evidence in this area results in a Community provision, the Member States may on the basis of the precautionary principle adopt strict microbiological standards, in particular for the protection of the health of groups at risk.

47. In my opinion the proportionality principle is not a static concept, but should rather be considered in the light of the intended objective. I conclude from the written observations of the Austrian Government and the Commission that the measure at issue aims primarily to protect certain vulnerable groups, such as children, pregnant women and older people. That is a legitimate aim. As already explained, it can be deduced from the present state of scientific knowledge that the consumption of foodstuffs contaminated with *Listeria monocytogenes* can have fatal consequences precisely for those categories of consumers. Furthermore, in the *Melkunie* judgment it is explicitly recognised that national health measures aimed at protecting 'some particularly vulnerable consumers' are permitted. [27]

48. The Austrian measure banning *Listeria monocytogenes* in fishery products not chemically preserved is in itself a strict rule. The measure assumes that the products can be considered to be a health risk purely on the basis of a qualitative analysis. The mere presence of *Listeria monocytogenes* in the foodstuff is sufficient for the trader to incur criminal liability. In my view, however, it is precisely because of the far-reaching aim of protecting vulnerable groups that the principle of proportionality permits strict measures to be taken in order to limit the risks for the consumers in question. As I see it, this view also underlies the judgments in *Melkunie* and *Heijn*.

49. Moreover, considered objectively, the Austrian measure is not impracticable.

27 — See paragraph 37 of this Opinion.

Insofar as the Community legislature has taken over the residual national competence in the area of measures to combat *Listeria monocytogenes,* zero tolerance has likewise been effectively adopted. I would refer here to the maximum limit value 'absent in 25 g' that has been laid down for cheese and hard cheese.[28] Moreover, a comparative review of the existing laws demonstrates that zero tolerance is also in place in other countries both within and outside the EU.[29]

50. There are currently no binding international limits for contamination with *Listeria monocytogenes.* It is apparent from both the 23 September 1999 Opinion of the Scientific Committee and the conclusions of the Joint FAO/WHO Expert Consultation in 2000 that there is currently — although neither the referring court nor Mr Hahn appears to agree with this — a lack of clarity as regards the acceptable limits for contamination with *Listeria monocytogenes* as regards the most vulnerable groups of the population. It appears to be generally accepted that, even for these vulnerable groups, a tolerance level of < 100 cfu/g[30] would pose minimal risks; however, no absolute certainty exists on this point. The category of foodstuff, the means of preparation and storage and also perhaps the amount consumed are all factors that can play a role in the cause of disease. The scientific reports make it abundantly clear that there is a lack of adequate and reliable data.

51. In view of this uncertainty, as the Commission has also maintained, strict zero tolerance can be justified, in considering proportionality, under the precautionary principle. The fact that Austria does not enforce zero tolerance with regard to *Listeria monocytogenes* for all foodstuffs does not alter that. The Court has already conceded in the *Heijn* case that such differences may exist. Such differentiation is also in line with discussions among experts in the context of the FAO and the World Health Organisation, and the Community legislature has not imposed a uniform standard.

52. Furthermore, I do not consider that the promotion of consumer education and information, as proposed by Mr Hahn, as a less restrictive measure, is an alternative equivalent to the establishment of strict maximum limits to combat a dangerous source of infection such as *Listeria monocytogenes.*

53. I therefore consider that provisions of national law which, in respect of fishery products not chemically preserved, lay down a policy of zero tolerance of contamination of such foods with *Listeria monocytogenes* are justified within the meaning of Article 30 EC.

28 — See paragraph 28 of this Opinion.

29 — The Commission referred in its written observations to the fact that Italy and the United States apply zero tolerance for contamination of foodstuffs with *Listeria monocytogenes,* whilst countries like Denmark and Canada prohibit the presence of *Listeria monocytogenes* in certain foodstuffs.

30 — Colony forming units per gram.

V — Conclusion

54. Accordingly I propose that the Court reply to the question referred by the Bezirksgericht Innere Stadt Wien as follows:

(1) As currently implemented Council Directive 91/493/EEC of 22 July 1991 laying down the health conditions for the production and the placing on the market of fishery products is not incompatible with the application of provisions of national law which, in respect of fishery products not chemically preserved (in particular, smoked salmon), lay down a policy of zero tolerance of contamination of such foods with *Listeria monocytogenes*.

(2) These provisions of national law also comply with the requirements of Article 30 EC.