JUDGMENT OF THE COURT
23 February 1988 *

In Case 131/86

United Kingdom of Great Britain and Northern Ireland, represented by H. R. L. Purse, of the Treasury Solicitor's Department, acting as Agent, assisted by Richard Plender, Barrister, with an address for service in Luxembourg at the British Embassy, 28 boulevard Royal,

applicant,

v

Council of the European Communities, represented by Antonio Sacchettini, a director in its Legal Department, and Moyra Sims, Administrator, acting as Agents, with an address for service in Luxembourg at the office of Jörg Käser, Director of the Legal Department of the European Investment Bank, 100 boulevard Konrad Adenauer, Kirchberg,

defendant,

supported by

Commission of the European Communities, represented by its Legal Adviser Dierk Booss and by D. Grant Lawrence, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

intervener,

APPLICATION for the annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages,

* Language of the Case: English.

THE COURT

composed of: G. Bosco, President of Chamber, acting as President, G. C. Rodríguez Iglesias (President of Chamber), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet and T. F. O'Higgins, Judges,

Advocate General: J. Mischo
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 24 June 1987, at which the applicant was represented by Sir Patrick Mayhew, QC, and R. Plender, Barrister,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 October 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 29 May 1986 the United Kingdom brought an action pursuant to Articles 173 and 174 of the EEC Treaty for the annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages (Official Journal 1986, L 95, p. 45, hereinafter referred to as 'the directive').

2 The main purpose of the directive is to lay down minimum standards which must be met from 1 January 1988 by newly built cages for laying hens and cages brought into use for the first time and from 1 January 1995 by all battery cages, and to lay down minimum conditions for the keeping of laying hens. It also auth-

orized the granting, until the end of the transitional period, of national aid intended for the functional extension of buildings housing the battery cages necessary for rearing the same number of hens.

3 The draft directive, which was based only on Article 43 of the Treaty, was adopted by the Council on 25 March 1986 by majority vote; Denmark and the applicant voted against its adoption.

4 On 15 April 1986 the final version of the directive, corresponding to the version published in the Official Journal of the European Communities, was notified to the United Kingdom. The preamble to that version, which was drawn up by the General Secretariat of the Council, differs in several respects from the version on which the Council voted.

5 Reference is made to the Report for the Hearing for a more extensive account of the facts and of the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

6 With regard to the doubts expressed by the Council concerning the United Kingdom's interest in bringing proceedings and hence the admissibility of the action, it need merely be pointed out that Article 173 of the Treaty draws a clear distinction between the right of action available to the Community institutions and the Member States on the one hand and that available to natural or legal persons on the other. The first paragraph of Article 173 gives each Member State, *inter alia*, the right to bring an action for annulment in order to challenge the legality of any Council directive without making the exercise of that right conditional on proof of an interest in bringing proceedings (see the judgment of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1493). The action is therefore admissible.

Substance

7 The United Kingdom's action for annulment is based on allegations that the statement of the reasons for the contested directive was not sufficient and that procedural irregularities took place after its adoption by the Council.

First submission

8 In support of its application the United Kingdom relies first of all on an alleged infringement of Article 190 of the Treaty, arguing that the legal basis of the directive is insufficient inasmuch as, according to its preamble, it is based only on Article 43 of the Treaty. Since the directive is designed for two different purposes, one in the area of agricultural policy and the other concerning the harmonization of national legislation on the protection of animals, it should also have been based on Article 100 of the Treaty and have complied with the procedural requirements laid down in that article. It is clear from the preparatory documents relating to the directive that its essential purpose is animal welfare. Furthermore, the United Kingdom asserts that the Council's action constitutes a departure from its practice in such matters prior to December 1985; it was formerly the Council's practice to base directives on both Article 43 and Article 100 of the Treaty.

9 The Council, backed by the Commission, which intervened in its support, argues that Article 100 of the Treaty is a residual and subsidiary provision which does not apply in this case, since Article 43 of the Treaty is on its own an adequate legal basis for the adoption of the directive in question. A measure which pursues an agricultural objective or has such an objective as its principal purpose must necessarily and exclusively be based on that article even if it is intended to result in the approximation of laws. As for the alleged change of practice, the Council submits that the practice of a dual legal basis referred to by the applicant originated in a political compromise reached within the Council in 1964, which was without prejudice to its future action.

10 The Council and the Commission also assert that the directive in question seeks to pursue the objectives set out in Article 39 of the Treaty, in particular to prevent distortions of competition on the market for poultry and eggs which might result from differences in the conditions in which animals are kept in different Member States.

11 It should be pointed out first of all that in this case the argument with regard to the correct legal basis is not a purely formal one, inasmuch as Articles 43 and 100 of the Treaty entail different rules regarding the manner in which the Council may arrive at its decision. The choice of the legal basis could thus affect the determination of the content of the contested directive.

12 Consequently, in order to determine whether the submission based on the alleged insufficiency of the legal basis of the directive at issue is well founded it is necessary to consider whether the Council had the power to adopt it on the basis of Article 43 alone.

13 By virtue of Article 38 of the Treaty, the provisions of Articles 30 to 46 apply to the products listed in Annex II to the Treaty.

14 Article 43, moreover, must be interpreted in the light of Article 39, which sets out the objectives of the common agricultural policy, and Article 40, which governs its implementation, providing *inter alia* that in order to attain the objectives set out in Article 39 a common organization of agricultural markets is to be established and that that organization may include all measures required to attain those objectives (judgment of 21 February 1979 in Case 138/78 *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713).

15 The agricultural policy objectives set out in Article 39 of the Treaty include in particular the increasing of productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production. Moreover, Article 39 (2) (b) and (c) provides that in working out the common agricultural policy account must be taken of the need to effect the appropriate adjustments by degrees and the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole. It follows that agricultural policy objectives must be conceived in such a manner as to enable the Community institutions to carry out their duties in the light of developments in agriculture and in the economy as a whole.

16 Measures adopted on the basis of Article 43 of the Treaty with a view to achieving those objectives under a common organization of the market as provided for in Article 40 (2) may include rules governing conditions and methods of production, quality and marketing of agricultural products. The common organizations of the markets contain many rules in that regard.

17 Efforts to achieve objectives of the common agricultural policy, in particular under common organizations of the markets, cannot disregard requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals, requirements which the Community institutions must take into account in exercising their powers.

18 Finally, it must be observed that according to Article 42 of the Treaty the rules on competition are to apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of provisions adopted pursuant to Article 43. Consequently, in adopting such provisions the Council must also take into consideration the requirements of competition policy.

19 It follows from the provisions discussed above, taken as a whole, that Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex II to the Treaty which contributes to the achievement of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty. There is no need to have recourse to Article 100 of the Treaty where such legislation involves the harmonization of provisions of national law in that field.

20 As the Court has pointed out, in particular in its judgments of 29 November 1978 in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347 and of 26 June 1979 in Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161, Article 38 (2) of the Treaty gives precedence to specific provisions in the agricultural field over general provisions relating to the establishment of the common market.

21 Consequently, even where the legislation in question is directed both to objectives of agricultural policy and to other objectives which, in the absence of specific provisions, are pursued on the basis of Article 100 of the Treaty, that article, a general one under which directives may be adopted for the approximation of the laws of the Member States, cannot be relied on as a ground for restricting the field of application of Article 43 of the Treaty.

22 It is on the basis of the foregoing considerations that it must be determined whether or not the contested directive falls within the scope of Article 43 of the Treaty as described above.

23 It appears from the documents before the Court that in the Community the keeping of laying hens in battery cages is the most widely used means of egg production, eggs being agricultural products listed in Annex II to the Treaty. Egg production is covered by the common organization of the market in eggs, the rules for which were laid down by Council Regulation No 2771/75 of 29 October 1975 (Official Journal 1975, L 282, p. 49). Article 2 of that regulation provides *inter alia* for Community measures to promote better organization of egg production and to improve quality. As the Court had occasion to point out in its judgment of 30 November 1978 in Case 31/78 *Bussone* [1978] ECR 2429), the characteristic feature of the organization of the market in eggs is compliance with common rules on competition and the introduction of common quality standards, having the purpose of encouraging trade initiatives with a view to improving the quality of the products and of perfecting the organization of production.

24 In laying down minimum standards for the keeping of laying hens, the directive forms part of that common organization of the market established in pursuit of the objectives set out in Article 39 of the Treaty. The parties are agreed that the Member States have laid down differing rules governing the conditions and methods of keeping laying hens in battery cages. The resulting variations in

conditions of production from one Member State to another are likely to give rise to distortions of competition which the common organization of the market is intended to eliminate. By laying down common minimum standards and authorizing national aid to facilitate the application of those standards the directive therefore pursues the objectives of Article 39 of the Treaty.

25 Against those considerations the United Kingdom argues that it is clear from the preparatory documents relating to the directive that its essential objective was animal welfare. It refers in that regard to the European Convention for the Protection of Animals kept for Farming Purposes, which was approved by the Council in the name of the Community by its Decision of 19 June 1978 (Official Journal 1978, L 323, p. 12).

26 However, a survey of the preparatory measures referred to by the parties shows that the decision to harmonize the standards applicable to animals kept for farming purposes was made essentially with a view to eliminating unequal conditions of competition in that field. In the preamble to its decision of 19 June 1978, referred to above, the Council stated that 'there are disparities between existing national laws on the protection of animals kept for farming purposes which may give rise to unequal conditions of competition and which may consequently have an indirect effect on the proper functioning of the common market' and that 'the convention deals with matters which are covered by the common agricultural policy'. The first of those recitals is repeated almost word for word in the Council Resolution of 22 July 1980 on the protection of layer hens in cages (Official Journal 1980, C 196, p. 1). It also appears in the draft of the contested directive put to the vote in the Council on 25 March 1986, where reference is made more particularly to interference 'with the smooth running of the organization of the common market in eggs and poultry' and, with some changes in the wording, in the version of the directive notified to the Member States.

27 It is true that the preparatory documents show that the directive was also conceived with a view to ensuring better treatment for laying hens, along the lines of the Convention referred to above. However, it must be emphasized that, as was pointed out above, varying national rules regarding agricultural products which may affect the proper functioning of a common organization of the market, such as, in this case, differing conditions for the keeping of laying hens, may be harmonized on the basis of Article 43 of the Treaty alone, and there is no need to have recourse to Article 100.

28 Finally, the United Kingdom argues that the Council departed from its consistent practice of basing measures in this field on both Article 43 and Article 100 of the Treaty.

29 On that point it is sufficient to state that the determination of the appropriate legal basis for a measure does not depend on the discretion of the Community legislature but must be based on objective factors which are amenable to judicial review (see the judgment of 26 March 1987 in Case 45/86, referred to above). A previous Council practice of adopting legislative measures in a particular field on a dual legal basis cannot derogate from the rules laid down in the Treaty. Such a practice cannot therefore create a precedent binding on the Community institutions with regard to the determination of the correct legal basis.

30 The applicant's first submission must therefore be rejected in its entirety.

Second submission

31 In its second submission the United Kingdom argues that the contested directive may be annulled on the ground that it differs from the text considered by the Council. The General Secretariat of the Council has no power to amend a text on which the Council has voted, except in the case of simple typographical or syntactic corrections. The United Kingdom further argues that the alterations in question are not permissible merely because they were made to the preamble to the directive rather than to its actual text.

32 The Council maintains that the alterations in the wording of the preamble to the directive are purely formal in nature and are intended to express more clearly the intention of its author. Such rewording falls within the discretion of the General Secretariat of the Council and is acceptable in so far as it does not amount to a substantive alteration in the measure itself.

33 The parties are agreed that the wording of the contested directive differs in a number of respects from the draft considered and voted on by the Council on 25 March 1986 and that the alterations in question were made by the General Secretariat of the Council. In particular, it appears from the documents before the Court that:

the redrafted version published in the Official Journal contains an added reference to Article 42 of the Treaty;

the references to the European Convention for the Protection of Animals kept for Farming Purposes and to the Council decision approving that Convention were replaced by a reference to the common organization of the market and to the rules on the conditions under which egg production takes place;

the remark to the effect that the directive constitutes the first step in the establishment of common minimum requirements applicable in all intensive housing systems was removed.

34 According to Article 9 of the Council's Rules of Procedure, adopted on 24 July 1979 (Official Journal 1979, L 268, p. 1), the texts of the acts adopted by the Council are to be signed by the President-in-Office at the time of their adoption and by the Secretary-General. Directives, decisions and recommendations of the Council are then notified by the President, who may entrust to the Secretary-General the task of attending to such notifications on his behalf (see Article 15).

35 However, the Council's Rules of Procedure do not authorize the Secretary-General or the staff of the General Secretariat to make alterations or corrections to texts adopted by the Council. Although it is clearly part of the duties of the Council's General Secretariat to correct spelling and grammar, that discretion cannot extend to the content of the measure in question.

36 In this case the alterations made by the Council's General Secretariat concern only the statement of the reasons on which the directive is based and do not affect the body of the measure itself. However, that statement of reasons was prepared pursuant to Article 190 of the Treaty, which requires that regulations, directives

and decisions of the Council and of the Commission should contain a statement of the reasons which led the institution to adopt them, so as to make possible a review by the Court and so that the Member States and the nationals concerned may be aware of the conditions under which the Community institutions have applied the Treaty (see the judgment of 7 July 1981 in Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805).

37 It follows that the statement of reasons is an essential part of a measure. Consequently, neither the Secretary-General of the Council nor the staff of its General Secretariat has the power to alter the statement of the reasons for a measure adopted by the Council.

38 In this case it is clear that the alterations made to the notified and published version of the directive in question go beyond simple corrections of spelling and grammar.

39 It follows that the United Kingdom's second submission is well founded. Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages must therefore be declared void.

Costs

40 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, according to the first subparagraph of Article 69 (3), the Court may, where each party succeeds on some and fails on other heads or where the circumstances are exceptional, order the parties to bear their own costs in whole or in part.

41 The main aspect of this case was the institutional question of the choice of the legal basis for the contested directive, which was the subject of the United Kingdom's first submission. Since the United Kingdom failed in that submission, although it was successful in its second submission, the parties, including the intervener, must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

(1) Declares void Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages;

(2) Orders the parties, including the intervener, to bear their own costs.

Bosco Rodríguez Iglesias Koopmans Everling

Bahlmann Galmot Kakouris Joliet O'Higgins

Delivered in open court in Luxembourg on 23 February 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President