JUDGMENT OF THE COURT (Sixth Chamber)
12 November 1998 *

In Case C-102/96,

Commission of the European Communities, represented by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg.

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in the same Ministry, acting as Agents,

defendant,

APPLICATION for a declaration that, by imposing the obligation of marking the carcases of uncastrated male pigs and subjecting them to heat treatment whenever the meat, regardless of carcase weight, has an androstenone content of more than 0.5 g/g, as shown by Professor Claus's modified enzyme immunoassay, and by regarding the meat as giving off a pronounced sexual odour and consequently unfit for human consumption if the threshold of 0.5 g/g of androstenone is exceeded, the Federal Republic of Germany has failed to fulfil its obligations under Article 5(1)(o) and Article 6(1)(b) of Council Directive 64/433/EEC of 26 June 1964 on health problems affecting intra-Community trade in fresh meat (OJ, English Special

* Language of the case: German.

Edition 1963-1964, p. 185), as reenacted by Council Directive 91/497/EEC of 29 July 1991 (OJ 1991 L 268, p. 69), in conjunction with Articles 5(1), 7 and 8 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) and under Article 30 of the EC Treaty,

THE COURT (Sixth Chamber),

composed of: G. Hirsch, President of the Second Chamber, acting as President of the Sixth Chamber, G. F. Mancini, J. L. Murray (Rapporteur), H. Ragnemalm and K. M. Ioannou, Judges,

Advocate General: A. La Pergola,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 20 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 3 February 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 27 March 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty

for a declaration that, by imposing the obligation of marking the carcases of uncastrated male pigs and subjecting them to heat treatment whenever the meat, regardless of carcase weight, has an androstenone content of more than 0.5 g/g, as shown by Professor Claus's modified enzyme immunoassay, and by regarding the meat as giving off a pronounced sexual odour and consequently unfit for human consumption if the threshold of 0.5 g/g of androstenone is exceeded, the Federal Republic of Germany has failed to fulfil its obligations under Article 5(1)(o) and Article 6(1)(b) of Council Directive 64/433/EEC of 26 June 1964 on health problems affecting intra-Community trade in fresh meat (OJ, English Special Edition 1963-1964, p. 185), as reenacted by Council Directive 91/497/EEC of 29 July 1991 (OJ 1991 L 268, p. 69), in conjunction with Articles 5(1), 7 and 8 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) and under Article 30 of the EC Treaty.

2 Public health requirements for intra-Community trade in fresh meat have been the subject of Community rules since the entry into force of Directive 64/433. That directive was amended by Directive 91/497 to take account of the abolition of veterinary checks at frontiers between Member States and to introduce more stringent health guarantees in the Member State of origin. The amending directive specified *inter alia* the conditions under which certain sorts of meat may be declared unfit for human consumption or subject to particular requirements as regards marking or heat treatment.

3 Article 5 of Directive 64/433, as reenacted by Directive 91/497, provides:

'1. Member States shall ensure that the official veterinarian declares unfit for human consumption:

...

(o) meat which gives off a pronounced sexual odour.'

4 Article 6 reads as follows:

'1. Member States shall ensure that:

...

(b) meat from:

...

(iii) without prejudice to the cases provided for in Article 5(1)(o) uncastrated male pigs with a carcase weight in excess of 80 kilograms, except where the establishment is able to guarantee by means of a method recognised by the procedure laid down in Article 16, or in the absence of such a method by a method recognised by the competent authority concerned, that carcases giving off a pronounced boar taint may be detected,

bears the special mark provided for by [Commission] Decision 84/371/EEC [of 3 July 1984 establishing the characteristics of the special mark for fresh meat referred to in Article 5(a) of Directive 64/433, OJ 1984 L 196, p. 46] and undergoes one of the treatments provided for in [Council] Directive 77/99/EEC of 21 December 1976 [on health problems affecting intra-Community trade in meat products, OJ 1977 L 26, p. 85] as last amended by Council Directive 89/662/EEC of 11 December 1989 concerning veteri-

nary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13);

...

(g) the treatment provided for in the preceding points is carried out in the establishment of origin or in any other establishment designated by the official veterinarian;

...'.

5 In anticipation of the completion of the internal market, veterinary checks on fresh meat previously carried out at the frontiers between Member States were in the main replaced by the procedures under Directive 89/662 in the country of origin of the fresh meat; in addition, detailed provisions were laid down to regulate the checks to be carried out in the country of destination.

6 Article 5 of Directive 89/662 provides:

'1. Member States of destination shall implement the following measures:

(a) The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport;

...'.

7 Article 7 of Directive 89/662 then provides:

'1. If, during a check carried out at the place of destination of a consignment or during transport, the competent authorities of a Member State establish:

...

(b) that the goods do not meet the conditions laid down by Community directives, or, in the absence of decisions on the Community standards provided for by the directives, by national standards, they may, provided that health and animal-health considerations so permit, give the consignor or his representative the choice of:

— destroying the goods,

or

— using the goods for other purposes, including returning them with the authorisation of the competent authority of the country of the establishment of origin.

...'.

8 Finally, Article 8(1) of Directive 89/662 provides:

'1. In the cases provided for in Article 7, the competent authority of the Member State of destination shall contact the competent authorities of the Member State of dispatch without delay. The latter authorities shall take all necessary measures and notify the competent authority of the first Member State of the nature of the checks carried out, the decisions taken and the reasons for such decisions.'

9 On 26 January 1993 the German Minister for Health sent a note to the highest veterinary authorities in each Member State setting out the requirements to be fulfilled when fresh meat is imported into Germany (hereinafter 'the note'). On 17 March 1993 the German Government sent a copy of that note to the Commission.

10 Paragraph 3 of the note stated that the rule contained in Article 6(1)(b) of Directive 64/433, as reenacted by Directive 91/497,

'is transposed into national law with a limit level of 0.5 g/g for androstenone, irrespective of weight limit. If this level is exceeded, the meat gives off a pronounced sexual odour and is unfit for human consumption within the meaning of Article 5(1)(o). Only Professor Claus's modified enzyme immunoassay is recognised as a specific method for measuring the level of androstenone. Meat from uncastrated male pigs which exceeds this level may not be imported into the Federal Republic of Germany as fresh meat.

... by agreement with the Commission and the Council (see the declaration concerning Article 6(1)(b) in the minutes of the Council meeting which adopted Directive 91/497), Article 7(1)(b) of Directive 89/662 is applied ... to all consignments of pigmeat from other Member States. All consignments of pigmeat, irrespective of any marking attesting to hygiene standards, are inspected at the place of destination to check whether this limit level has been complied with and, where it has been exceeded, action is taken.

...'.

11 As it considered that the requirements referred to by the Federal Republic of Germany in paragraph 3 of the note were in breach of Directive 64/433, as amended by Directive 91/497, of Directive 89/662 and of Article 30 of the Treaty, the Commission gave the German Government formal notice on 3 June 1993 to submit its observations within two months.

12 By letter of 23 August 1993 the German Government took issue with the complaints made by the Commission, but did not put forward any arguments which caused the Commission to alter its opinion.

13 By letter of 5 October 1994 the Commission sent the Federal Republic of Germany a reasoned opinion alleging that it had failed to fulfil its obligations under the above directives and under Article 30 of the Treaty. At the same time the Commission

called on the Federal Republic of Germany to take the measures necessary to comply with the reasoned opinion within two months of its notification.

14 In its reply of 16 March 1995 the German Government undertook to inform the Member States and the highest veterinary authorities in Germany that in accordance with Community rules the checks on consignments of meat mentioned in paragraph 3 of the note could be carried out only in a non-discriminatory manner and by means of spot-checks at the place of destination.

15 The Commission questioned the German authorities about the progress of the measures announced.

16 In a letter of 14 February 1996 the German Government confirmed the commitments made in its reply to the reasoned opinion and stated that it would inform the highest veterinary authorities in the other Member States of the measures taken to implement the note. However, it was not in a position to comply with the reasoned opinion in respect of paragraph 3 of the note. On that point it denied that the German practice was contrary to Community law and pointed to the overriding need to protect the consumer, a concept which, in Germany, was of such importance that it was not politically acceptable to alter the present legal position.

17 It was against that background that the Commission brought this action before the Court.

18 The Commission takes the view that the measures stipulated in paragraph 3 of the note are contrary to Articles 5(1)(o) and 6(1)(b) of Directive 64/433, as reenacted by Directive 91/497, which, it argues, completely harmonised the rules intended to solve the public health problems arising in connection with the production and

marketing of fresh meat for human consumption from the animal species listed therein, other than in the areas expressly excluded from its scope. Achievement of the harmonisation sought by those provisions is guaranteed by Article 8 of Directive 89/662, which lays down a Community procedure to resolve difficulties arising from any differences between the methods used by the Member States to detect carcases affected by an excessively pronounced boar taint. Under that procedure the Commission is to investigate methods which give rise to doubts, the result of such investigation being binding on the Member States concerned.

19 The German Government disputes that Directive 64/433, as reenacted by Directive 91/497, effects total harmonisation of the public health provisions of the different Member States applicable to meat, and to pigmeat in particular, at least as regards the provisions on the detection of pronounced sexual odour, which should therefore be examined in the context of Article 30 of the Treaty.

20 It acknowledges that the German practice in issue here might be regarded as a restriction on intra-Community trade. However, it considers that such a restriction is justified both on grounds of the protection of the health of humans within the meaning of Article 36 of the EC Treaty and by mandatory requirements within the meaning of Case 120/78 *Rewe-Zentral* (the *'Cassis de Dijon'* case) [1979] ECR 649, paragraph 8, in particular the need to protect the consumer.

21 Here, it must be pointed out that Article 36 of the Treaty, whilst it allows the maintenance of restrictions on the free movement of goods justified on grounds of the protection of the health and life of animals, which are fundamental requirements recognised by Community law, cannot be applied where Community directives provide for harmonisation of the measures necessary to achieve the specific objective which would be furthered by reliance upon it (see, in particular,

Case C-5/94 *The Queen* v *MAFF* ex parte *Hedley Lomas* [1996] ECR I-2553, paragraph 18). Its application is also excluded when the need to protect consumers arises.

22 Therefore, the appropriate checks must be carried out and protective measures adopted within the framework outlined by the harmonising directives (see Case C-323/93 *Centre d'Insémination de la Crespelle* v *Coopérative de la Mayenne* [1994] ECR I-5077, paragraph 31). In that regard, the Member States must display mutual trust with regard to checks carried out on their respective territories (see, most recently, Case C-1/96 *R* v *MAFF*, ex parte *Compassion in World Farming* [1998] ECR I-1251, paragraph 47).

23 It must therefore be established whether Directive 64/433, as reenacted by Directive 91/497, read in conjunction with Directive 89/662, provides for the harmonisation of measures to detect and assess boar taint.

24 As the Court has held in previous cases, in interpreting provisions of Community law it is necessary to consider not only their wording but also the context in which they occur and the objectives of the rules of which they are part (see, in particular, *Compassion in World Farming*, cited above, paragraph 49).

25 On the question, first, of the background to the provisions in question, the second, third and fourth recitals in the preamble to Directive 64/433 state that intra-Community trade is hindered by 'differences between the health requirements of Member States concerning meat' and that, to eliminate such differences, the relevant health provisions of the Member States must be approximated. Moreover, according to the fifth and sixth recitals in the preamble to Directive 91/497, the need to adapt and extend to all meat production the requirements of Directive 64/433/EEC is a consequence of the abolition of veterinary checks at frontiers between Member States under Directive 89/662.

26 Directive 64/433 established, furthermore, a harmonised system of health inspections, based on the principle that the public health guarantees required by all the Member States are equivalent, which ensures the protection of health and at the same time the equal treatment of products. The purpose of that system is to transfer supervision to the exporting Member State (see Joined Cases 2/82 to 4/82 *Delhaize Frères 'Le Lion'* v *Belgian State* [1983] ECR 2973, paragraph 11, and Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621, paragraph 25).

27 As regards, second, the purpose of the provisions concerned, Directive 64/433, as reenacted by Directive 91/497, is intended to regulate public health conditions for the production and marketing of fresh meat. Directive 89/662 lays down the rules applicable to veterinary checks in intra-Community trade. Essentially such checks, previously carried out at the frontiers between Member States, were relocated in the country of origin of fresh meat. Those directives are amongst the measures intended to bring about the gradual completion of the internal market.

28 As regards, more specifically, the rules on the detection of carcases giving off a pronounced sexual odour, the method provided for in Article 6(1)(b)(iii) of Directive 64/433, as reenacted by Directive 91/497, has not yet been established. However, the same subparagraph also provides that in the absence of such a method the method recognised by the competent authority concerned must be applied. Under Article 6(1)(g) the treatment provided for in the preceding points is, in principle, to be carried out in the establishment of origin. Finally, where the assessment of conformity with health regulations differs from that resulting from spot-checks carried out in the country of destination, Article 8 of Directive 89/662 provides for a special procedure to remedy such disparities.

29 Thus, under the combined provisions of Directive 64/433, as reenacted by Directive 91/497, and Directive 89/662, the measures for the detection of a pronounced sexual odour in uncastrated male pigs have been harmonised at Community level.

30 Accordingly, it must be determined whether the Federal Republic of Germany has, by reason of the conditions in paragraph 3 of the note, failed to fulfil its obligations under Articles 5(1)(o) and 6(1)(b) of Directive 64/433, as reenacted by Directive 91/497, in conjunction with Articles 5(1), 7 and 8 of Directive 89/662 and Article 30 of the Treaty.

31 In the first place, under Article 5(1)(o) of Directive 64/633, as reenacted by Directive 91/497, Member States are to ensure that the official veterinarian declares unfit for human consumption meat which gives off a pronounced sexual odour. Further, under Article 6(1)(b)(iii) only uncastrated male pigs with a carcase weight in excess of 80 kilograms must bear the special mark provided for by Decision 84/371 and undergo heat treatment as provided for by Directive 77/99, and then only where the establishment is not able to guarantee, by means of a joint method or in the absence of such a method by a method recognised by the competent authority concerned, that carcases giving off a pronounced boar taint may be detected.

32 It is clear from the documents before the Court that the German authorities also require marking and heat treatment for carcases weighing less than 80 kg. Moreover, they require that treatment regardless of the fact that the authority of the country of origin uses a suitable method for detecting meat which gives off a pronounced sexual odour and recognise only the enzyme immunoassay mentioned in paragraph 3 of the note as a specific method for detecting the androstenone which they believe to be the source of boar taint.

33 The action brought by the Commission must therefore be considered well founded in so far as it concerns failure to fulfil obligations under Articles 5(1)(o) and 6(1)(b)(iii) of Directive 69/433, as reenacted by Directive 91/497.

34 Second, the Commission considers that the Federal Republic of Germany has failed to fulfil its obligations under the combined provisions of Articles 5(1), 7 and 8 of Directive 89/662 in that, rather than applying Professor Claus's modified enzyme immunoassay for spot-checks, as Article 5(1)(a) of Directive 89/662 authorises them to do, the German authorities have unilaterally declared that method mandatory in all cases and refused to recognise the conformity with health regulations of pigmeat imported and checked under the Danish skatol method, without, however, initiating the special procedure set up by Article 8 of Directive 89/662.

35 The Federal Republic of Germany submits that, in the absence of harmonised rules, each Member State may establish unilaterally a threshold above which the sexual odour of the boar renders its meat unfit for human consumption. On that point, it observes that the skatol method used by the Danish authorities is scientifically unsuitable.

36 As stated in paragraph 29 above, the provisions on the detection of pronounced sexual odour in uncastrated male pigs are harmonised at Community level.

37 Accordingly, if the Federal Republic of Germany found, in the course of carrying out authorised checks and on the basis of its own methods, that the imported meat gave off a pronounced sexual odour which rendered it unfit for human consumption — a situation covered by Article 7(1)(b) of Directive 89/662 — it should have initiated the procedure provided for in Article 8 of that directive and insisted that the competent authority of the Member State of dispatch — in this case, the Kingdom of Denmark — contact the competent German authorities without delay.

38 Article 8 of Directive 89/662 leaves the Member States no option but to initiate the procedure it provides for.

39 According to the Commission, the competent German authorities did not initiate the procedure provided for by Article 8. The German Government disputes that claim, without, however, putting forward any evidence that it has in fact initiated that procedure.

40 The action brought by the Commission must therefore be considered well founded in so far as it concerns Articles 5(1), 7 and 8 of Directive 89/662.

41 It must therefore be declared that, by imposing the obligation of marking the carcases of uncastrated male pigs and subjecting them to heat treatment whenever the meat, regardless of carcase weight, has an androstenone content of more than 0.5 g/g, as shown by Professor Claus's modified enzyme immunoassay, and by regarding the meat as giving off a pronounced sexual odour and consequently unfit for human consumption if the threshold of 0.5 g/g of androstenone is exceeded, the Federal Republic of Germany has failed to fulfil its obligations under Articles 5(1)(o) and 6(1)(b) of Directive 64/433, as reenacted by Directive 91/497, and under Articles 5(1), 7 and 8 of Directive 89/662.

Costs

42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1) **Declares that, by imposing the obligation of marking the carcases of uncastrated male pigs and subjecting them to heat treatment whenever the meat, regardless of carcase weight, has an androstenone content of more than 0.5 g/g, as shown by Professor Claus's modified enzyme immunoassay, and by regarding the meat as giving off a pronounced sexual odour and consequently unfit for human consumption if the threshold of 0.5 g/g of androstenone is exceeded, the Federal Republic of Germany has failed to fulfil its obligations under Articles 5(1)(o) and 6(1)(b) of Council Directive 64/433/EEC of 26 June 1964 on health problems affecting intra-Community trade in fresh meat, as reenacted by Council Directive 91/497/EEC of 29 July 1991, and under Articles 5(1), 7 and 8 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;**

2) **Orders the Federal Republic of Germany to pay the costs.**

Hirsch Mancini Murray

Ragnemalm Ioannou

Delivered in open court in Luxembourg on 12 November 1998.

H. A. Rühl P. J. G. Kapteyn

Registrar President of the Sixth Chamber