JUDGMENT OF THE COURT (Fifth Chamber)

12 July 2001 *

In Case C-365/99,

Portuguese Republic, represented by L. Fernandes and M.J. Abecassis, acting as Agents, assisted by C. Aguiar and T. Ferreira de Lima, advogados, and by G. van der Wal, avocat, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities,

defendant,

APPLICATION for annulment of Commission Decision 99/517/EC of 28 July 1999 amending Decision 98/653/EC concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal (OJ 1999 L 197, p. 45), in so far as it extends until 1 February 2000 the

* Language of the case: Portuguese.

restriction on exports prescribed by Article 4 of Commission Decision 98/653/EC of 18 November 1998 concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal (OJ 1998 L 311, p. 23),

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward, L. Sevón (Rapporteur) and S. von Bahr, Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the Portuguese Republic, represented by T. Ferreira de Lima and by L. Parret, avocat, at the hearing on 22 February 2001,

after hearing the Opinion of the Advocate General at the sitting on 27 March 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 October 1999, the Portuguese Republic applied under Article 230 EC for annulment of Commission Decision 99/517/EC of 28 July 1999 amending Decision 98/653/EC concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal (OJ 1999 L 197, p. 45, hereinafter 'the contested decision'), in so far as it extends until 1 February 2000 the restriction on exports prescribed by Article 4 of Commission Decision 98/653/EC of 18 November 1998 concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal (OJ 1998 L 311, p. 23).

Legal framework

2 Article 4 of Decision 98/653 provides:

'Portugal shall ensure that until 1 August 1999 the following are not dispatched from its territory to other Member States or to third countries, when derived from bovine animals slaughtered in Portugal:

(a) meat;

(b) products which are liable to enter the human food or animal feed chains;

(c) materials which are destined for use in cosmetic or medicinal products or medical devices.'

3 Decision 98/653 is based:

— on the EC Treaty,

— on Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29), as amended by Council Directive 92/118/EEC of 17 December 1992 laying down animal health and public health requirements governing trade in and imports into the Community of products not subject to the said requirements laid down in specific Community rules referred to in Annex A(I) to Directive 89/662/EEC and, as regards pathogens, to Directive 90/425 (OJ 1993 L 62, p. 49), in particular Article 10(4) thereof, and

— on 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), as amended by Directive 92/118, in particular Article 9(4) thereof.

4 The second and third recitals in the preamble to Decision 98/653 refer in particular to:

— the incidence of 66 cases of bovine spongiform encephalopathy (hereinafter 'BSE') in Portugal between 1 January 1998 and 14 October 1998, constituting a BSE incidence rate calculated over the preceding 12 months of 105.6 cases per million animals over two years of age, as well as a sharp increase in the incidence of cases since June 1998;

— the fact that a mission carried out in Portugal by the Food and Veterinary Office of the Commission between 28 September and 2 October 1998 confirmed the findings of previous missions, namely that, despite an overall improvement, there remained certain shortcomings in the enforcement of the measures to control the BSE risk factors.

5 Article 13 of Decision 98/653 provides, in particular, that the Portuguese Republic is to implement a programme to demonstrate effective compliance with all relevant Community legislation on identification and registration of animals, the notification of animal diseases and epidemio-surveillance for transmissible spongiform encephalopathy (hereinafter 'TSE') and with all other Community legislation concerning protection against BSE. Under Article 13, the Portuguese Republic is also required to adopt a programme to demonstrate effective compliance with Decision 98/653 and with the relevant national measures to protect against BSE.

6 Article 14 of Decision 98/653 requires the Portuguese Republic to send the Commission every four weeks a report on the application of the protective measures taken against TSEs in accordance with Community and national

provisions and on the results of the programmes referred to in Article 13 of that decision.

7 Article 15 of Decision 98/653 provides:

'The Commission shall carry out Community inspections on-the-spot in Portugal to:

(a) verify the application of the provisions of this Decision, in particular in relation to the implementation of official controls;

(b) to examine the development of the incidence of the disease, the effective enforcement of the relevant national measures and to conduct a risk assessment demonstrating whether appropriate measures to manage any risk have been taken.'

8 Article 16 of Decision 98/653 is worded as follows:

'1. This Decision shall be reviewed within 18 months after its adoption at the latest, pending an overall examination of the situation, in particular in view of the development of the incidence of the disease and the effective enforcement of the relevant measures, and in the light of new scientific information.

2. ...

3. This Decision shall be amended, where appropriate, after consultation of the appropriate scientific committee, in accordance with the procedure laid down in Article 17 of Directive 89/662/EEC.'

9 Decision 98/653 was amended by the contested decision, Article 1(2) of which provides:

'2. In Article 4, the words "1 August 1999" are replaced by "1 February 2000".'

10 The fourth to seventh recitals in the contested decision are worded as follows:

'(4) Whereas the prohibition on the dispatch from Portugal of bovine products was to apply only until 1 August 1999, provided that a risk assessment conducted on the basis of the findings of a mission of the Food and Veterinary Office, taking into account the evolution of the disease, demonstrates that appropriate measures have been taken to manage any risk, and that the relevant Community and national measures are complied with and effectively enforced;

(5) Whereas at the General Session of the World Organisation for Animal Health (International Office of Epizootic Diseases (OIE)) Committee from 17 to 21 May 1999, a proposal of the OIE International Animal Health Code Commission concerning the criteria for the determination of the BSE status of a country or zone was adopted; whereas according to those criteria, a country or zone will be classified as having a high incidence of BSE if the BSE incidence rate, calculated over the past 12 months, has been greater than 100 cases per 1 000 000 within the cattle population over 24 months of age in the

country or zone; whereas the current BSE incidence rate in Portugal calculated over the past 12 months per 1 000 000 animals over 24 months of age is 211; whereas, therefore, Portugal is to be classified as having a high incidence of BSE; whereas Article 3.2.13.9 of that Code recommends conditions for the import of deboned meat and meat products from cattle from a country or zone with a high incidence of BSE; whereas Portugal cannot provide guarantees that those conditions are met;

(6) Whereas missions on BSE related issues have been carried out in Portugal by the Food and Veterinary Office from 22 February to 3 March 1999 and from 19 to 23 April 1999; whereas those missions contributed to the assessment of the application and effectiveness of measures to protect against BSE; whereas those missions concluded that serious efforts and considerable progress had been made in the implementation of risk management measures in a short period, despite not all measures being adequately enforced;

(7) Whereas in those circumstances, it is appropriate to maintain the prohibition on the dispatch of bovine products'.

11 The eleventh recital in the preamble to the contested decision states that the measures prescribed thereby are in accordance with the opinion of the Standing Veterinary Committee.

Procedure before the Court

12 The Portuguese Republic's application was duly notified to the Commission. Considering that the Commission had not lodged a defence within the prescribed

time-limit, the Portuguese Republic requested that the Court give judgment by default in its favour in accordance with Article 94(1) of the Rules of Procedure of the Court.

13 In that connection, it must be noted that the Commission, despite having been properly notified, did not lodge a defence within the time-limit prescribed by Article 40(1) of the Rules of Procedure. The Court must therefore give judgment by default. Since there is no doubt as to the admissibility of the application, it is incumbent on the Court, in accordance with Article 94(2) of the Rules of Procedure, to consider whether the form of order sought by the applicant appears well founded.

Substance

14 The Portuguese Government advances four pleas in support of its claim for annulment, namely: (i) the absence of an adequate statement of reasons, (ii) breach of the Animal Health Code of the International Office of Epizootic Diseases (hereinafter the 'OIE'), (iii) infringement of procedural requirements and non-compliance with sound administrative practice and (iv) breach of the principle of proportionality.

The first plea in law

15 By its first plea, the Portuguese Government submits that the contested decision does not contain an adequate statement of reasons as to matters of fact and law.

16 It observes that both Decision 98/653 and the contested decision are based on Directives 89/662 and 90/425, that they involve emergency measures constituting an exception to the principle of free movement of goods and that they must therefore be applied restrictively.

17 It points out that in 1998 the BSE incidence rate in Portugal was 105.6 cases per million animals over the age of 2 years and that Portugal therefore fell within the category of countries or zones with a low incidence of BSE by reference to the criteria laid down in Article 3.2.13.1 of the 1998 OIE Animal Health Code.

18 The Portuguese Government claims that it had already taken various measures for the prevention and eradication of BSE. It does not dispute that there may have been certain shortcomings and some delay in the adoption or implementation of specific measures. However, a large number of new measures had been taken, as was noted in the mission reports of the Food and Veterinary Office of the Commission.

19 In particular, a veterinary mission carried out between 14 and 18 June 1999 found significant improvements. The shortcomings noted in the draft report on that mission concerned only matters of detail, on which the Portuguese authorities provided clarification.

20 The Portuguese Government considers that the conclusions in the draft mission report do not justify extending the export ban prescribed by Article 4 of Decision 98/653 until 1 February 2000, particularly if account is taken of the comments of the Portuguese authorities and of the situation which had initially led the Commission to adopt that decision.

21 In that connection, it is clear from the 1998 version of the OIE Animal Health Code, on which the Portuguese Government relies, that Article 3.2.13.2 of that code did not at that time include definitions of 'countries or zones with a low incidence of BSE' or 'countries or zones with a high incidence of BSE'.

22 By contrast, the 1999 version of that code specifies that a country or a zone is to be regarded as having a high incidence of BSE, in particular, where the criteria listed in Article 3.2.13.1 of the code are met and where the BSE incidence rate has been greater than one hundred cases per million animals over the age of 24 months during the preceding 12 months.

23 The Portuguese Government refers to the 1998 incidence rate of 105.6 cases but does not challenge the rate of 211 cases given in the contested decision. Those facts are sufficient to establish that as early as 1998 Portugal had to be considered a country with a high incidence of BSE for the purposes of the definition given in the 1999 version of the OIE Animal Health Code and that, at the time when the contested decision was adopted, the situation had deteriorated, since the incidence rate had doubled.

24 As regards the reports of the missions carried out in Portugal by the Food and Veterinary Office of the Commission, it should be noted that the contested decision takes into account the reports of the missions which took place between 22 February and 3 March 1999 and 19 and 23 April 1999.

25 As the Advocate General observes in points 36 to 38 of his Opinion, those reports indicate serious shortcomings as regards compliance with Community legislation relating to BSE and fresh meat.

26 The reference to those reports constitutes an appropriate and adequate statement of reasons for the finding, set out in the sixth recital in the preamble to the contested decision, that 'serious efforts and considerable progress had been made in the implementation of risk management measures in a short period, despite not all measures being adequately enforced'.

27 It is on the basis of those reports that the statement of reasons for the contested decision finds that Portugal is a country with a high incidence of BSE and that the measures taken there to protect against BSE continue to be inadequate.

28 Those findings meet the requirements of Article 16(1) of Decision 98/653, which provided for there to be a review of the export ban 'in particular in view of the development of the incidence of the disease and the effective enforcement of the relevant measures'.

29 For reasons which will be further explained in the context of the Court's response to the third plea in law, it was not possible, at the time when the contested decision was adopted, to take account of the report of the veterinary mission carried out in June 1999.

30 It follows that the contested decision does contain a sufficient statement of reasons, both as to facts and law. The first plea must therefore be rejected.

The second plea in law

31 By its second plea, the Portuguese Government asserts that the contested decision is contrary to the OIE Animal Health Code.

32 It maintains that Decision 98/653 and the contested decision were based on the OIE Animal Health Code. For the purposes of that code, Portugal falls within the category of countries with a low incidence of BSE. In relation to such countries, the code does not require there to be a total ban on exports, but merely detailed rules concerning the various types of products.

33 The Portuguese Government claims that the Commission failed to have regard to the code in both Decision 98/653 and the contested decision, since it banned all exports of meat and meat products, even though it was not possible under that code to impose such a ban.

34 In that regard, it should be noted in any event that the basis of the contested decision is not the OIE Animal Health Code (as the Portuguese Government maintains) but rather, in particular, Article 10(4) of Directive 90/425 and Article 9(4) of Directive 89/662. The contested decision may refer to the code, but does so because it is a relevant document drafted by an international organisation renowned for its expertise.

35 Furthermore, for the reasons explained in points 46 to 49 of the Advocate General's Opinion, there was no inconsistency between the recommendations contained in the OIE Animal Health Code and the prohibition imposed by the contested decision. At the time when the contested decision was adopted, Portugal was, as stated in paragraph 23 above, a country with a high incidence of

BSE from which beef could be exported only if strict conditions were met, which was manifestly not the case in this instance.

36 It follows that the second plea must be rejected.

The third plea in law

37 By its third plea, the Portuguese Government claims that the contested decision was adopted in breach of procedural requirements and was contrary to sound administrative practice.

38 It submits that the Standing Veterinary Committee was not in full possession of the facts when it came to consider, at its meeting on 16 July 1999, the Commission's proposal to amend Decision 98/653. According to the Portuguese Government, the report concerning the veterinary mission carried out in Portugal between 14 and 18 June 1999 should have been made available to that committee. The draft report on that mission was sent to the Portuguese Minister for Agriculture, Rural Development and Fisheries on 14 July 1999 and reached the Portuguese Permanent Representation on 19 July 1999.

39 During the Standing Veterinary Committee's meeting, the representatives of various Member States pointed out the significance of that report and drew attention to the fact that a decision should not be taken on the basis of the report relating to the veterinary mission carried out between 22 February and 3 March 1999. The Commission suggested that the report on the June 1999 veterinary mission should be presented orally but this was refused by the Portuguese delegation on the ground that it had not yet received that report, did not know what it contained and was not in a position to express any opinion on it.

40 The Portuguese Government also submits that the Standing Veterinary Committee should have been given access to the periodic reports sent by the Portuguese Republic to the Commission in accordance with Article 14 of Decision 98/653.

41 It should be noted in that regard that the checks carried out by the Commission's Food and Veterinary Office are governed by Commission Decision 98/139/EC of 4 February 1998 laying down certain detailed rules concerning on-the-spot checks carried out in the veterinary field by Commission experts in the Member States (OJ 1998 L 38, p. 10).

42 Article 7(1) of that decision provides that '[t]he Commission shall confirm the results of the checks within 20 working days in a written report' and that '[t]he Member State shall give its comments within 25 working days of the receipt of the written report from the Commission'.

43 The Portuguese Government maintains that the report on the June 1999 veterinary mission was sent to the competent Portuguese authorities on 14 July 1999 and reached Portugal's Permanent Representation on 19 July 1999, that is to say, within the period prescribed by Decision 98/139.

44 As at 16 July 1999 when the Standing Veterinary Committee held its meeting, no definitive and comprehensive version of the report on the June 1999 veterinary mission could have existed, since the Portuguese Republic had not yet submitted its observations. The Commission was therefore complying with the relevant Community legislation when, for the purposes of that meeting, it submitted only the reports on the two veterinary missions carried out between February and April 1999.

45 The Commission cannot be criticised for having called the meeting of the Standing Veterinary Committee too early, regard being had to the date of the June 1999 veterinary mission. It should be borne in mind that the measures prescribed by Article 4 of Decision 98/653 were due to expire on 1 August 1999 and that a new decision had, in so far as might be necessary, to be adopted before that date.

46 Nor are there any grounds for complaining that the Commission should have arranged for the veterinary mission carried out in June 1999 to take place earlier, in order to be in a position to submit the definitive and comprehensive version of the report thereon to the Standing Veterinary Committee before the latter took its decision. For such a report to have been available in sufficient time, the mission would have had to take place in May 1999. It is sufficient to observe that the latest veterinary mission in respect of which a report was submitted to the Standing Veterinary Committee had been carried out between 19 and 23 April 1999 and that, as the Advocate General notes in point 37 of his Opinion, the report described serious shortcomings, especially as regards the identification of animals, which could certainly not have been put right in one month.

47 Moreover, according to the Portuguese Government, the Commission proposed that the report on the June 1999 veterinary mission should be presented orally to the members of the Standing Veterinary Committee but this was opposed by the Portuguese delegation itself.

48 As to the periodic reports sent by the Portuguese Government to the Commission pursuant to Article 14 of Decision 98/653, suffice it to say that those documents were not of an adversarial nature and that the Commission was not obliged to submit them to the members of the Standing Veterinary Committee.

49 It follows that the third plea is unfounded.

The fourth plea in law

50 By its fourth plea, the Portuguese Government claims that the contested decision violates the principle of proportionality.

51 It takes the view that an export ban is disproportionate to the objective pursued. It compares its situation with that of the United Kingdom of Great Britain and Northern Ireland at the time when it was decided to impose a ban in relation to that Member State and points out that Portugal is not a significant exporter of meat or meat products. It is easier to regulate low-volume exports than large volumes such as those exported from the United Kingdom. Furthermore, the Community did not adopt any protective measures concerning Community imports from Switzerland, despite a report attributing various shortcomings and risks connected with BSE to that country.

52 Even before the adoption of Decision 98/653, there was a significant body of legislation in Portugal concerning the prevention and eradication of BSE. That legislation has been finalised and improved. The matters of detail needing to be regulated in accordance with the report drawn up after the June 1999 veterinary mission were such that there was neither any need nor any justification for an extension of the export ban while those details were being worked out.

53 The Portuguese Government points out in that connection that, according to the Food and Veterinary Office of the Commission, various improvements were found to have taken place from a legislative standpoint and as regards the implementation of Community and national legislation in the course of the veterinary missions carried out in Portugal between 22 February and 3 March 1999 and 14 and 18 June 1999. The Office concluded that less rigorous measures

than the extension of the export ban until 1 February 2000 were sufficient — always assuming that any measures at all were still necessary or required.

54 In that connection, it is already apparent from the assessment of the first two pleas that the contested decision was appropriate as regards the objective pursued by it, and that it was not possible at that time to contemplate a resumption of exports in the immediate future.

55 Furthermore, as regards the control of exports from Portugal, it is apparent from the situation described in point II.2.1.1 of the report of the veterinary mission carried out between 22 February and 3 March 1999 that there were, in effect, no physical checks on beef exports at the points of exit from Portuguese territory. Point II.2.1.1 of the report on the June 1999 veterinary mission states that it was not until after 21 April 1999, when an agreement was entered into between two Portuguese administrative departments, that such checks could be carried out.

56 As to the anti-BSE measures adopted and implemented by the Portuguese authorities, it is quite clear, simply from reading the reports of the Food and Veterinary Office of the Commission, that the shortcomings referred to in those reports were not matters of mere detail, despite the assertions of the Portuguese Government.

57 Even supposing that it were relevant, for the purpose of assessing the proportionality of the contested decision, to take as a basis (i) the situation of other Member States or third countries in relation to risks connected with BSE and (ii) the scope of the measures taken by the Community in respect of those risks, a comparison between the situation in Portugal and that of the United Kingdom or Switzerland does not, on any view, show that the measure imposed by the contested decision with regard to the Portuguese Republic is dispropor-

tionate. The resumption of beef exports from the United Kingdom was authorised only after that Member State had proved that it had put in place export arrangements of a kind advocated by the OIE Animal Health Code. As is apparent from a document produced by the Portuguese Government at the hearing, it was not until December 2000 that a date which could be used as a reference date in the context of such arrangements was fixed for the Portuguese Republic. It was, therefore, impossible in practical terms to contemplate a resumption of exports in 1999.

58 As regards Switzerland, the incidence of BSE was much lower there than in Portugal and the report on a veterinary mission carried out in Switzerland between 8 and 12 February 1999 by the Food and Veterinary Office of the Commission did not find such serious shortcomings as those which came to light in the course of the veterinary missions carried out in Portugal.

59 It follows that the fourth plea is unfounded.

60 In the light of the foregoing, the applicant's claims must be held to be unfounded and the action must therefore be dismissed.

Costs

61 Since the Portuguese Republic has been unsuccessful, it must be ordered to bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the Portuguese Republic to bear its own costs.**

La Pergola Wathelet Edward

Sevón von Bahr

Delivered in open court in Luxembourg on 12 July 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber