OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 8 March 1988 *

Mr President,
Members of the Court,

1. The essential aspect of the questions put by the Østre Landsret is whether there has been complete harmonization in relation to additives in feedingstuffs.

2. It should be said at the outset that the present questions concern only the state of Community law prior to the adoption of Council Directive 84/587.[1] The provisions of that directive do not have to be interpreted now and I shall refer to them only in so far as they may shed light on the interpretation of the previous directives. The provisions which the Court is asked to interpret are the following: Directive 70/524[2] and the amendments thereto made by Directives 73/103[3] and 75/296.[4]

3. Question 1 is basically concerned with the point whether the degree of harmonization achieved by Community legislation prior to Directive 84/587 was such as to deprive Member States of any possibility of relying on Article 36 of the Treaty as regards national measures intended to ensure identification of additives and also the purity of those substances in the case of importation from other Member States of feedingstuffs containing them. It appears that the dispute in the main proceedings is concerned with a national requirement to register the branded product used as an additive.

4. Let us bear in mind first of all that in the case of Community harmonization Member States may no longer have recourse to Article 36. The judgment in *Tedeschi* v *Denkavit*[5] expressed this in particularly clear terms:

'Where, in application of Article 100 of the Treaty, Community directives provide for the harmonization of the measures necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of production adopted within the framework outlined by the harmonizing directive.'

Harmonization by Community measures thus precludes the power of Member States to take unilateral measures.

5. It is precisely the existence of such harmonization which is at issue here. Article 6 of Directive 70/524 lays down the procedure to be observed on fixing criteria

* Translated from the French.

1 — Directive 84/587/EEC of 29 November 1984, OJ L 319, 8.12.1984, p. 13.

2 — Directive 70/524/EEC of 23 November 1970, OJ L 270, 14.12.1970, p. 1.

3 — Directive 73/103/EEC of 28 April 1973, OJ L 124, 10.5.1973, p. 17.

4 — Directive 75/296/EEC of 28 April 1975, OJ L 124, 15.5.1975, p. 29.

5 — Judgment of 5 October 1977 in Case 5/77 [1977] ECR 1555.

of purity for the additives referred in the directive by conferring power to do so on the Council. That procedure was amended by Directive 75/296 which delegated the power of decision on the subject to the 'Standing Committee for Feedingstuffs'. Directive 75/296 expressly provided that criteria of composition, which the directive had not until then expressly included, and physico-chemical and biological properties might be fixed in accordance with the aforementioned procedure.

6. In view of those provisions there can be no doubt that, as from the adoption of Directive 70/524 as regards the criteria of purity, and in any event as from the adoption of Directive 75/296, the harmonization of the Community procedures in the matter was achieved. That view is confirmed by Article 13 of the directive which precludes 'marketing restrictions other than those provided for in this directive'. Measures such as those at issue here could therefore not be adopted by the Member States since their adoption is prohibited by Directive 75/296 in a field from then on wholly governed by Community law. Accordingly the conclusion cannot differ from that arrived at in the judgments of 3 October 1985 in *Commission* v *Federal Republic of Germany*[6] and *Denkavit Futtermittel* v *Land Nordrhein-Westfalen*[7] in which it was held that

'. . . in relation to all constituents capable of giving rise to problems or dangers from the point of view of proper animal nutrition or from the point of view of animal or human health, the two directives have set up a *comprehensive* system which enables account to be taken of the need to amend the directives periodically and of urgent problems which may arise in practice'.

7. The arguments advanced by the Danish Government do not seem to me capable of casting doubt on that view. It maintains that since the presence of impurities is likely to involve serious risks to public health, the matter in question is, in accordance with the judgments in *Denkavit Futtermittel GmbH* v *Minister für Ernährung, Landwirtschaft und Forsten*[8] and *Denkavit Futtermittel* v *Land Nordrhein-Westfalen,*[9] one which has not been harmonized. Although it is true those two decisions recognized the possibility of adopting unilateral measures on the basis of Article 36, I would emphasize that they refer to microscopic pathogens in relation to the health inspection of compound feedingstuffs intended to prevent epizootic diseases. It is not possible to equate such germs with the impurities in an additive, even if the latter have harmful effects upon health. Moreover, the analogy overlooks the fact that the criteria of purity must be fixed according to the Community procedure laid down in Article 6. Any difficulties in implementing that procedure do not affect the actual principle of harmonization in that respect.

8. Finally, although Directive 84/587 set up a system whereby by means of a mandatory monograph provided for in Article 8 for certain products the criteria of identification and purity have to be defined, it can in no way be inferred that such a matter was not previously harmonized. Although the previous system did not make recourse to the procedure of Article 6 systematic, it was nevertheless mandatory when it was intended to fix the criteria of purity or composition. The difference between the law before and after the directive is not a matter of the degree of harmonization attained. It relates solely to the systematic

6 — Case 28/84 [1985] ECR 3097 at p. 3115, paragraph 14.

7 — Case 195/84 [1985] ECR 3181.

8 — Case 251/78 [1979] ECR 3369.

9 — Case 73/84 [1985] ECR 1013.

nature of the fixing of the relevant criteria. The second recital in the preamble to Directive 84/587 contains a perfect statement of the reasons for which the measure was adopted for certain products: '... experience has demonstrated ... that the current rules ... have not afforded the required degree of safety ...'. It is not however possible to assert that any improvement in the Community rules means that previously there was no harmonization.

9. Thus the degree of harmonization achieved by the Community rules under Directive 70/524 and its amendments prior to Directive 84/587 appears such as to exclude any recourse to Article 36 of the Treaty by the national authorities with respect to measures intended to ensure identification and to lay down a criterion of purity of additives. And the view that harmonization is purely formal must be firmly rejected. Let me emphasize that the adoption of unilateral measures by Member States with respect to identification and purity of additives cannot fail to lead to appreciable differences which would frustrate the objectives of harmonization pursued.

10. It is only if harmonization has not reached such a degree as to exclude recourse to Article 36 that the Court would have to answer the second question concerning the possibility for Member States to require information relating to the registration of additives. In view of the answer that I propose to the first question, that question does not arise.

11. I shall thus confine myself to pointing out that in any event the information in question is expressly excluded by the wording of Article 10 (4), which prohibits 'any reference to additives other than in the form provided for in this directive' and by that of Article 13 which requires the Member States to ensure 'that feedingstuffs which conform to the provisions of this Directive shall be subject, as regards the presence or absence of additives and as regards marking, to no marketing restrictions other than those provided for in this Directive'. In view of those provisions it is not possible to allow information other than that provided for by Article 10 (1), which relates only to additives themselves and in any event in no case authorizes reference to a registration similar to that referred to by the national court.

12. The third question concerns the compatibility with Article 30 of the requirement of authorization to which importers of feedingstuffs containing additives are subject and the fourth question asks essentially whether Directive 70/524 provided for such a degree of harmonization as to deprive Member States of recourse to Article 36 in connection with such a requirement.

13. The national court has described the authorization in question as being issued once and for all and as analogous to that required of domestic producers; it constitutes the only means of knowing the undertakings at whose premises the checking prescribed by the directive must be carried out. It is also stated that an authorization may not be refused or withdrawn on specific grounds but only, in accordance with the principles of the national law, for imperative reasons based on human or animal health. Finally, authorization is granted in practice within a few weeks on

the basis of a request, which need contain only the importer's name and address, and so far has never been refused to or withdrawn from any importer.

14. With regard to Article 30 of the Treaty, the potentially restrictive nature of a measure suffices, according to established case-law, to bring it within the scope of measures having an effect equivalent to quantitative restrictions, the following well-known definition of which was given in *Procureur du Roi* v *Dassonville*:[10] all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

15. In the case of authorization necessarily implying a discretion on the part of the national administration the Court's judgment in *Commission* v *United Kingdom*[11] referred to the restrictive aspects of such a system as follows:

'Even though the United Kingdom maintained at the hearing that current administrative practice permits licences to be issued promptly and automatically, a system requiring the issue of an administrative authorization necessarily involves the exercise of a certain degree of discretion and creates legal uncertainty for traders.'

During the discussion which arose at the hearing on the scope of the concept of authorization the Danish Government admitted that it could in theory be refused. Thus, the circumstances to which the national court has referred do not appear to me to be such as to deprive the requirement in question of the nature of a measure having equivalent effect.

16. It is accordingly necessary to inquire whether there is in this case harmonization such as, in accordance with the aforementioned principles, to exclude recourse to Article 36. First of all it is necessary to distinguish carefully between harmonization of additives and harmonization of the rules applicable to traders concerned in the sector. In that respect Directive 70/524 on additives makes no mention of the traders concerned. Like the Commission, I must point out that Article 13, which requires Member States to ensure that feedingstuffs are subject, *as regards the presence or absence of additives*, to no marketing restrictions other than those provided for in the directive, provides crucial evidence that there is no harmonization in that respect in so far as the areas in which harmonization excludes national measures are thus specified. That interpretation is supported by a reading of Article 20 of Directive 84/587 which no longer mentions the abovementioned limit, whereas Article 13 (3) provides for annual publication by each Member State of the list of manufacturers of additives. Even though the latter provision thus postulates a check on the traders, it is important to point out that the limitation to restrictions made solely by reason of the presence or absence of additives disappears, which does tend to show that henceforth, but only henceforth, the 'control' of traders is covered by the Community rules. The sequential logic of the provisions at issue is clear. Since Directive 70/524 did not contain provisions relating to authorization of traders, it was, if necessary, for the Member States to adopt relevant measures *ad hoc* on the subject on the basis of Article 36 of the Treaty.

10 — Judgment of 11 July 1974 in Case 8/74 [1974] ECR 837.

11 — Judgment of 8 February 1983 in Case 124/81 [1983] ECR 203.

17. In that respect the national court has not asked whether a measure similar to that at issue should be regarded as compatible with Article 36. I should therefore merely say that Directive 84/587, which provides for control of the traders concerned, has set out in its ninth recital the grounds of such a requirement when it states that '... it is appropriate that the production and use of antibiotics be limited to those who have the competence and the appropriate installations and equipment for the manufacture of additives ... and who are included on the list of manufacturers of a Member State'. Such objectives are intended to ensure, if necessary, that the traders concerned are liable and in any event that they are trustworthy. They are certainly in accordance with the provisions of Article 36.

18. The fifth question concerns the compatibility with Directive 70/524 and Articles 9 and 95 of the Treaty of an annual levy in the same amount on domestic producers and importers holding the aforementioned authorization and intended to cover the expenditure occasioned by the checks by random sampling carried out in accordance with Directive 70/524/EEC. The levy appears as connected with the system of authorization which, as we have just seen, is not covered by the directive. Accordingly, it is not necessary to consider the levy's lawfulness with regard to the directive. It remains to consider it in the light of Articles 9 and 95 of the Treaty. Article 9, which prohibits customs duties and charges having equivalent effect, cannot preclude a system of taxation which, as in the present case, is imposed annually in the same amount on importers and domestic producers, *independently of the quantities imported.* The fixed and non-discriminatory nature of that taxation means, in my opinion, that it is not possible to see in it the characteristics of a 'pecuniary charge ... imposed ... on goods by reason of the fact that they cross a frontier', referred in the judgment in *Denkavit Loire* v *French State.*[12]

19. I am similarly led to the view that the contested measure is not incompatible with Article 95 of the Treaty. The internal taxation in question seems to be identical as regards importers and domestic producers who are taxed according to the same criteria. In that respect the criteria set out in the Court's judgment in *Officier van Justitie* v *Kortmann*[13] may be recalled:

'It is sufficient that the internal tax applies in accordance with the same criteria, objectively justified by the purpose for which the tax was introduced, to domestic products and imported products so that it does not result in the imported product's bearing a heavier charge than that borne by the similar domestic product.'

20. Denkavit states in this respect that the domestic producer is not liable to any increase in the impact of the levy on his production if he has recourse to dealers whereas the foreign producer incurs unreasonable costs if he has recourse to several importers. That argument is unconvincing. The sole importer may perfectly well have recourse to independent dealers established in the territory into which the goods are imported without their having to pay the levy. Finally, the system in question, which applies to the traders on the market in question and not to the products does not appear to me to be contrary to the requirements of the case-law of the Court according to which the taxation must be imposed on products at the same marketing stage and the chargeable event must be identical.[14]

12 — Judgment of 31 May 1979 in Case 132/78 [1979] ECR 1923, paragraph 7.

13 — Judgment of 28 January 1981 in Case 32/80 [1981] ECR 251, paragraphs 27 and 28.

14 — Case 132/78, cited above, paragraph 8.

21. In consequence I propose that the Court should rule that:

(1) Council Directive 70/524 of 23 November 1970, as amended up to the adoption of Directive 84/587 of 29 November 1984, provides for harmonization which precludes Member States from relying on Article 36 of the Treaty in order to impose on the importation from other Member States of feedingstuffs containing additives, measures intended to ensure the identification and the purity of the additives in question.

(2) A measure by a Member State subjecting to authorization the importation of feedingstuffs from other Member States is contrary to Article 30.

(3) Directive 70/524 of 23 November 1970, as amended up to the adoption of Directive 84/587, did not provide for harmonization depriving Member States of the power to have recourse to Article 36 for the adoption of domestic measures concerning the control of traders.

(4) An annual levy charged in the same amount on domestic producers and importers is not contrary to Articles 9 and 95 of the Treaty.