OPINION OF ADVOCATE GENERAL MISCHO

delivered on 27 March 2001 [1]

1. Commission Decision 98/653/EC of 18 November 1998 concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal [2] provides in particular in Article 4 that:

'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 cosmetics or medicinal products or medical devices.'

2. That decision 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, [3] as last amended by Council Directive 92/118/EEC of 17 December 1992, [4] 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, [5] as last amended by Directive 92/118, in particular Article 9 thereof.

3. The preamble to Decision 98/653 refers, in particular, to:

— the notification of 66 cases of bovine spongiform encephalopathy (hereinafter 'BSE') in Portugal between 1 January 1998 and 14 October 1998, that is to say a BSE incidence rate calculated over the past 12 months of 105.6 cases

1 — Original language: French.
2 — OJ 1998 L 311, p. 23.
3 — OJ 1990 L 224, p. 29.
4 — OJ 1993 L 62, p. 49.
5 — OJ 1989 L 395, p. 13.

per million animals over two years of age (second recital) and, in particular, a sharp increase in the incidence of BSE since June 1998 (third recital);

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

4. Article 2 of the decision also prohibits the export to other Member States or to third countries of live bovine animals and bovine embryos, meat meal, bone meal, and meat-and-bone meal of mammalian origin.

5. Article 13 of the decision 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, epidemio-surveillance for transmissible spongiform encephalopathy (hereinafter 'TSE') and all other Community legislation to protect against BSE. It was also required to adopt a programme to demonstrate effective compliance with the decision and with the relevant national measures to protect against BSE.

6. Under Article 14, the Portuguese Republic is required 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.

7. Article 15 provides in addition that 'the Commission shall carry out Community inspections on-the-spot in Portugal...:

(a) [to] 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 [and] 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 reads 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.

...

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. The Portuguese Republic did not bring an action for the annulment of Decision 98/653.

10. On 28 July 1999, the Commission adopted Decision 1999/517/EC amending Decision 98/653/EC concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal. [6]

11. Article 1(2) of that decision provides: 'In Article 4, the words "1 August 1999" are replaced by "1 February 2000".'

12. It is against that provision, which prolongs by six months the prohibition imposed by Article 4 of Decision 98/653, that the action for annulment now under consideration is directed. The action was brought by the Portuguese Republic on 4 October 1999.

13. It should be noted that the action falls to be considered under the default procedure.

14. As the Commission did not lodge a defence within the time prescribed, the Portuguese Republic applied for judgment by default under Article 38 of the EC Statute of the Court of Justice and Article 94 of the Rules of Procedure.

6 — OJ 1999 L 197, p. 45.

15. But, in order for the Court to give such a judgment, it is necessary, under Article 94(2) of the Rules of Procedure, for it first to consider whether the application initiating proceedings is admissible, whether the appropriate administrative formalities have been complied with, and whether the application appears well founded.

16. There is therefore no question of allowing the applicant's claims to benefit from a presumption of truth.

17. Proceedings by default, far from facilitating the Court's task, make it more complicated because, in the absence of any challenge by the defendant of the merits of the applicant's claims, it alone has the task of ascertaining whether any objections can be made to the pleas set out in the application.

18. In the present case, the Portuguese Republic's application, which is admissible, advances four pleas in law in support of the action for annulment. It contends that the decision does not contain an adequate statement of reasons as to matters of fact and law, that it is contrary to the Health Code of the International Office of Epizootic Diseases (hereinafter 'OIE'), that it was adopted in breach of essential procedural requirements and is contrary to the principle of sound administrative practice and, finally, that it breaches the principle of proportionality. These pleas will be examined successively, in that order, in order to assess their merits.

The first plea

19. In the first plea, the Portuguese Government asserts that in so far as emergency measures such as the prohibition laid down in Article 4 of Decision 98/653 involve exceptions to the principle of free movement of goods, they can only be adopted if it is demonstrated that they are genuinely necessary.

20. In its view, that was not the case as regards the six-month extension of the prohibition imposed by Decision 1999/517.

21. In this respect, account should be taken of the fact that in 1998 the Portuguese Republic, with a BSE incidence rate of 105.6 cases per million animals over two years of age had, under the criteria established by the OIE, to be classified as a country with a low BSE incidence rate, and of the fact that the Portuguese Government had already then introduced measures to prevent and eradicate BSE.

22. The application also makes reference to the reports drawn up following the various missions carried out in Portugal by the Food and Veterinary Office of the Community, indicating that, if the situation could be judged unsatisfactory in 1998, it

was very noticeably improved in 1999, the measures prescribed by the Community legislation having been diligently implemented and the recommendations made by the experts duly taken into account.

23. The Portuguese Government does not deny that the last mission carried out before the adoption of the contested decision, from 14 to 18 June 1999, indicated certain improvements still to be made, but considers that these only concerned points of detail.

24. Between 1998 and 1999 the situation had changed completely so that, if Decision 98/653 might appear to be justified, there was no justification at all for the extension of the prohibition for six months by Decision 1999/517.

25. I do not find that argument persuasive, for various reasons. Before setting these out, it should first be made clear that there is no question of discussing in the context of this action the validity of Decision 98/653.

26. The decision was not contested by the Portuguese Republic at the time, and its validity must now be considered to be established. The only issue which must be considered is whether the extension of the prohibition for six months resulting from Decision 1999/517 is properly supported by a statement of reasons as to matters of fact and law.

27. The Portuguese Government's argument is based on a false premiss. It maintains that, according to the criteria established by the OIE, Portugal was, in 1998 as well as in 1999, a zone with a low BSE incidence rate.

28. However, the successive versions of the Animal Health Code of the OIE show clearly that in 1998 it did not yet include a definition of low incidence zones nor, for that matter, of high incidence zones, the definitions still being under consideration. Definitions are only provided in the 1999 version of the Code.

29. For a zone to be classified as having a low incidence rate it is necessary, amongst other conditions, for there to have been fewer than 100 cases of BSE per million animals over two years of age, calculated over the past 12 months. For a zone to be classified as having a high incidence rate it is necessary, amongst other conditions, for there to have been more than 100 cases of BSE per million animals over two years of age, calculated over the same period.

30. It cannot therefore be disputed that Portugal could not, either in 1998, when there was no definition, or in 1999, when it

had an undisputed 211 cases per million animals (see the fifth recital of the contested decision), be considered to be a low incidence zone.

31. Next, it is claimed that the reports relating to the missions carried out from 22 February to 3 March 1999 and from 14 to 18 June of that year reveal a satisfactory situation, subject to some details still to be dealt with.

32. Either the Commission and the Portuguese Government did not read the same reports or, more probably, they do not have the same conception of what constitutes a detail.

33. The sixth recital of the contested decision states that those missions, together with a mission carried out from 19 to 23 April, which the Portuguese Government does not mention at all, '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.'

34. The Portuguese Government is certainly justified in considering that, given the initial situation, the progress recorded by those missions did constitute most of what was expected of the Portuguese authorities, and the remainder could be considered as relatively minor in view of what had already been accomplished. But that does not change the fact that the result achieved was not yet the result expected of them.

35. I can, moreover, only express surprise at the Portuguese Government's optimism.

36. In fact, the report compiled following the mission of 22 February to 3 March 1999, although noting a very marked improvement as regards both the adoption and the enforcement of legislation, states that there is nevertheless progress to be made concerning compliance with the export ban (inadequate and badly organised road checks), withdrawal of specified risk materials, compliance with the ban on the use of animal meal (no controls at farm level) and controls on movement of animals (interval between the birth of an animal and its marking, problems concerning knowledge of birth cohorts).

37. In the summary report concerning the mission of the Food and Veterinary Office carried out in Portugal from 19 to 23 April 1999 in order to inspect fresh meat establishments (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) and trade in fresh meat (Directive 89/662) it is stated, *inter alia*, that non-approved establishments operate illegally, without the competent authorities, who are well aware of the fact, having adopted measures to remedy the situation, that there are serious shortcomings concerning hygiene at slaughter and that identification of animals does not satisfy the requirements of Community legislation.

38. These various shortcomings appear so serious to the authors of the report that they recommend that the Commission seriously consider bringing proceedings against the Portuguese Republic for failure to comply with numerous provisions of Community legislation.

39. The report compiled following the mission carried out from 14 to 18 June 1999 does not mention such serious shortcomings, but emphasises the fact that it is not yet possible to positively ascertain whether the measures adopted by the Portuguese authorities in response to the recommendations contained in the preceding reports have been adequately implemented and have had the expected effects.

40. I should make it clear that no criticism of the action of the Portuguese authorities is intended. It must be noted, however, that in the sixth recital of Directive 98/653 it was expressly pointed out that 'the prohibition on the dispatch of bovine products *can be limited in time, provided*[7] 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'. In the fifth and sixth recitals of the contested decision the Commission noted both that between 1998 and 1999 the number of cases per million animals over two years of age had risen from 105.6 to 211, and that the reports of missions carried out did not describe a situation totally under control, as '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'. It is plain, therefore, that the Commission has been able to show convincing reasons to justify extending the prohibition for an additional six months.

41. Finally, I would observe, although it is not relevant to assessment of the legality of the contested decision at the date on which it was adopted, that in Commission Decision 2000/104/EC of 31 January 2000 amending Decision 98/653 concerning emergency measures made necessary by

7 — The emphasis is mine.

the occurrence of bovine spongiform encephalopathy in Portugal, [8] the Commission was obliged to remove the limitation until 1 February 2000 of the export ban in view of the fact that the conditions for a resumption of Portuguese exports of bovine meat were still not satisfied. The Portuguese Republic's first plea must therefore, in my opinion, be rejected.

The second plea

42. With regard to the second plea put forward by the Portuguese Government, a comment on a point of principle must be made. In alleging breach of the Animal Health Code of the OIE the Portuguese Government implies that the Commission was required to abide by that Code. However, that has not yet been established.

43. In my opinion, the provisions which the Commission was obliged to observe are those which constitute the legal basis of its decision, that is, Directives 90/425 and 89/662. The Animal Health Code of the OIE does not lay down provisions which bind the Community institutions.

44. Clearly, its provisions can, and even, in my opinion, must, be taken into consideration in assessing whether the Community measures comply with the principle of proportionality. One could certainly question the Commission's adoption of strict prohibition measures if, for example, the Code only recommended increased surveillance measures.

45. There remains, however, the possibility that in certain cases there may be valid reasons for the Commission to go beyond the OIE's recommendations and that, given such reasons, it would be fruitless for an applicant to allege breach of the Animal Health Code, which is non-binding within the Community legal order.

46. In the present case, however, it is completely unnecessary to raise this issue, as there is no inconsistency between the recommendations of the Animal Health Code and the prohibition imposed by the contested decision. Contrary to what the Portuguese Government maintains Portugal was, at the time of its adoption, a high incidence zone and the Animal Health Code provides that bovine meat can only be exported from such zones under certain strict conditions, which are laid down in Article 3.2.13.10.

47. These conditions include an effective ban on feed containing meat-and-bone meal, the existence of a permanent system for the identification of cattle enabling

8 — OJ 2000 L 29, p. 36.

animals to be traced back to the dam and herd of origin, the removal of specified risk materials and the slaughter and destruction of definite high risk animals, such as offspring and birth cohorts of BSE cases.

48. In fact, bovine meat can only be exported on the basis of either of two regimes: one a certified herds scheme, indicating that the products have been derived from animals born, raised and having remained in herds without BSE cases for the last seven years, the other a date-based scheme, indicating that the products were derived from animals born after the date of an effective ban on feed containing meat-and-bone meal.

49. The conditions laid down by the Animal Health Code were, having regard to the reports of the missions carried out during the first half of 1999, obviously not fulfilled in Portugal at the date on which the contested decision was adopted.

50. If further evidence was required, it would be found in Decision 2000/104, the fifth and sixth recitals of which provide:

'Portugal put forward a first proposal for a date-based scheme to the Commission on 3 December 1999; this scheme must be examined in the light of measures taken by Portugal as regards the feed ban, the traceability of cattle, the culling of offspring and birth cohorts of BSE cases and the removal of specified risk materials; furthermore the implementation of those measures should be verified by a Commission mission before the Commission can propose a partial lifting of the ban to the Standing Veterinary Committee.

In those circumstances, it is appropriate to maintain the prohibition on the dispatch of bovine products until the scheme proposed by Portugal can be adopted.'

51. I am therefore bound to conclude that the second plea put forward by the Portuguese Government must also be dismissed.

The third plea

52. In the third plea, the Portuguese Government claims in essence that consultation of the Standing Veterinary Committee prior to adoption of the contested decision was vitiated by irregularities, in so far as it did not have either the report drawn up following the mission carried out in Portugal from 14 to 19 June 1999, or the

periodic reports sent by the Portuguese authorities to the Commission in accordance with Article 14 of Decision 98/653. That withholding of information vitiated the Committee's favourable opinion of the draft decision proposed by the Commission.

53. The fact that the report of the mission was not available to the Committee is beyond doubt, and it should be noted that the recitals of the contested decision refer only to the missions of February to March and April 1999.

54. In my opinion, if the report of the June mission had been available on 16 July, when the Standing Veterinary Committee met, the Portuguese Republic's plea would incontestably be well founded.

55. But, as the Portuguese Government moreover recognises, the report only existed in draft form at that date. It must be noted that Article 7(1) of 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[9] provides that 'the Commission shall confirm the results of the checks within 20 working days in a written report.... The Member State shall give its comments within 25 working days of the receipt of the written report from the Commission'.

56. To be precise, in the present case the report was sent to the Portuguese Republic, according to its own statement, on 14 July 1999, which was within the time-limit. It reached the Portuguese Permanent Representation on 19 July, that is, after the meeting of the Standing Veterinary Committee.

57. Starting from 19 July, the Portuguese Government had the period laid down in Article 7(1) within which to make its comments. There was therefore no possibility of giving the Standing Veterinary Committee a definitive report for the day of its meeting.

58. As the Portuguese Government acknowledges, the Commission proposed at the meeting that it present the report orally, but the Portuguese Government did not agree to that, as it was entitled to.

59. It cannot therefore be asserted that the Committee was not in possession of the most recent report effectively available.

9 — OJ 1998 L 38, p. 10.

60. It may be objected that the Commission could have sent a mission to Portugal early enough for the Committee to have had access to its report, or postponed the meeting of the Standing Veterinary Committee.

61. As the Portuguese Government implicitly acknowledges, when it points out that the mission between February and March, carried out three months after the adoption of Decision 98/653, took place too early for improvements to have been found, there would have been no point in sending a mission to Portugal in May 1999, as there was very little probability of its having been able to remedy, at that time, the shortcomings found between February and March and in April. Postponing the meeting of the Standing Veterinary Committee would not have made sense either because, given the time-limits set by Article 7(1), one could not count on a definitive report being available at the end of July, and the Commission had to adopt a decision by 31 July at the latest as the prohibition in Article 4 of Decision 98/653 expired on 1 August 1999.

62. As for the monthly reports sent by Portugal, they are unilateral documents which are certainly very useful to the Commission, in so far as they enable it to plan missions precisely and to define their object, but I do not believe that they can constitute a factor to be taken into account by the Standing Veterinary Committee when taking a decision concerning the BSE situation in Portugal.

63. It therefore cannot be maintained, as the Portuguese Government does, that the Commission failed to comply with the procedural requirements imposed on it prior to adoption of the contested decision.

64. I can therefore only conclude that the Portuguese Government's third plea is unfounded.

The fourth plea

65. For the fourth plea it is possible to be relatively brief, in so far as consideration of the first two pleas has shown that the contested decision taken by the Commission was appropriate to the practical situation in Portugal as regards BSE.

66. The Portuguese Government claims that Portugal is not a significant exporter of bovine meat and that, for this reason, its exports are easy to check. I do not find this argument in the least convincing.

67. In the first place, it is not in fact the quantities exported that count as regards

the risk of the presence in the human food chain of products contaminated with BSE, but the guarantees that can be given as to the absence of contamination in the products. In the second place, an export ban clearly does not impose a disproportionate burden on a Member State which classifies itself as a minor exporter.

68. The Portuguese Government also states that, despite the fact that it had a very high BSE incidence rate, the United Kingdom has been authorised to resume exports and that exports of bovine meat to the Community from Switzerland have not been prohibited, when that country is far from being free from BSE.

69. As regards the United Kingdom, while it is true that it is the Member State which has been most affected by BSE, it must be noted that, if resumption of exports has been authorised, it is because the United Kingdom adduced evidence that it had put in place one of the schemes recommended by the OIE, which I described in my examination of the Portuguese Government's second plea. It must also be recalled that it was only well after the measures stipulated in the Animal Health Code were implemented that those exports were authorised whereas, at the time the contested decision was taken, the Portuguese authorities were still considering the details of the scheme that they were going set up and that they submitted to the Commission, as stated above, on 3 December 1999. One could not, therefore, compare the situation in Portugal in July 1999 with that in the United Kingdom at the same time.

70. As regards Switzerland, while it is true that it is affected by BSE, it cannot be considered that the problems there have, at any time, attained the same degree of seriousness as those in Portugal. Although during the mission which was carried out from 8 to 12 February 1999 by the Food and Veterinary Office the experts observed a certain number of shortcomings and drew up some recommendations, their report did not advocate a prohibition on Swiss exports to the Community and assesses very positively the programme of control and eradication set up by the Swiss authorities.

71. I therefore do not believe it possible to consider that the Portuguese Government's fourth plea, concerning breach of the principle of proportionality, is well founded.

Conclusion

72. As none of the pleas put forward by the Portuguese Republic appear to me to be well founded, I must propose that the Court decide as follows:

— The application is dismissed.

— The Portuguese Republic must bear its own costs.