

JUDGMENT OF THE COURT (Fifth Chamber)

13 November 1990*

In Case C-331/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice, Queen's Bench Division, for a preliminary ruling in the proceedings pending before that court between

The Queen

and

The Minister for Agriculture, Fisheries and Food and The Secretary of State for Health,

ex parte:

Fédération européenne de la santé animale (Fedesa),

Pitman-Moore, Inc.,

Distrivet SA,

Hoechst (UK) Ltd,

National Office of Animal Health Ltd,

Donald Leslie Haxby CBE

and

Robert Sleightholme,

* Language of the case: English.

on the validity of Council Directive 88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action (Official Journal 1988 L 70, p. 16),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of Chamber, G. C. Rodríguez Iglesias, Sir Gordon Slynn, R. Joliet and M. Zuleeg, Judges,

Advocate General: J. Mischo

Registrar: D. Louterman, Principal Administrator,

after considering the observations submitted on behalf of

the applicants in the main proceedings, by Christopher Carr and Thomas Sharpe, barristers;

the Government of the Kingdom of Spain, by Javier Conde de Saro, Director-General for the Coordination of Legal and Institutional Relations with the European Communities, and Rosario Silva de Lapuerta, abogado del Estado in the Legal Department for matters before the Court of Justice, acting as Agents;

the United Kingdom of Great Britain and Northern Ireland, by Susan Hay, of the Treasury Solicitor's Department, and by Richard Plender, barrister;

the Government of the Italian Republic, by Pier Giorgio Ferri, avvocato dello Stato, acting as Agent;

the Council of the European Communities, by Moyra Sims, a member of its Legal Department, and by Bjarne Hoff-Nielsen, Legal Adviser, acting as Agents;

the Commission of the European Communities, by Blanca Rodríguez Galindo and Grant Lawrence, members of its Legal Department, and Dierk Booss, Legal Adviser, acting as Agents;

having regard to the Report for the Hearing and further to the hearing on 13 December 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 March 1990,

gives the following

Judgment

- 1 By an order of 20 September 1988, which was received at the Court on 14 November 1988, the High Court of Justice, Queen's Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty certain questions relating to the validity of Council Directive 88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action (Official Journal 1988 L 70, p. 16).
- 2 Those questions arose in proceedings brought by Fedesa and others against the Minister for Agriculture, Fisheries and Food and the Secretary of State for Health. In the national court the applicants in the main proceedings are challenging the validity of the national regulations which partly implement the directive at issue, on the ground that the directive is invalid.
- 3 The directive at issue was adopted on 7 March 1988 and notified to the Member States on 11 March 1988. Its contents, including the date by which it was to be implemented, are identical to the contents of Council Directive 85/649/EEC of 31 December 1985 prohibiting the use in livestock farming of certain substances having a hormonal action (Official Journal 1985 L 382, p. 228), which was annulled by the Court in its judgment in Case 68/86 *United Kingdom v Council* [1988] ECR 855 on the ground that by failing to comply with the procedure laid down in Article 6(1) of its rules of procedure the Council had infringed an essential procedural requirement.

4 The High Court of Justice, Queen's Bench Division, referred the following questions to the Court of Justice:

- (1) Is Council Directive 88/146 of 7 March 1988 invalid by reason of its inconsistency with the principle of legal certainty?
- (2) Is Council Directive 88/146 of 7 March 1988 invalid by reason of its inconsistency with the principle of proportionality?
- (3) Is Council Directive 88/146 of 7 March 1988 invalid by reason of its inconsistency with the principle of equality?
- (4) Is Council Directive 88/146 of 7 March 1988 invalid by reason of the Council's misuse of powers, that directive being inconsistent with the objectives of the common agricultural policy contained in Article 39 of the EEC Treaty?
- (5) Is Council Directive 88/146 of 7 March 1988 invalid by reason of its inconsistency with Article 190 of the EEC Treaty having regard in particular to the fact that it fails to state adequately the reasons on which it is based?
- (6) Is Council Directive 88/146 of 7 March 1988 invalid by reason of its infringement of essential procedural requirements, having regard in particular to the fact that it did not originate in a proposal of the Commission directed towards the implementation of that directive or any other directive, that if it originated in a proposal derived from the Commission that proposal derived from a Commission which did not, in its composition, reflect the composition of the Commission at the time of the issuance of Directive 88/146, and that the Council failed to obtain the necessary opinion of the European Parliament, which opinion should have addressed itself to that directive and no other?
- (7) Is Council Directive 88/146 of 7 March 1988 invalid by reason of its inconsistency with the principle that legislation should not be retrospective in effect, particularly when it seeks the imposition of criminal penalties for acts done before its publication?

5 Reference is made to the Report for the Hearing for the facts of the dispute, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 Before examining the various grounds on which the directive is alleged to be invalid, it should be pointed out that the directive seeks, as is clear from its preamble, to remove distortions of competition and barriers to trade resulting from differences in Member States' legislation on the administration to farm animals of certain substances having a hormonal action. The first recital in the preamble to the directive points out in particular that assessments of the effect on human health of those substances vary in the national regulations. The Council therefore considered that it was necessary to lay down rules ensuring that all consumers were able to buy the products in question under largely identical conditions of supply and that those products corresponded to their anxieties and expectations in the best possible manner. It considered that such a course of action would be bound to bring about an increase in consumption of the products in question (see the second recital in the preamble to the directive).

The alleged infringement of the principle of legal certainty

7 The first ground of invalidity considered by the national court relates to the consistency of the directive with the principle of legal certainty. On that point it was argued during the proceedings that the directive lacked any scientific basis justifying the public-health considerations and consumer anxieties which underlay its adoption and that it frustrated the legitimate expectations of traders, who were entitled to expect that the substances in question would not be prohibited in the absence of any objectively based doubt as to their safety, efficacy and quality.

8 Even if it were to be held, as the applicants in the main proceedings have argued, that the principle of legal certainty requires any measure adopted by the Community institutions to be founded on a rational and objective basis, judicial review must, having regard to the discretionary power conferred on the Council in the implementation of the common agricultural policy, be limited to examining whether the measure in question is vitiated by a manifest error or misuse of powers, or whether the authority in question has manifestly exceeded the limits of its discretion.

- 9 In the light of the foregoing, the claim based on the existence of scientific evidence demonstrating the safety of the five hormones in question cannot be upheld. It is not necessary to order any measures of inquiry to verify the accuracy of that allegation; it need merely be stated that, faced with divergent appraisals by the national authorities of the Member States, reflected in the differences between existing national legislation, the Council remained within the limits of its discretionary power in deciding to adopt the solution of prohibiting the hormones in question, and respond in that way to the concerns expressed by the European Parliament, the Economic and Social Committee and by several consumer organizations.
- 10 Nor did the directive frustrate the legitimate expectations of traders affected by the prohibition of the use of the hormones in question. It is true that Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action (Official Journal 1981 L 222, p. 32) refers to the fact that the harmless or harmful effects of the substances in question have yet to be examined in detail (fourth recital), and requires the Commission to take account of scientific developments (Article 8). However, that directive does not pre-empt the conclusions which may be drawn therefrom by the Council in the exercise of its discretion. Moreover, in view of the divergent appraisals which had been made, traders were not entitled to expect that a prohibition on administering the substances in question to animals could be based on scientific data alone.
- 11 It follows from the foregoing that the alleged infringement of the principle of legal certainty cannot be upheld.

The alleged infringement of the principle of proportionality

- 12 It was argued that the directive at issue infringes the principle of proportionality in three respects. In the first place, the outright prohibition on the administration of the five hormones in question is inappropriate in order to attain the declared objectives, since it is impossible to apply in practice and leads to the creation of a dangerous black market. In the second place, outright prohibition is not necessary because consumer anxieties can be allayed simply by the dissemination of information and advice. Finally, the prohibition in question entails excessive disadvantages, in particular considerable financial losses on the part of the traders concerned, in relation to the alleged benefits accruing to the general interest.

- 13 The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.
- 14 However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see in particular the judgment in Case 265/87 *Schröder* [1989] ECR 2237, paragraphs 21 and 22).
- 15 On the question whether or not the prohibition is appropriate in the present case, it should first be stated that even if the presence of natural hormones in all meat prevents detection of the presence of prohibited hormones by tests on animals or on meat, other control methods may be used and indeed were imposed on the Member States by Council Directive 85/358/EEC of 16 July 1985 supplementing Directive 81/602/EEC (Official Journal 1985 L 191, p. 46). It is not obvious that the authorization of only those hormones described as 'natural' would be likely to prevent the emergence of a black market for dangerous but less expensive substances. Moreover, according to the Council, which was not contradicted on that point, any system of partial authorization would require costly control measures whose effectiveness would not be guaranteed. It follows that the prohibition at issue cannot be regarded as a manifestly inappropriate measure.
- 16 As regards the arguments which have been advanced in support of the claim that the prohibition in question is not necessary, those arguments are in fact based on the premiss that the contested measure is inappropriate for attaining objectives other than that of allaying consumer anxieties which are said to be unfounded. Since the Council committed no manifest error in that respect, it was also entitled to take the view that, regard being had to the requirements of health protection,

the removal of barriers to trade and distortions of competition could not be achieved by means of less onerous measures such as the dissemination of information to consumers and the labelling of meat.

- 17 Finally, it must be stated that the importance of the objectives pursued is such as to justify even substantial negative financial consequences for certain traders.
- 18 Consequently, the principle of proportionality has not been infringed.

The alleged infringement of the principle of equal treatment

- 19 It was argued that the directive is discriminatory inasmuch as it has unequal consequences in the different Member States on account of the different conditions, circumstances and traditional practices in regard to cattle rearing.
- 20 In that connection it is sufficient to state that a harmonization measure which is intended to standardize previously disparate rules of the Member States inevitably produces different effects depending on the prior state of the various national laws. Where Community rules apply equally to all Member States, as in the present case, there cannot be said to be discrimination.
- 21 Consequently, the alleged infringement of the principle of equal treatment cannot be upheld.

The allegation of a misuse of powers

- 22 It was alleged that the directive at issue is incompatible with the objectives of the common agricultural policy laid down in Article 39 of the Treaty. It was further alleged that the directive is in fact intended to reduce beef production, an objective which may be properly pursued only on the basis of Article 100 of the Treaty.

- 23 As the Court has already held (see judgment in *United Kingdom v Council*, cited above, paragraphs 21 and 22) with regard to Council Directive 85/649, mentioned above, which was identical to the directive at issue in these proceedings, in regulating conditions for the production and marketing of meat with a view to improving its quality, the directive comes into the category of measures provided for by the common organizations of the markets in meat and thus contributes to the achievement of the objectives of the common agricultural policy set out in Article 39 of the Treaty, and the Council therefore had the power to adopt it on the basis of Article 43 of the Treaty alone.
- 24 Furthermore, the Court has consistently held (see in particular the judgments in Joined Cases 140, 146, 221 and 226/82 *Walzstahl-Vereinigung and Thyssen v Commission* [1984] ECR 951, paragraph 27, and Case 69/83 *Lux v Court of Auditors* [1984] ECR 2447, paragraph 30) that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.
- 25 However, although the material made available to the Court and relied on by the applicants in the main proceedings shows that the possibility of a reduction in surpluses was indeed taken into consideration during the process leading to the adoption of the directive, it does not follow that such a reduction, which is not cited in the preamble to the directive as one of the objectives pursued, was in fact the exclusive or main purpose of the rules adopted.
- 26 Furthermore, it should be stated that the agricultural policy objectives laid down in Article 39 of the Treaty include in particular the stabilization of markets. Moreover, Article 39(2)(b) and (c) provides that in working out the common agricultural policy account must be taken of the need to effect the appropriate adjustments by degrees and of the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole. It follows that, as the Court held at paragraph 10 of its judgment in *United Kingdom v Council*, agricultural policy objectives must be conceived in such a manner as to enable the Community institutions to carry out their duties in the light of developments in agriculture and in the economy as a whole.

27 Accordingly, the reduction of agricultural production surpluses cannot be said to be foreign to the objectives of the common agricultural policy.

28 It follows from all the foregoing that the directive is not vitiated by a misuse of powers.

The alleged inadequacy of the statement of reasons

29 As regards the alleged inadequacy of the statement of reasons, the Court has already held at paragraphs 28 and 36 of its judgment in *United Kingdom v Council* that the reasons for the directive are sufficiently stated since its preamble gives a sufficiently clear statement of the objectives pursued.

30 As regards the claim based on the failure to mention the objective of reducing meat production, it is pertinent only if such a reduction was the genuine or main ground for the directive. That proposition has already been rejected in connection with the examination of the fourth question.

31 Consequently, the allegation of failure to state reasons cannot be upheld.

The alleged infringement of essential procedural requirements

32 It was argued that the directive at issue is vitiated by several procedural defects on the ground that, following the annulment of the previous directive by the Court's judgment in *United Kingdom v Council*, the Council adopted the new directive in the absence of a new proposal by the Commission and a new opinion from the Parliament.

33 In the first place it was alleged that the annulment of the earlier directive entailed the nullity of all preparatory acts.

- 34 The directive which preceded the directive at issue was annulled on account of a procedural defect concerning solely the manner in which it was finally adopted by the Council. In those circumstances the annulment of the directive does not affect the preparatory acts of the other institutions.
- 35 Secondly, it was alleged that a new proposal by the Commission and a new opinion from the European Parliament were necessary owing to changes which had occurred since the adoption of the preparatory acts both in the composition of those institutions as a result of the accession of Spain and Portugal, countries which have animal husbandry traditions different from those of the rest of the Community, and in the state of scientific knowledge.
- 36 First of all, a change in the composition of an institution does not affect the continuity of the institution itself, and its final or preparatory acts in principle retain their full effect.
- 37 Furthermore, it is for the institutions themselves to assess whether or not changes in the circumstances, of whatever nature they may be, require them to take a fresh view. With regard, in particular, to Commission proposals, that institution has the right, under Article 149(3) of the Treaty, to alter them at any time so long as the Council has not acted.
- 38 It was further argued that the Parliament ought to have been consulted afresh following the amendment of the Commission's proposal in 1985 after the opinion of the Parliament had been obtained.
- 39 In that respect it must be observed that, apart from some changes which were technical rather than substantive, the Commission's proposal was modified essentially in the manner indicated by the Parliament, which, in its opinion, had advocated the total prohibition of the five substances eventually agreed upon by the Council, whereas the proposal submitted to it involved the prohibition of only two substances. In those circumstances fresh consultation was not necessary.

- 40 It follows from the foregoing that the directive at issue is not vitiated by infringement of essential procedural requirements.

The alleged infringement of the principle that legislation should not be retroactive

- 41 It was argued that the directive at issue infringes the principle that legislation must not be retroactive since it was adopted on 7 March 1988 and stipulated that it was to be implemented by 1 January 1988 at the latest. In that connection two aspects should be distinguished, namely the retroactive effect of penal provisions and retroactive effect outside the criminal sphere.
- 42 As regards the first aspect, it should first be pointed out that the Court has held (see in particular the judgment in Case 63/83 *Regina v Kirk* [1984] ECR 2689, paragraph 22) that the principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right which takes its place among the general principles of law whose observance is ensured by the Court of Justice.
- 43 As the Court held in its judgment in Case 14/86 *Pretore di Salò v Persons Unknown* [1987] ECR 2545, a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive. None of the provisions of the directive at issue seek to produce that effect.
- 44 Article 10 of the directive, which is reproduced verbatim from the previous directive annulled by the Court in its judgment of 23 February 1988 referred to above, provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply *inter alia* 'with this directive, by 1 January 1988 at the latest'. That provision cannot be interpreted as imposing on Member States the obligation to adopt measures which conflict with Community law, in particular with the principle that penal provisions may not have retroactive effect. Nor may it provide a basis for criminal proceedings instituted under provisions of national law which may have been adopted in implementation of the annulled directive and whose sole basis is to be found in that directive.

- 45 As regards the retroactive effect of the directive at issue outside the criminal sphere, it should be recalled that, as the Court has already held on several occasions (see in particular the judgment in Case C-337/88 *Società agricola fattoria alimentare* [1990] ECR I-1, paragraph 13), although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. In order to reply to the question raised, it is therefore necessary to determine whether those criteria were satisfied in the present case.
- 46 Since in the present case the earlier directive was annulled because of a procedural defect, the Council considered it necessary to adopt a directive in the same terms, including the date stipulated for its implementation, in order to avoid a temporary legal vacuum with regard to the existence of a basis in Community law for national provisions adopted by the Member States in order to comply with the directive which was annulled.
- 47 As regards the legitimate expectations of the persons concerned, it should be observed that the period between the annulment of the first directive (23 February 1988) and the notification of the directive at issue (11 March 1988, the directive having been adopted on 7 March) or its publication in the Official Journal on 16 March was very short and, furthermore, the earlier directive was annulled because of a procedural defect. In those circumstances, the persons concerned, whose activities were subject to national legislation adopted in order to implement the directive which was annulled, could not expect the Council to change its attitude on the substance of the matter. Accordingly, the retroactive nature of the new directive does not infringe the principle of the protection of legitimate expectations.
- 48 It follows from the foregoing that the directive is not inconsistent with the principle that legislation should not be retroactive.
- 49 Accordingly, the reply to be given to the national court should be that examination of the questions raised has disclosed no factor of such a nature as to affect the validity of Council Directive 88/146 of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action.

Costs

50 The costs incurred by the Government of the Kingdom of Spain, the United Kingdom and the Government of the Italian Republic and by the Council and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the High Court of Justice, Queen's Bench Division, by order of 20 September 1988, hereby rules:

Examination of the questions raised has disclosed no factor of such a nature as to affect the validity of Council Directive 88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action.

Moitinho de Almeida

Rodríguez Iglesias

Slynn

Joliet

Zuleeg

Delivered in open court in Luxembourg on 13 November 1990.

J.-G. Giraud

J. C. Moitinho de Almeida

Registrar

President of the Fifth Chamber