

OPINION OF ADVOCATE GENERAL
LÉGER

delivered on 14 September 1995 *

1. The Bundesverwaltungsgericht has referred to the Court for a preliminary ruling a question concerning the compatibility of a regulation adopted by the Federal Minister for Food, Agriculture and Forestry with Article 3(1)(a) of Council Directive 88/166/EEC of 7 March 1988 complying with the judgment of the Court of Justice in Case 131/86 (annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages).¹

provides, in particular, that all cages must have a minimum surface area of:

— 530 cm² as from 1 July 1989;⁵

— 550 cm² as from 1 January 1993.⁶

2. The question arose in the course of a dispute between Hans Hönig and the town of Stockach² and the *Land* Baden-Württemberg.³

4. Mr Hönig is a poultry farmer and raises laying hens in battery cages. The birds, which weigh over 2 kg, are housed in fives in cages with an area of 2 125 cm²; thus each hen has an average of 425 cm² space.

3. On 1 January 1988 a regulation came into force in Germany on the protection of laying hens kept in battery cages.⁴ As regards hens weighing more than 2 kg the regulation

5. Notwithstanding the notice he received from the *Land* administrative authorities⁷ to the effect that he would be prosecuted for failing to comply with the regulation on laying hens, Mr Hönig informed the

* Original language: French.

1 — Hereinafter 'Directive 88/166' or 'the directive' (OJ 1988 L 74, p. 83).

2 — Hereinafter 'Stockach'.

3 — Hereinafter 'the Land'.

4 — Regulation of 10 December 1987, BGBl. I, p. 2622 (hereinafter 'the regulation on laying hens').

5 — *Ibidem*, Article 2(1), second indent, in conjunction with Article 2(2).

6 — Order for reference, p. 2 of the English translation.

7 — State Veterinary Office, Radolfzell.

administration that he would continue to run his business as in the past and at the same time brought an action for a declaratory judgment before the Verwaltungsgericht against the *Land* and Stockach.⁸

national rules stricter than those laid down by the Community legislature; however, it also considers that there is doubt as to the interpretation to be given to the Community text and therefore has decided to stay the proceedings and refer to the Court of Justice for a preliminary ruling on the following question:

6. In support of that action he claims that the regulation on laying hens is incompatible with Community law and in particular with Article 3 of the directive. He maintains that the purpose of the directive is to eliminate distortion of competition between Community poultry farmers. By failing to adhere strictly to the conditions laid down in the Community text, the regulation on laying hens created conditions which were less favourable for German poultry farmers, thus creating unequal conditions of competition as between Member States in that sector, which was contrary to the purpose of the Directive.

'Is Article 3(1)(a) of the Annex to Council Directive 88/166/EEC of 7 March 1988 to be interpreted as meaning that it obliges the Member States to lay down the minimum cage area specified in the directive, without leaving any scope for more stringent national requirements?'

His application was dismissed as unfounded and his appeal was rejected; he then appealed against the latter decision to the Bundesverwaltungsgericht.

7. I consider that the reply to that question should be in the negative, for three essential reasons: the wording of the Community text, its *ratio legis*, and the case-law of the Court of Justice.

8. *In the first place*, as regards the wording of Article 3(1)(a) of the directive, it is as follows:

That court considers that Article 3 of the directive permits Member States to impose

'(a) at least 450 cm² of cage area, measured in a horizontal plane which may be used

⁸ — Order for reference, p. 3 of the English translation.

without restriction, in particular not including non-waste deflection plates liable to restrict the area available, shall be provided for each laying hen.'

adopted by the Council as early as 1976¹⁰ and explained in its resolution of 22 July 1980 as follows:

9. In my view,⁹ the wording of the Community provision at issue is entirely unequivocal: the words 'at least' indicate that the Community legislature has laid down a minimum threshold, which means that Member States may not adopt rules less favourable as regards the protection of the hens; in other words, they may not go below the Community standards. However, Member States may raise the threshold and impose on their own territory standards which are stricter, that is to say which are more favourable to the hens. If, as Mr Hönig maintains, the legislature had intended to ensure uniform application strictly to the letter of that standard, the wording would have been quite different, for instance: 'the cage area is to be 450 cm²' or '... must be 450 cm² ...'.

'... the keeping of layer hens in cages must be subject to compliance with minimum standards and criteria established in order to ensure the protection of these animals;

... appropriate rules for this purpose should be adopted by the Council, acting on a proposal from the Commission, before 1 November 1981'.¹¹

10. That view is supported by an analysis of all the provisions of the directive and the context in which it was adopted.

11. The directive lays down not only the dimensions of the cages used for battery farming,¹² but also the conditions governing such farming methods,¹³ which are set out in the Annex to the directive.

Directive 88/166 forms part of a common action programme for animal protection

The directive is addressed to the Member States and not, as Mr Hönig maintains, to poultry farmers. That is indicated by both

⁹ — See also the observations of the Commission, the United Kingdom, the German Government and the defendant.

10 — Proposal for a Council decision adopting the European Convention on the protection of animals kept for farming purposes (OJ 1976 C 133, p. 6).

11 — Resolution on the protection of layer hens in cages (OJ 1980 C 196, p. 1).

12 — Article 3 of the directive.

13 — Article 4.

the wording and the sense of the provisions; in accordance with Article 189 of the EC Treaty, Article 12 expressly provides so.¹⁴ Moreover, it would be unreasonable and ineffective to make poultry farmers responsible individually for providing a cage area per hen greater than that provided for by Article 3(1)(a) of the directive: they have no interest in doing that.

Consequently, to maintain as does Mr Höning that the cage area available for battery hens determined by Article 3(1)(a) of the directive is a fixed measure and that it is not permitted to increase it would run counter to the aim of the Community text.

The repeated, if not systematic, use of the words 'at least'¹⁵ and the adjective 'minimum'¹⁶ emphasize the Community legislature's aim of providing measures for the protection of poultry in intensive farming systems, in accordance with the intentions it had expressed as early as 1976.¹⁷ Moreover, the title of the directive and Article 1 thereof¹⁸ make this abundantly clear.

12. That remark brings us to the *second reason* for maintaining that the reply to the question referred by the national court must be in the negative: the *ratio legis* of the Community text.

It may therefore be said that the standards laid down by the directive are primarily intended to avoid any injury or unnecessary suffering for the animals and to safeguard their health and welfare.¹⁹

13. The objective pursued by the Community legislature is twofold. It is on the one hand to protect the animals farmed,²⁰ and on the other hand to reduce inequalities in conditions of competition as between Member States in this particular sector (the market in eggs and poultry), which are attributable to the different national rules in this area.²¹

14 — 'This directive is addressed to the Member States.'

15 — Article 3(1)(a), (b), (c) and (d) and, in the Annex to the directive, points 8 and 11.

16 — In the title, the third recital in the preamble and Article 1.

17 — See, in particular, the fifth and sixth recitals in the preamble to the proposal for a Council decision approving the European Convention on the protection of animals kept for farming purposes, referred to above.

18 — 'This directive lays down the minimum standards for the protection of laying hens kept in battery cages.'

19 — See paragraph 15 of the Opinion of Advocate General Mischo in Case 131/86 *United Kingdom v Council* [1988] ECR 905.

20 — First recital in the preamble to the directive: 'whereas the Community has ... approved (the European Convention on the protection of animals kept for farming purposes) by Decision 78/923/EEC ...; whereas the keeping of laying hens in battery cages is the most widely used means of egg production in the Community ...; whereas ... this means of housing may, in certain cases, lead to unnecessary and excessive suffering on the part of the animal'.

21 — Second recital in the preamble to the directive: '... the national laws at present in force in the field of the protection of animals kept for farming purposes present differences which may distort conditions of competition and in consequence interfere with the smooth running of the organization of the common market in eggs and poultry'.

In order to strike the right balance between the conflicting interests of

— the economic necessity of reducing production costs, and

— the moral and ethical necessity of introducing rules protecting animals,

and to reconcile them,²² the Community legislature sought to lay down, as a first step, common minimum standards.

14. That analysis has been confirmed by the Court of Justice in its judgment in *United Kingdom v Council*, cited above, in which it stated:

‘... the survey of the preparatory measures referred to by the parties shows that the

decision to harmonize the standards applicable to animals kept for farming purposes was made essentially with a view to eliminating unequal conditions of competition in that field’.²³

‘... the preparatory documents show that the directive was also conceived with a view to ensuring better treatment for laying hens, along the lines of the Convention referred to above. However, it must be emphasized that, as was pointed out above, varying national rules regarding agricultural products which may affect the proper functioning of a common organization of the market, such as, in this case, differing conditions for the keeping of laying hens, may be harmonized on the basis of Article 43 of the Treaty alone, and there is no need to have recourse to Article 100’.²⁴

15. Contrary to what the plaintiff in the main action has maintained, the directive has not one purpose — *to remove inequalities in conditions of competition between Member States* — but two, since it seeks also to ensure *the protection of animals*.

22 — Third recital in the preamble to the directive (the emphasis is mine): ‘whereas there is therefore a need to establish priority parameters and to define common minimum requirements applicable in all intensive housing systems, in order to enable the market to operate satisfactorily in comparison, in particular, with Article 39 of the Treaty, while bearing in mind the need to protect animals; whereas it is necessary for this purpose, as a first step, to establish Community measures for laying hens in battery cages’.

23 — Paragraph 26.

24 — Paragraph 27.

Moreover, the directive has not led to the abolition of disparities between Member States' legislation, but has merely reduced them. In the absence of agreement between the Member States, *full harmonization* of the rules applicable to battery hens *has not been achieved*.²⁵ On this point, it should be noted that the words 'as a first step' in the third recital in the preamble and the fourth and fifth recitals not only emphasize that the Community text is merely a stage but also hint of reforms yet to come.

the facts before the Court today with those on which the Court ruled on 22 June 1993 in *Philip Morris Belgium and Others*²⁷ and *Gallagher and Others*.²⁸

The Court held that where the directive did not seek full harmonization²⁹ and provided that the purpose of the Community provision, considered in the light of all its provisions, was respected,³⁰ Member States were free to go beyond the minimum requirements laid down:³¹

16. *The last argument* in support of this view is to be found in the case-law of the Court of Justice.

"The expression "at least" contained in both articles must be interpreted as meaning that, if they consider it necessary, Member States are at liberty to decide that the indications and warnings are to cover a greater surface area in view of the level of public awareness of the health risks associated with tobacco consumption".³²

17. The Court was called upon recently to rule on the interpretation of provisions contained in Council Directive 89/622/EEC of 13 November 1989,²⁶ which also laid down minimum standards. It is useful to compare

27 — Case C-222/91 [1993] ECR I-3469.

28 — Case C-11/92 [1993] ECR I-3545.

29 — *Gallagher*, cited above, paragraph 22 (the emphasis is mine): 'Admittedly, as the applicants in the main proceedings have pointed out, this interpretation of the provisions may imply less favourable treatment for national products in comparison with imported products and leaves in existence some inequalities in conditions of competition. However, those consequences are attributable to the degree of harmonization sought by the provisions in question, which lay down minimum requirements.'

30 — *Philip Morris Belgium*, cited above, paragraphs 8 to 11, and *Gallagher*, cited above, paragraphs 11 to 14.

31 — *Philip Morris Belgium*, cited above, paragraph 17, and *Gallagher*, cited above, paragraphs 20, 22 and 23.

32 — *Gallagher*, cited above, paragraph 20.

25 — See the Commission's observations on this point, pages 8 and 9 of the French translation.

26 — Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ 1989 L 359, p. 1).

18. In conclusion, for the reasons set out above, I propose the following reply to the question which has been referred:

Article 3(1)(a) of the Annex to Council Directive 88/166/EEC of 7 March 1988 complying with the judgment of the Court of Justice in Case 131/86 (annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages) is to be interpreted as permitting Member States to lay down stricter national rules regarding cage area for laying hens kept in battery cages.