

JUDGMENT OF THE COURT (Fifth Chamber)

3 July 2003 *

In Case C-220/01,

REFERENCE to the Court under Article 234 EC by the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court) (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

Joseph Lennox, trading as 'R. Lennox & Son',

and

Industria Lavorazione Carni Ovine,

on the interpretation of Article 9 of Council Directive 91/68/EEC of 28 January 1991 on animal health conditions governing intra-Community trade in ovine and caprine animals (OJ 1991 L 46, p. 19) and of various other Community provisions,

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, acting for the President of the Fifth Chamber,
A. La Pergola, P. Jann, S. von Bahr and A. Rosas (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- Joseph Lennox, by C. Quigley, Barrister, instructed by A.M. Burstow and D. Cooper, of Argles Stoneham Burstow, Solicitors,
- Industria Lavorazione Carni Ovine, by M. Sheridan, Barrister, instructed by Beachcroft Wansbroughs, Solicitors,
- the Irish Government, by D. O'Hagan, acting as Agent, and E. Mulloy, BL,
- the Commission of the European Communities, by A. Bordes and K. Fitch, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Joseph Lennox, represented by C. Quigley; of Industria Lavorazione Carni Ovine, represented by M. Sheridan; of the Irish Government, represented by R. Boyle, BL; and of the Commission, represented by A. Bordes and K. Fitch, at the hearing on 12 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 17 October 2002,

gives the following

Judgment

- 1 By order of 13 November 2000, received at the Court on 30 May 2001, the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court), referred for a preliminary ruling under Article 234 EC a number of questions on the interpretation of Article 9 of Council Directive 91/68/EEC of 28 January 1991 on animal health conditions governing intra-Community trade in ovine and caprine animals (OJ 1991 L 46, p. 19) and of various other Community provisions.
- 2 Those questions have arisen in a dispute between Mr Lennox, trading as 'R. Lennox & Son', a livestock exporter established in the United Kingdom, and Industria Lavorazione Carni Ovine ('ILCO'), a company operating a slaughterhouse in Italy, concerning the loss of three consignments of live sheep on the ground that, when they were exported from the United Kingdom to Italy, they were not accompanied by the health certificates required under Italian legislation.

Legal framework

Community law

Directive 90/425/EEC

- 3 Trade between Member States in certain live animals is governed by 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).
- 4 Article 1 of Directive 90/425 applies to, *inter alia*, live animals and animal products that are covered by the directives listed in Annex A to that directive. Ovine animals were included in that annex by Directive 91/68.
- 5 Directive 90/425 lays down the principle that animals are to be checked in the Member State of dispatch. Article 5, however, sets out several types of inspections which may be carried out in the Member State of destination.
- 6 Article 5(1)(a) of Directive 90/425 establishes the principle of veterinary spot checks. Article 5(1)(b) makes provision for other checks, which will vary according to the circumstances.

7 Thus, Article 5(1)(b)(i) of that directive requires the competent authority to check the certificates or other accompanying documents where the animals are intended for an approved market or assembly centre as defined by Community rules. By contrast, Article 5(1)(b)(ii) provides that, where animals are intended for a slaughterhouse placed under the supervision of an official veterinarian, the latter must ensure, ‘in particular on the basis of the certificate or accompanying document’, that only animals that meet the requirements of Directive 90/425 and, by reference to the directives cited in the annexes to that directive, those of Directive 91/68 are slaughtered.

8 Article 5(1)(b), second subparagraph, of Directive 90/425 provides further that, in the case in which the animals are destined for dealers, establishments, holdings, centres or organisations, those receiving the animals must, *inter alia*, ensure that they are accompanied by the requisite certification, notify the competent authority of any irregularity or anomaly and, in the latter case, isolate the animals in question until that authority has taken a decision regarding them.

9 Article 8(1) of Directive 90/425 sets out the various measures which may be adopted by the Member State of destination in the case in which checks have revealed the presence of disease. These measures include the placing of the animals in quarantine, their slaughter or their return to the Member State of dispatch. Article 8(1)(b), second subparagraph, of that directive, however, provides that, if the certificate or documents are found to contain irregularities, the owner or his representative must be granted a period of grace before recourse is had to this last possibility.

10 Article 10(1) of Directive 90/425 is worded as follows:

‘Each Member State shall immediately notify the other Member States and the Commission of any outbreak in its territory, in addition to an outbreak of diseases referred to in Directive 82/894/EEC, of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health.

The Member State of dispatch shall immediately implement the control or precautionary measures provided for in Community rules, in particular the determination of the buffer zones provided for in those rules, or adopt any other measure which it deems appropriate.

The Member State of destination or transit which, in the course of a check referred to in Article 5, has established the existence of one of the diseases or causes referred to in the first subparagraph may, if necessary, take the precautionary measures provided for in Community rules, including the quarantining of the animals.

Pending the measures to be taken in accordance with paragraph 4, the Member State of destination may, on serious public or animal health grounds, take interim protective measures with regard to the holdings, centres or organisations concerned or, in the case of an epizootic disease, with regard to the buffer zone provided for in Community rules.

The measures taken by Member States shall be notified to the Commission and to the other Member States without delay.’

Directive 91/68

- 11 Article 3 of Directive 91/68 provides that ovine and caprine animals for slaughter may be the subject of trade between Member States only if they fulfil the conditions laid down in Article 4 of that directive, whilst ovine and caprine animals for breeding and fattening may be the subject of trade only if they fulfil the conditions laid down in Articles 4, 5 and 6 of that directive, without prejudice to any additional guarantees which may be required pursuant to Articles 7 and 8 thereof.

- 12 Article 4(1) of Directive 91/68 provides that ovine and caprine animals must be identified and registered, that they must show no clinical sign of disease when inspected, that they must not come from a holding which is the subject of a prohibition on health grounds or have been in contact with animals from such a holding, and that they must not be the subject of animal health restrictions applied pursuant to Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease (OJ 1985 L 315, p. 11). Article 4(2) of Directive 91/68 requires Member States to exclude from trade any ovine or caprine animals which might have to be slaughtered under a national programme for the eradication of certain diseases and those which cannot be marketed on their own territory for health or animal health reasons justified by Article 36 of the EC Treaty (now, after amendment, Article 30 EC).

- 13 Article 5 of Directive 91/68 imposes a number of conditions relating to brucellosis for ovine and caprine animals intended for fattening or breeding.

- 14 Under Article 6 of Directive 91/68, additional conditions are imposed in regard to animals intended for breeding. That article provides *inter alia* that such animals must have been obtained from a holding and must have been in contact only with animals from a holding in which certain diseases have not been clinically

diagnosed for specified minimum periods. In particular, with regard to scrapie, sheep must meet the additional requirements set out in Article 6(b) of that directive, which specifically provides that no case of scrapie must have been confirmed on the holding in question for at least two years.

- 15 The obligation relating to the health certificate is set out in Article 9 of Directive 91/68:

‘In trade between Member States, ovine and caprine animals must, during transportation to the place of destination, be accompanied by a health certificate, signed by an official veterinarian, which conforms to Annex E (Models I, II and III), and which must be drawn up, on the day of the inspection provided for in Article 4(1)(b), in at least one of the official languages of the Member State of destination, and be valid for 10 days. The certificate shall consist of a single sheet.’

- 16 Three models of forms are shown in Annex E to Directive 91/68. Model I set out in that annex (‘Model I’) is for trade in animals intended for slaughter, Model II set out in that annex (‘Model II’) is for animals intended for fattening, while Model III established by that annex is designed for animals intended for breeding. The only difference between Model I and Model II is that the latter contains a phrase certifying that the animals are eligible for entry into an officially brucellosis-free holding.

- 17 Article 10(1) of Directive 91/68 is worded as follows:

‘The rules laid down in Directive 90/425/EEC shall apply, in particular to checks at origin, to the organisation of, and follow-up to, the checks to be carried out by

the Member State of destination, and to the protective measures to be implemented.’

Italian law

18 By Order No 600.3/VET/340/2/8920 adopted on 24 December 1996 (‘the order of 24 December 1996’), the Italian Ministry of Health regulated imports into Italy of bovine and ovine animals for breeding or fattening originating in France, Ireland, Portugal and the United Kingdom.

19 In its preamble, the order of 24 December 1996 referred to the existence of cases of Bovine Spongiform Encephalopathy (‘BSE’) in those different Member States, to the monitoring programmes adopted in some of them, and to the fact that Italy was in a different position with regard to animal health and did not require similar measures. The order of 24 December 1996 also referred to the opinion of a national working group dealing with Transmissible Spongiform Encephalopathies (‘TSEs’) and stated that it was being introduced ‘pending the adoption of possible Community measures’.

20 Under the terms of the order of 24 December 1996, live sheep for breeding or fattening could be imported only if the following declaration was included in the accompanying health certificate:

‘The animals referred to in this certificate were born and raised on farms in which no case of Transmissible Spongiform Encephalopathy (TSE) has been registered in the last six years.’

- 21 The order of 24 December 1996 also provided for the removal of certain specified risk material when the meat was being cut up.
- 22 Explanatory Memorandum No 600.3/340/2/73 of 3 January 1997 ('the memorandum of 3 January 1997') extended the requirement for a TSE declaration in health certificates, as laid down in the order of 24 December 1996, to animals imported for purposes of slaughter.
- 23 Both documents were notified to the Commission by fax on 10 January 1997.
- 24 Following a request by the Court, the United Kingdom Government, by letter of 31 May 2002, confirmed that it had received notification of the order of 24 December 1996 and of the memorandum of 3 January 1997.
- 25 The order of 24 December 1996 was repealed following the Commission's adoption of Decision 98/272/EC of 23 April 1998 on epidemio-surveillance for transmissible spongiform encephalopathies and amending Decision 94/474/EC (OJ 1998 L 122, p. 59).

The dispute in the main proceedings and the questions submitted for preliminary ruling

- 26 According to the order for reference, a contract, governed by English law, was concluded between Lennox and ILCO in June 1997 for the export of three consignments of live sheep from the United Kingdom to ILCO's place of business in Italy.

- 27 The sheep were to be delivered on 6 July 1997. Although Lennox was aware that ILCO operated a slaughterhouse, no discussion took place between the parties as to whether the sheep were intended for immediate slaughter or for further fattening prior to slaughter.
- 28 The health certificates required under Directive 91/68 for trade in live sheep for slaughter or for further fattening were issued in the United Kingdom by the Ministry of Agriculture, Fisheries and Food ('MAFF'). For the sheep sent to ILCO, Lennox obtained health certificates from MAFF which were headed 'Health Certificate for Trade between Member States of the European Community in Ovine and Caprine Animals for Fattening'.
- 29 On 1 July 1997, ILCO requested that Lennox send details of the loadings, including health certificates. Lennox submits that a MAFF official forwarded those health certificates to ILCO by fax on Friday, 4 July 1997. ILCO, it argues, would have had sight of those certificates on Monday, 7 July 1997.
- 30 The animals were loaded on 4 July 1997 and arrived at ILCO's premises on 7 July 1997. On the day of their arrival, ILCO informed Lennox that the health certificates were incorrect in so far as they stated that the sheep were intended for fattening, not for slaughter. ILCO asked Lennox to send to it certificates for slaughter, failing which the sheep would be returned to the United Kingdom.
- 31 An Italian veterinary official sequestered the sheep. On 8 July 1997, a fax was sent by the Italian Ministry of Health to the British Embassy in Rome requesting approval for the return of the sheep to the United Kingdom in accordance with Council Directive 89/608/EEC of 21 November 1989 on mutual assistance

between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of legislation on veterinary and zootechnical matters (OJ 1989 L 351, p. 34) and Directive 90/425. The reason stated for this request was that the health certificates used were for further fattening, 'for which the TSE declaration is required, as stated by the Order 600.3/VET/340/2/8920 of 24 December 1996.'

32 The British Embassy in Rome turned down that request, having been informed by MAFF of the latter's view that the requirement that a TSE declaration be included constituted an unlawful restriction on trade. Lennox sought to verify that the sheep were from a TSE-free farm. No certificate for animals intended for slaughter was sent.

33 The sheep were ultimately destroyed. Lennox sought payment of GBP 57 254.40 from ILCO on the basis that Lennox had fulfilled its contractual obligations. Following ILCO's refusal to make payment, Lennox sued for that amount and ILCO counterclaimed for damages in respect of the loss incurred.

34 ILCO presented to the High Court a declaration of Italian law made by an Italian lawyer which states that the importation into Italy of live sheep for slaughter which are accompanied by health certificates for trade in sheep intended for fattening constitutes a breach of Italian law. That declaration states further that failure by an exporter to comply with the requirements relating to the production of correct and accurate certificates constitutes a criminal offence and that the use of non-conforming certificates amounts to fraud.

35 In the light of these facts, the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court), referred the following questions to the Court for a preliminary ruling:

'1. (a) Where a consignment of sheep is exported from one Member State to another Member State and the sheep are for slaughter on arrival, is the requirement under Article 9 of Directive 91/68/EEC complied with where the accompanying health certificate is not a Model I certificate, as in Annex E thereof, but is a Model II certificate?

(b) If the answer to Question 1(a) is No, so that the consignment must be accompanied only by a Model I certificate, does the responsibility for identifying the correct certificate prior to export rest on the exporter or on the recipient of the sheep, or is it for the applicable national law of the contract to determine which party bears this responsibility?

(c) Where a consignment of sheep is exported from one Member State to another Member State and the sheep are for slaughter on arrival and where the accompanying health certificate is a Model II certificate, is the national law of the State of destination entitled to make the importation unlawful on the ground that the certificate is not a Model I certificate?

2. (a) In July 1997, was it compatible with Community law, in particular Articles 28 EC to 30 EC (ex Articles 30 to 36 of the EC Treaty) and/or Article 152 EC (ex Article 129 of the EC Treaty) and/or Articles 6 EC and 174 EC (ex Article 130r of the EC Treaty) and Council Directives 89/662/EEC, 90/425/EEC and 91/68/EEC for a Member State to require

that the health certificates required pursuant to Article 9 of Directive 91/68/EEC include the following declaration: “The animals referred to in this certificate were born and raised on farms in which no case of Transmissible Spongiform Encephalopathy (TSE) has been registered in the last 6 years.”?

- (b) If the answer to Question 2(a) is No, where the exporter has otherwise fulfilled its obligations under the applicable law of the contract to deliver the sheep to the recipient’s place of business, is a national court required, in civil proceedings between the exporter and the recipient concerning their contractual rights and obligations regarding the importation of the sheep, to ignore any obligation under the national law of the Member State of destination that the accompanying health certificate include the said declaration?’

The questions submitted for preliminary ruling

Question 1

- ³⁶ By Question 1(a) and (c), the High Court is seeking in substance to ascertain whether a Member State can prevent the importation of sheep for slaughter when they arrive on its territory in the case where they are accompanied by a Model II health certificate, which is provided for trade between Member States in ovine and caprine animals intended for fattening. By Question 1(b), the High Court seeks to determine, if a Member State can prevent such importation, who is responsible for identifying the certificate which is appropriate for the transaction in question.

Observations submitted to the Court

- 37 Lennox, the Irish Government and the Commission take the view that, in the case of trade between Member States in animals intended for slaughter, the condition laid down in Article 9 of Directive 91/68 is satisfied even when the certificate presented is a Model II certificate for fattening and not a Model I certificate for slaughter. They submit that sheep for fattening must fulfil the requirements in Article 4 to 8 of Directive 91/68, whereas sheep for slaughter need only fulfil the requirements of Article 4 of that directive. It follows that sheep which meet the requirements for fattening necessarily satisfy the requirements relating to slaughter.
- 38 In view of the fact that the substantive conditions are fulfilled, the formal defect as to the model of certificate used should not have substantive consequences and should not therefore render the importation illegal. The Commission points out that the checks carried out in the Member State of importation pursuant to the relevant directives must also include veterinary inspections and that a veterinarian must certify that an animal accompanied by a certificate stating that the animal satisfies the requirements for fattening necessarily satisfies the requirements relating to slaughter. Lennox and the Irish Government submit that the purpose of Directives 90/425 and 91/68 is to facilitate trade and that those directives must be the subject of reasonable interpretation by the Member States and by their officials and agents.
- 39 ILCO, in contrast, takes the view that the condition set out in Article 9 of Directive 91/68 was not complied with during the transaction involving the animals at issue in the main proceedings. It stresses that one of the objectives of Directives 90/425 and 91/68 is to simplify checks, so that the Member State of destination can confine itself to carrying out administrative checks and veterinary spot checks. The reliability of the certificate system could be jeopardised if the national authorities of that State were allowed a margin of discretion.

- 40 With regard to the responsibility of the contracting parties to identify the appropriate certificate, ILCO argues that Directives 90/425 and 91/68, which set out the principle of checks in the Member State of dispatch, place the onus on the consignor to identify, prior to export, the certificate that is required. The national law governing the contract, however, may in certain circumstances impose that responsibility on a person other than the consignor.
- 41 So far as the consequences of inadequate certification are concerned, ILCO argues that it may be appropriate to separate the problem of free movement of goods from that of the penalty. Presentation of a certificate of the inappropriate model might not prevent importation of the sheep but might simply involve payment of a fine.

Findings of the Court

- 42 It should be stated at the outset that, according to the wording of Directive 91/68, sheep intended for slaughter are those which must satisfy the least number of health requirements in order to be able to be traded between Member States. They need satisfy only the requirements set out in Article 4 of that directive, whereas sheep intended for fattening or breeding must also satisfy the requirements set out in Articles 5 and 6 of that directive, without prejudice to any additional guarantees that may be required in accordance with Articles 7 and 8 thereof.
- 43 It follows that a sheep which satisfies the health requirements governing designation for fattening or breeding necessarily meets the requirements which must be satisfied by a sheep intended for slaughter.

- 44 With regard to the question whether the importation of a sheep intended for slaughter may be prohibited by a Member State of destination on the ground that it is accompanied by a health certificate stating that it satisfies the requirements for fattening, it should first be pointed out that the Model II health certificate provided for fattening contains wording identical to that featuring on the Model I certificate provided for slaughter, together with an additional reference to brucellosis.
- 45 Second, it is necessary to determine whether Directives 90/425 and 91/68 provide for specific penalties in the case where the certificate presented in the Member State of destination is of a model which differs from that corresponding to the use to which it is intended that the animal be put.
- 46 In accordance with Article 10 of Directive 91/68, it is the rules laid down in Directive 90/425 that are applicable to checks carried out in the Member State of destination.
- 47 It should be borne in mind in this regard that Article 5 of Directive 90/425, which describes the checks in the Member State of destination, makes provision for different types of checks. Article 5(1)(a) establishes the principle of veterinary spot checks. Article 5(1)(b) provides for other checks, which will vary according to the circumstances.
- 48 Thus, Article 5(1)(b)(i) of that directive requires the competent authority to check the certificates or other accompanying documents where the animals are intended for an approved market or assembly centre as defined by Community rules. In contrast, Article 5(1)(b)(ii) provides that, where animals are intended for a slaughterhouse placed under the supervision of an official veterinarian, the latter

must ensure, 'in particular on the basis of the certificate or accompanying document', that only animals that meet the requirements of Directive 90/425 and, by reference to the directives referred to in the annexes to that directive, those of Directive 91/68 are slaughtered.

49 It follows from this latter provision that the check carried out by the official veterinarian relates to substantive conditions and not simply to the heading on the certificates. Consequently, if sheep intended for slaughter but accompanied by a Model II health certificate are presented at a slaughterhouse placed under the supervision of an official veterinarian, the latter must, without confining himself to the heading of the certificate but by examining the information contained therein, certify that, according to the certificate, the sheep do indeed meet all health requirements relating to slaughter.

50 It should also be borne in mind that Article 5(1)(b), second subparagraph, of Directive 90/425 provides that, in the case in which the animals are intended for dealers, establishments, holdings, centres or organisations, those receiving the animals must, *inter alia*, ensure that they are accompanied by the requisite certification, notify the competent authority of any irregularity or anomaly and, in the latter case, isolate the animals in question until that authority has decided what is to be done with them.

51 Consequently, if sheep intended for slaughter but accompanied by a Model II health certificate are presented at a slaughterhouse that is not placed under the supervision of an official veterinarian, the person in charge of that slaughterhouse must contact the competent authority in order to inform it of any irregularity. However, in this case also, the competent authority may only, with regard to references on the certificates, determine that those certificates contain all information necessary in regard to the health requirements governing slaughter.

- 52 It follows from those provisions that, when animals are accompanied by valid health certificates which do not correspond to the use to which the animals are to be put but which include all the information necessary for that use, the competent authorities of a Member State of destination cannot prevent the importation of those animals by relying on the mere error as to the certificate.
- 53 The answer to Question 1(a) and (c) must therefore be that a Member State cannot prevent the importation of sheep intended for slaughter when they arrive on its territory solely on the ground that they are accompanied by a Model II health certificate, which is provided for trade between Member States in ovine and caprine animals intended for fattening.
- 54 In the light of that reply, it is unnecessary to answer Question 1(b).

Question 2

- 55 By Question 2(a), the High Court seeks in substance to ascertain whether, at the time of the facts in the main proceedings, Community law precluded a Member State from imposing a requirement under national law such as the order of 24 December 1996, as clarified by the memorandum of 3 January 1997, that, when bovine and ovine animals originating in France, Ireland, Portugal or the United Kingdom were imported for slaughter, breeding or fattening, the health certificate accompanying those animals state that they had been born and raised on farms in which no case of TSE had been registered during the previous six years.

Observations submitted to the Court

- 56 Lennox submits that the requirement, at issue in the main proceedings, that a TSE declaration be provided was not compatible with Community law. It argues that there was in this case no 'outbreak... of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health' within the meaning of Article 10(1) of Directive 90/425 which would have authorised the Italian Republic to adopt safeguard measures. It points out that scrapie is a disease mentioned in Heading II of Annex B to Directive 91/68. If the Member State in question wished to put in place a national programme to combat or monitor that disease, or if it believed that it was free of the disease, it ought, under Articles 7 and 8 of the directive respectively, to have submitted to the Commission the measures which it was intending to adopt.
- 57 With regard to the statement of 10 July 1996 by the Spongiform Encephalopathy Advisory Committee ('SEAC'), an independent scientific body responsible for advising the United Kingdom Government, drawing attention to the risk of BSE infection of sheep through animal meal, Lennox argues that there was no reference to any risk of such a scale as to justify adoption of a measure equivalent to a ban on imports.
- 58 By way of alternative submission, Lennox contends that the measure resulting from the order of 24 December 1996 was disproportionate. It would, it contends, have been sufficient to require, in accordance with the recommendations of SEAC, removal of the specified risk material.
- 59 Lennox also submits that it was impossible for it to meet a requirement of which it was unaware but which it finds was known to the United Kingdom authorities.

60 ILCO, in contrast, submits that national rules imposing the requirement of a TSE declaration were justified under Article 36 of the Treaty in the light of the uncertainty surrounding the risk of cross-contamination between BSE and scrapie. It draws attention to a health certificate meeting the requirements imposed by Italian legislation which was drawn up by a United Kingdom veterinary official at the time of the exports in issue in the main proceedings but which related to sheepmeat. It concludes that the United Kingdom authorities had taken the measures necessary to draw up adequate bilingual certificates but that those certificates did not cover the case of exports of live animals.

61 The Irish Government and the Commission take the view that the Italian Republic was entitled to adopt rules requiring a TSE declaration as a safeguard measure in accordance with Article 10(1) of Directive 90/425. Article 36 of the Treaty, they submit, has no application here as the sector in question was harmonised by Directives 90/425 and 91/68. The Commission submits further that those directives do not run counter to Article 129 of the EC Treaty (now, after amendment, Article 152 EC) and that Article 130r of the EC Treaty (now, after amendment, Article 174 EC) on the environment does not apply to the case in the main proceedings. Directive 89/662, which is also mentioned in Question 2, relates to trade in animal products and products of animal origin and is for that reason not applicable to the main proceedings.

62 The Commission submits that, although Directive 90/425 was adopted on the basis of Article 43 of the EC Treaty (now, after amendment, Article 37 EC), it is nonetheless a harmonisation measure. The Commission points out in this connection that Article 100a(5) of the EC Treaty (now, after amendment, Article 95(10) EC) required that harmonising measures adopted thereunder 'shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Community control procedure'.

- 63 The Commission argues that scientific discoveries relating to TSE are equivalent to an outbreak of disease within the meaning of Article 10(1) of Directive 90/425.
- 64 In its examination of whether the measures in issue in the main proceedings were justified and proportionate, the Commission notes that they were adopted five months after the publication, on 10 July 1996, of a statement by SEAC drawing attention to the risk of BSE infection of sheep through animal meal. Moreover, only ovine animals from holdings on which there was a recent history of scrapie were prohibited from being imported, which would suggest that the measures in question were proportionate. The Commission points out, however, that, in the absence of any Community provision requiring cases of scrapie in sheep to be recorded, it was not clear whether the information necessary for providing the certification required by the Italian authorities actually existed. If it did not, this might suggest that the measures in question were disproportionate.
- 65 In any event, the Commission draws the general conclusion that the issue of whether the conditions set out in Article 10 of Directive 90/425 were complied with by the order of 24 December 1996 is essentially a question of fact and that, in view of the overriding need to protect public health, the particular practical difficulties which surround decision-taking at Community level in relation to BSE and the scientific uncertainties, the order on the whole satisfied those conditions.
- 66 The Irish Government and the Commission point out that the procedure for notifying the Commission was complied with by the Italian Government. The Commission states that it cannot verify whether the other Member States were properly notified.

- 67 ILCO, the Irish Government and the Commission point out that the order of 24 December 1996 was repealed as soon as relevant Community measures were adopted, which would also suggest that the measures in issue in the main proceedings were proportionate.

Findings of the Court

- 68 According to settled case-law, where Community directives provide for harmonisation 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 of the Treaty is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonising directive (see, *inter alia*, Case C-241/01 *National Farmers' Union* [2002] ECR I-9079, paragraph 48).
- 69 Trade in live ovine animals is regulated by Directive 91/68. So far as the adoption of safeguard measures is concerned, however, Article 10(1) of that directive refers to Directive 90/425. It is therefore in the light of Directive 90/425 that it is appropriate to determine whether safeguard measures could be adopted.
- 70 Pending adoption by the Commission of measures pursuant to Article 10(4) of Directive 90/425, the fourth subparagraph of Article 10(1) of that directive allows a Member State of destination to take, on serious public or animal health grounds, interim protective measures such as a measure prohibiting imports (see, by way of analogy, with regard to the fourth subparagraph of Article 9(1) of Council Directive 89/662, Case C-477/98 *Eurostock* [2000] ECR I-10695, paragraphs 57 and 79).

- 71 First of all, in this regard, it is common ground that, when the order of 24 December 1996 was adopted, there was no Community-law provision that took into consideration the possibility of contamination of ovine animals by the BSE prion. Article 6(b) of Directive 91/68 covers only scrapie, which is, however, a TSE distinct from BSE, this latter disease being a TSE which was originally thought to be specific to bovine animals.
- 72 With regard, next, to the question whether there was, in the case in the main proceedings, an ‘outbreak... of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health’ within the meaning of the first subparagraph of Article 10(1) of Directive 90/425, it should be recalled, as follows from the Court’s case-law, that this condition is likely to be met when new information significantly alters the perception of the danger represented by the disease (see, along these lines, Case C-157/96 *National Farmers’ Union and Others* [1998] ECR I-2211, paragraphs 29 to 32, and Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraphs 50 to 53).
- 73 It should be noted in this regard that the order of 24 December 1996 was adopted some months after the publication on 10 July 1996 of a statement by SEAC to the effect that it could not be ruled out that BSE might be transmissible to ovine animals and might have been transmitted through animal meal. This statement itself followed an earlier statement issued by SEAC on 20 March 1996 to the effect that BSE was probably transmissible to humans.
- 74 It follows that SEAC’s statement of 10 July 1996 could have been regarded as being an outbreak of a zoonosis, disease or other cause likely to constitute a serious hazard to animals or to human health within the meaning of Article 10 of

Directive 90/425 and as justifying, in accordance with that provision, the adoption of a measure such as that in issue in the main proceedings.

- 75 The fifth subparagraph of Article 10(1) of Directive 90/425 requires that the measures taken by Member States be notified to the Commission and to the other Member States without delay. That was what happened in the case in the main proceedings. According to the Italian Government, the order of 24 December 1996 was notified to the other Member States and the Commission by memorandum of 10 January 1997. In reply to a question put by the Court, the United Kingdom Government confirmed that this order and the memorandum of 3 January 1997 had been notified to it.
- 76 So far as the proportionality of the measure is concerned, it must be recalled that the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted do not exceed the limits of what is appropriate and necessary in order to attain 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 (see Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, paragraph 16, and Case C-180/96 *United Kingdom v Commission*, cited above).
- 77 In the present case, the reason for the order of 24 December 1996 lay in the worrying number of outbreaks of BSE that had been detected in France, Ireland, Portugal and the United Kingdom.
- 78 It is common ground that this order was repealed by a decree of 15 June 1998, that is to say, shortly after the entry into force of Decision 98/272 by which the Commission imposed Community rules within this area.

- 79 With regard to the six-year period specified in the declaration laid down by the order of 24 December 1996, it does not appear, as the Advocate General noted in point 74 of his Opinion, that this was an inappropriate period of time when regard is had to the Community provisions then applicable to bovine animals, which referred to a period of the same length.
- 80 Regard being had to the uncertainties at that time concerning the means by which the disease could be transmitted, it does not appear that the removal of risk material ought to have been preferred on the ground that it would have been an equally effective but less restrictive measure by which to achieve the objective pursued.
- 81 Nor does it appear that the order of 24 December 1996 gave rise to particular difficulties for the Member States in view of the fact that, as is clear from the documentation submitted to the Court by ILCO, the competent authorities of the United Kingdom had adopted, at the time of the exports in issue in the main proceedings, albeit for sheepmeat alone, a health-certificate model which included the declaration required by that order.
- 82 It follows that, in adopting the order of 24 December 1996 and the memorandum of 3 January 1997, the Italian authorities complied with all of the conditions laid down in Article 10 of Directive 90/425.

- 83 The answer to Question 2(a) must therefore be that, at the time of the facts in the main proceedings, Community law, and more particularly Directive 91/68 and Article 10 of Directive 90/425, did not preclude a Member State from imposing a requirement under national law such as the order of 24 December 1996, as clarified by the memorandum of 3 January 1997, that, when bovine and ovine animals originating in France, Ireland, Portugal or the United Kingdom were imported for slaughter, breeding or fattening, the health certificate accompanying those animals state that they had been born and raised on a farm in which no case of TSE had been registered during the previous six years.
- 84 In view of the answer to Question 2(a), it is unnecessary to reply to Question 2(b).

Costs

- 85 The costs incurred by the Irish Government and by the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, for the parties to the main proceedings, a step in the action 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 of England and Wales, Queen's Bench Division (Commercial Court), by order of 13 November 2000, hereby rules:

1. A Member State cannot prevent the importation of sheep intended for slaughter when they arrive on its territory solely on the ground that they are accompanied by a Model II health certificate established by Annex E to Council Directive 91/68/EEC of 28 January 1991 on animal health conditions governing intra-Community trade in ovine and caprine animals, which is provided for trade between Member States in ovine and caprine animals intended for fattening.
2. At the time of the facts in the main proceedings, Community law, and more particularly Directive 91/68 and Article 10 of 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, did not preclude a Member State from imposing a requirement under national law such as Italian Order No 600.3/VET/340/2/8920 of 24 December 1996, as clarified by Explanatory Memorandum No 600.3/340/2/73 of 3 January 1997, that, when bovine and ovine animals originating in France, Ireland, Portugal or the

United Kingdom were imported for slaughter, breeding or fattening, the health certificate accompanying those animals state that they had been born and raised on a farm in which no case of Transmissible Spongiform Encephalopathy had been registered during the previous six years.

Edward

La Pergola

Jann

von Bahr

Rosas

Delivered in open court in Luxembourg on 3 July 2003.

R. Grass

M. Wathelet

Registrar

President of the Fifth Chamber