

OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 2 December 2004<sup>1</sup>

1. The present references for a preliminary ruling by the College van het Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) (the Netherlands) originate in appeal proceedings brought by Mr Tempelman and by Mr and Mrs Van Schaijk against the Directeur van de Rijksdienst voor de keuring van Vee en Vlees (Director of the Government Meat and Livestock Inspectorate). Both cases arose as a consequence of the 2001 outbreak of foot-and-mouth disease (FMD) and concern Dutch measures of preventive slaughter. The referring court is uncertain as to whether the measures contested in the main proceedings were taken in conformity with Community law and raises questions as to the discretion of Member States to take eradication measures that appear to go beyond the measures expressly provided for by Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease.<sup>2</sup>

**I — Community legal framework**

2. The relevant Community legal framework for the present cases consisted, at the material time, of the following acts: Council Directive 90/425/EEC of 26 June 1990,<sup>3</sup> Directive 85/511 as amended by Council Directive 90/423/EEC of 26 June 1990<sup>4</sup> and Commission Decision 2001/246/EC of 27 March 2001 laying down the conditions for the control and eradication of foot-and-mouth disease in the Netherlands in application of Article 13 of Directive 85/511.<sup>5</sup>

3 — 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; 'Directive 90/425').

4 — Council Directive 90/423/EEC of 26 June 1990 amending Directive 85/511/EEC, Directive 64/432/EEC on animal health problems affecting intra-Community trade in bovine animals and swine and Directive 72/462/EEC on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat or meat products from third countries (OJ 1990 L 224 p. 13; 'Directive 90/423').

5 — OJ 2001 L 88, p. 21. Amended by Commission Decision 2001/279/EC of 5 April 2001 (OJ 2001 L 96, p. 19).

1 — Original language: Portuguese.

2 — OJ 1985 L 315, p. 11; 'Directive 85/511'. This directive was repealed by Council Directive 2003/85/EC of 29 September 2003 (OJ 2003 L 306, p. 1).

3. Article 10 of Directive 90/425 reads, in so far as relevant to the present requests for a preliminary ruling:

‘1. 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 protec-

tive 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.

...

4. The Commission shall in all cases review the situation in the Standing Veterinary Committee at the earliest opportunity. It shall adopt the necessary measures for the animals and products referred to in Article 1 and, if the situation so requires, for the products derived from those animals, in accordance with the procedure laid down in Article 17. The Commission shall monitor the situation and, by the same procedure, shall amend or repeal the decisions taken, depending on how the situation develops.’

4. Articles 1, 2, 4, 5 and 13 of Directive 85/511, as amended by Directive 90/423, read as follows:

*Article 1*

- in which the presence of foot-and-mouth disease has been officially ascertained following a laboratory examination;

13. This Directive defines the Community control measures to be applied in the event of outbreaks of foot-and-mouth disease, whatever the type of virus concerned.

*Article 2*

For the purposes of this Directive ... [t]he following definitions shall ... apply:

- (d) “animal suspected of being infected” means any animal of a susceptible species showing clinical symptoms or post-mortem lesions which are such that the presence of foot-and-mouth disease may reasonably be suspected;
- (e) “animal suspected of being contaminated” means any animal of a susceptible species which may — according to the epizootiological information collected — have been directly or indirectly exposed to the foot-and-mouth virus.

...

- (c) “infected animal” means any animal of a susceptible species:

*Article 4*

- in which clinical symptoms or post-mortem lesions which may arise from foot-and-mouth disease have been ascertained, or

1. Member States shall ensure that, where a holding contains one or more animals suspected of being infected or of being contaminated with foot-and-mouth disease, official means of investigation to confirm or

rule out the presence of the disease are set in motion immediately and, in particular, that the official veterinarian takes the necessary samples, or has them taken, for laboratory examination.

— no animals of other species enter or leave the holding without the authorisation of the competent authority;

As soon as the suspected infection is notified, the competent authority shall have the holding placed under official surveillance and shall in particular order that:

— all movement from the holding of meat or carcasses of animals of susceptible species or of animal feed, utensils, objects or other substance, such as wool or waste or rejected matter, liable to transmit foot-and-mouth disease be prohibited, unless authorised by the competent authority;

— a census be made of all categories of animals of susceptible species and that, in respect of each of these categories, the number of animals already dead, infected or liable to be infected or contaminated be recorded; the census must be kept up to date to take account of animals born or dying during the period of suspicion; the information in the census must be produced on request and may be checked at each visit;

...

2. The competent authority may extend the measures provided for in paragraph 1 to adjoining holdings should their location, their configuration, or contacts with animals from the holding where the disease is suspected give reason to suspect possible contamination.

— all animals of susceptible species on the holding be kept in their living quarters or some other place where they can be isolated;

...

#### *Article 5*

— no animals of susceptible species enter or leave the holding;

As soon as it has been confirmed that one or more of the animals defined in Article 2(c)

are on a holding, the competent authority shall introduce the following measures:

- (1) the official veterinarian takes adequate samples or has them taken for examination by the laboratory referred to in Annex I, where these samples and examinations have not been taken or carried out during the period of suspicion in accordance with the first subparagraph of Article 4(1);

(4) the competent authority may extend the measures provided for in paragraph 1 to adjoining holdings should their location, their configuration, or contacts with animals from the holding where the disease has been recorded give reason to suspect possible contamination.

...

*Article 13*

- (2) in addition to the measures listed in Article 4(1), the following measures are taken without delay:

1. Member States shall ensure that:

- all animals of susceptible species on the holding shall be slaughtered on the spot under official supervision in such a way as to avoid all risk of spreading the foot-and-mouth virus;

- the use of foot-and-mouth vaccines is prohibited,

...

- after being slaughtered, the aforementioned animals shall be destroyed under official supervision in such a way that there is no risk of spreading the foot-and-mouth virus;

3. Notwithstanding the provisions of paragraph 1 concerning the use of foot-and-mouth disease vaccine, it may be decided, when foot-and-mouth disease has been confirmed and threatens to become extensive, that emergency vaccination using tech-

...

nical procedures guaranteeing the animals' total immunity may be introduced. In this case, the measures to be taken shall include:

- the extent of the geographical area in which emergency vaccination is to be carried out,
- the species and the age of the animals to be vaccinated,
- the duration of the vaccination campaign,
- a specific standstill of vaccinated animals and their products,
- the special identification and special registration of the vaccinated animals,
- other matters appropriate to the emergency situation.

collaboration with the Member State concerned, acting in accordance with the procedure laid down in Article 16. This decision shall have particular regard to the degree of concentration of animals in certain regions and the need to protect special breeds.

However, by way of derogation from the first subparagraph, the decision to introduce emergency vaccination around the outbreak may be taken by the Member State concerned following notification to the Commission, provided that basic Community interests are not endangered. This decision shall be immediately reviewed in the Standing Veterinary Committee in accordance with the procedure laid down in Article 16.'

5. Commission Decision 2001/246/EC, based on Article 10 of Directive 90/425 and Article 13 of Directive 85/511, provides as follows in Articles 1 and 2:

*'Article 1*

For the purpose of this Decision the following definitions shall apply:

The decision to introduce emergency vaccination shall be taken by the Commission in

1. "Pre-emptive killing" shall mean the killing of susceptible animals on hold-

ings within a certain radius around holdings placed under the restrictions laid down in Articles 4 or 5 of Directive 85/511/EEC.

to effectively reduce the spread of virus by immunisation for at least one of the following reasons:

It is aimed at the urgent reduction of numbers of animals of susceptible species in an infected area.

— constraints on the execution of killing of animals of susceptible species in compliance with the provisions in Directive 93/119/EEC,

2. "Suppressive vaccination" shall mean emergency vaccination of animals of susceptible species in identified holdings situated in a defined area, the vaccination zone, which is carried out exclusively in conjunction with pre-emptive killing as defined in paragraph 1.

— constraints on the available capacities to destroy killed animals in accordance with Article 5(2), second indent, of Directive 85/511/EEC.

#### *Article 2*

It is aimed at an urgent reduction of the amount of virus circulating and the risk of virus spreading beyond the perimeters of the area without delaying the pre-emptive killing.

1. Without prejudice to Directive 85/511/EEC, and in particular Articles 4, 5 and 9 thereof, the Netherlands may decide on resorting to suppressive vaccination under the conditions set out in the Annex.

It shall only be carried out where the pre-emptive killing of animals of susceptible species must be delayed for an estimated time most likely exceeding the time required

2. Before commencing the measures referred to in paragraph 1, the Netherlands shall ensure that the Member States and the Commission are officially informed on the details concerning the geographical and

administrative definition of the vaccination zone, the number of holdings affected and the time when vaccination will be started and accomplished and the reason why the measures have been taken.

Subsequently the Netherlands shall ensure that the information submitted in accordance with the first subparagraph is completed without undue delay with the details concerning the killing of vaccinated animals, in particular the number of animals killed, the number of holdings affected, the time the killing was completed, and the modifications of the restrictions applied in the areas concerned.

## II — Facts and reference for a preliminary ruling

6. Mr and Mrs Van Schaijk ran a biodynamic livestock holding in Ravenstein. By decision of 26 March 2001 — one day before the Commission adopted Decision 2001/246 —, the RVV informed them that all biungulate animals on their holding were regarded as suspected of foot-and-mouth disease (FMD) and would consequently be killed, because less than one kilometre (772 metres) from Mr and Mrs Van Schaijk's holding, there was a holding on which one or more animals seriously suspected of FMD were present. On 27 March, Mr and Mrs Van Schaijk objected to the decision of the RVV. By letter of the same date, they applied to the

president of the College van Beroep voor het Bedrijfsleven for injunctive relief, namely suspension of the decision. The application was dismissed by judgment of 28 March 2001 and Mr and Mrs Van Schaijk's biungulate animals were killed.<sup>6</sup> By decision of 15 November 2001, the RVV declared Mr and Mrs Van Schaijk's objection against the decision of 26 March 2001 unfounded. Mr and Mrs Van Schaijk subsequently appealed before the College van Beroep voor het bedrijfsleven.

7. Mr Tempelman kept angora goats at Wenum, a village in the vicinity of Oene. On 3 April 2001, the Minister for Agriculture, Nature Management and Fisheries decided that all biungulates in the Oene region should be vaccinated and, later, killed. After hearing about Mr Tempelman's angora goats, the RVV informed Mr Tempelman on 23 May 2001 that his goats were regarded as suspected of FMD since several cases of FMD had been found in the vicinity of the place where the goats were located. The angora goats were killed on the same day. By letter of 12 June 2001, Mr Tempelman lodged an objection against the RVV's decision. By decision of 15 November 2001, the RVV declared Mr Tempelman's objection unfounded. Mr Tempelman appealed against that finding before the College van Beroep voor het Bedrijfsleven.

<sup>6</sup> — Several weeks later, it turned out, from laboratory analysis of blood samples taken before the killing, that there had been no traces of the FMD virus on the primary holding, nor within a radius of 1 kilometre thereof.



8. In its order of 7 January 2003, the College van Beroep decided that the grounds of appeal put forward by Mr Tempelman were unfounded in so far as they were based on national law. In its order of the same day in the proceedings between Mr and Mrs Van Schaijk and the RVV, the College van Beroep reached a similar conclusion: relevant national legislation provided the RVV with a sufficient legal basis for deciding, on 26 March 2001, to kill Mr and Mrs Van Schaijk's animals. However, the College van Beroep considered that it remained to be determined whether the contested decisions were compatible with Community law.

9. The College van Beroep decided to refer the following questions to the Court for a preliminary ruling:

'1) May a Member State derive from Community law the power to decide to kill animals which are suspected of being infected or contaminated with the foot-and-mouth virus?

2) Does Directive 85/511/EEC, as amended by Directive 90/423/EEC, afford the Member States scope to (order or) take supplementary national measures to control foot-and-mouth disease?

3) What limits does Community law place on a Member State with regard to

taking supplementary national measures other than those provided for in Directive 85/511/EEC, as amended by Directive 90/423/EEC?

10. Written observations were submitted to the Court by both Mr Tempelman and Mr and Mrs Van Schaijk, by the Commission and by the Netherlands, Greek, Irish, Italian and the United Kingdom Governments. At the hearing held on 29 September 2004 the Court heard oral argument from Mr and Mrs Van Schaijk, the Commission and the Governments of Greece, the Netherlands, Ireland and the United Kingdom.

### III — Assessment

11. In its order for reference, the College van Beroep notes that the answers to its questions may depend on how Article 10 of Directive 90/425 must be understood. It considers that this matter is not entirely clear and that it may influence the way in which Directive 85/511 should be interpreted. Therefore, I shall first attempt to clarify the correlation between Directive 85/511 and Directive 90/425, particularly Article 10 thereof. Subsequently I shall discuss each question of the referring court.

A — *The correlation between Directives 90/425 and 85/511*

12. Directive 90/425 and Directive 85/511 have concurrent objectives. Both directives address the safeguarding of animal health in light of the free movement of animals and agricultural products. Directive 90/425 and Directive 90/423, which amended Directive 85/511, were adopted on the same date on the basis of Article 43 of the EC Treaty (now, after amendment, Article 37 EC).

13. With a view to the completion of the internal market, Directive 90/425 aims to ensure that veterinary checks are carried out at the place of dispatch only, instead of at border controls, which implies the harmonisation of the basic requirements relating to the safeguarding of animal health.<sup>7</sup> In the event of an outbreak of a disease likely to constitute a serious hazard to animals or to human health, Article 10 of Directive 90/425 provides a mechanism of precautionary measures in order to prevent further spreading. Under Article 10(1), Member States concerned can or shall immediately take precautionary or interim protective measures. The Commission must swiftly adopt definitive measures under Article 10(4), such as, in this instance, Decision 2001/246.

14. For Member States of destination or transit, Article 10 provides that they may take precautionary measures provided for in Community rules. On serious public or animal health grounds they may take interim protective measures pending the measures to be taken by the Commission in accordance with paragraph 4 of that article. In its judgment of 26 May 1993 in *Commission v Portugal*, the Court of Justice made clear that once the Commission has taken a decision under Article 10(4), Member States of destination have no power to take measures other than those expressly provided for therein.<sup>8</sup>

15. The second subparagraph of Article 10 (1) concerns Member States of dispatch. It provides that, when an outbreak occurs, 'the Member State of dispatch shall immediately implement the control or precautionary measures provided for in Community rules ... or adopt any other measure which it deems appropriate'.

16. Mr and Mrs Van Schaijk and the Netherlands Government suggest diametrically opposite interpretations of the word 'or' in this passage. Both interpretations aim to settle the issue whether Community rules for the control of animal diseases leave room for

7 — See the preamble to the directive.

8 — Case C-52/92 [1993] ECR I-2961, paragraph 19. See also Case C-304/88 *Commission v Belgium* [1990] ECR I-2801, paragraph 19.

additional Member State action and consequently have a bearing on how Directive 85/511 should be read for the purpose of answering the preliminary questions of the *College van Beroep*.

between the wording of a provision in one language version and in the others, it is preferable to solve the point at issue without giving preference to any one of the texts involved.<sup>9</sup>

17. According to Mr and Mrs Van Schaijk, it follows from the use of the word 'or' that whenever Community rules exist, these rules should be considered to preclude additional Member State action.

18. According to the Netherlands Government, 'or' should be interpreted as 'and'; the provision should be seen as always giving Member States room to adopt measures in addition to those required by any existing set of Community rules. The Netherlands Government relies on the German language version of the Directive, where instead of 'or' the word '*sowie*' (as well as) is used.

19. Yet, neither interpretation seems wholly convincing in light of the aim of Directive 90/425. I do not consider it likely that Article 10(1) of that directive aspires to settle in full the question whether all prior and subsequent Community rules on the control of animal diseases are exhaustive. Besides, when there is an apparent discrepancy

20. I believe that the clause under consideration is meant to express that, in the absence of Community rules covering the event, or if and insofar as those Community rules are not exhaustive, Member States of dispatch must implement the measures which they deem appropriate. Naturally, Community rules may for example be provided by a Commission decision based on Article 10(4), by a relevant directive, or by a combination of Community instruments. Article 10(1) may be said to create a presumption that Member States must take any other appropriate measures, but that such presumption applies only in so far as the Community rules are not exhaustive. In this light, the clause under consideration has the purpose of reaffirming two points. First, that to achieve the aim of the directive, the relevant Community rules must be applied. Second, that Member States must nevertheless adopt other measures which they deem appropriate.<sup>10</sup> The second point

<sup>9</sup> — Case 80/76 *Kerry Milk* [1977] ECR 425, paragraph 11.

<sup>10</sup> — The use of the word 'shall' in the second subparagraph of Article 10(1) must be understood as imposing an obligation on Member States to take all necessary measures to fight the disease; they have, however, a margin of appreciation in defining the measures which they '[deem] appropriate'.

ensues from the premiss that Community rules may not exist or may not be exhaustive and that national measures may be necessary to complement the Community control measures.

85/511 provides only for the slaughter of animals of susceptible species on a holding which has been confirmed as containing one or more infected animals as defined in Article 2(c).<sup>11</sup>

21. At the material time, Community measures for the control of FMD were provided by Directive 85/511. Consequently, the 2001 outbreak of FMD prompted the application of the mechanism of Article 10 of Directive 90/425 and the implementation of the control measures provided by Directive 85/511.

22. It follows that Directive 85/511 must be examined in order to resolve the issue whether Community law precludes Member States from taking additional control measures. As the referring court has recognised, the question here is whether that directive, if not providing for them, precludes additional measures such as the ones taken by the Netherlands in the cases of Mr Tempelman and Mr and Mrs Van Schaijk.

24. The Netherlands Government argues that an obligation to slaughter possibly contaminated animals must nevertheless be derived from Article 5 of Directive 85/511. This would follow from Article 5(4), which provides that 'the competent authority may extend the measures provided for in paragraph 1 to adjoining holdings should their location ... give reason to suspect possible contamination'. Paragraph 1 concerns the taking of adequate samples for laboratory examination. However, according to the Netherlands Government, the reference to paragraph 1 of Article 5 is erroneous and must be read as a reference to paragraph 2 of Article 5, which relates to measures such as the slaughter and destruction of animals. It submits that another reading would not make sense, since Article 4(2) of the directive already provides for the taking of samples on adjoining holdings suspected of being contaminated. In support of its reasoning, it draws a parallel between Directive 85/511

*B — Does Directive 85/511 provide for preventive killing?*

23. The College van Beroep considers in its order for reference that Article 5 of Directive

<sup>11</sup> — See point 4 above.

and a number of other veterinary directives<sup>12</sup> and refers to paragraph 124 of the judgment in *Jippes*, where the Court stated: 'The preventive slaughter of animals on holdings where one or more animals have been found to be infected and of possibly contaminated animals on adjoining holdings is required by Article 5 of Directive 85/511.'<sup>13</sup> At the hearing held in the present cases before this Court, the Commission indicated that it was also of the opinion that the reference to paragraph 1 in Article 5(4) of the Directive is a mistake.

26. Moreover, the Court affirmed in its judgment in *Met-Trans and Sappol* that it is not entitled to assume the role of the Community legislature and interpret a provision in a manner contrary to its express wording.<sup>15</sup> The Court has furthermore stated in paragraph 19 of its judgment in Case 348/85 *Denmark v Commission* that 'Community legislation must be certain and its application must be foreseeable by those subject to it'.<sup>16</sup>

25. At the outset, it is worth noting that the reference in Article 5(4) to paragraph 1 is identical in every language version of Directive 85/511.<sup>14</sup>

27. Even if the proposition that the reference to paragraph 1 renders Article 5(4) superfluous were true, it is not the Court's place to substitute an intrinsically unambiguous cross-reference by a reference to another paragraph. In this regard it should be noted that Article 5(1) restates as regards infected animals what Article 4(1) has already stated as regards animals suspected of being infected or contaminated; Article 5(4) might likewise be read as a similar restatement, confirming that what is provided for by Article 4(2) also applies to the situation where animals have been found to be infected.

28. The Court's statement in *Jippes* indeed appears at odds with the text of Article 5. However, first of all, that statement concerns only holdings adjoining a holding where one

12 — Council Directive 92/35/EEC of 29 April 1992 laying down control rules and measures to combat African horse sickness (OJ 1992 L 157, p. 19); Council Directive 92/40/EEC of 19 May 1992 introducing Community measures for the control of avian influenza (OJ 1992 L 167, p. 1); Council Directive 92/66/EEC of 14 July 1992 introducing Community measures for the control of Newcastle disease (OJ 1992 L 260, p. 1); Council Directive 92/119/EEC of 17 December 1992 introducing general Community measures for the control of certain animal diseases and specific measures relating to swine vesicular disease (OJ 1993 L 62, p. 69); Council Directive 2000/75/EC of 20 November 2000 laying down specific provisions for the control and eradication of blue-tongue (OJ 2000 L 327, p. 74); Council Directive 2001/89/EC of 23 October 2001 on Community measures for the control of classical swine fever (OJ 2001 L 316, p. 5); Council Directive 2002/60/EC of 27 June 2002 laying down specific provisions for the control of African swine fever and amending Directive 92/119/EEC as regards Teschen disease and African swine fever (OJ 2002 L 192, p. 27).

13 — Case C-189/01 [2001] ECR I-5689.

14 — According to consistent case-law of the Court, the interpretation of a provision of Community law involves a comparison of the various language versions: Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 18; Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, paragraph 28; Case C-36/98 *Spain v Council* [2001] ECR I-779, paragraph 47.

15 — Joined Cases C-310/98 and C-406/98 [2000] ECR I-1797, paragraph 32.

16 — [1987] ECR 5225. See also Case C-209/96 *United Kingdom v Commission* [1998] ECR I-5655, paragraph 35.

or more animals *have been found to be infected*. At least with Mr and Mrs Van Schaijk's holding, this was not the situation. The animals on that holding were preventively killed because in the vicinity there was a holding *suspected of being contaminated*.

C — Does Directive 85/511 preclude preventive killing?

29. In addition, it is worth recalling that the statement in *Jippes* is part of a passage concerning the legal basis of Commission Decision 2001/246. The Court concluded in paragraph 127 of its judgment in *Jippes* that Community law provided an adequate legal basis for the adoption of that decision. To my mind, this conclusion can simply be drawn from two provisions to which the Court referred: Article 13(3) of Directive 85/511 and Article 10(4) of Directive 90/425, which both relate to decisions to be taken by the Commission in case of an outbreak of FMD. This conclusion is neither affected nor substantiated by the text of Article 5 of Directive 85/511, to which the Court also made reference, but which concerns FMD control measures to be taken by the Member States.

31. The second question of the referring court asks whether Directive 85/511 allows for supplementary national measures for the control of FMD. In order to provide an answer to the referring court, it is necessary to consider whether Community law at the material time provided for an exhaustive regime for handling outbreaks of FMD in the Community, which precludes additional national measures.

32. Directive 85/511 does not expressly allow Member States freedom to take more stringent measures than those provided for by the directive. However, such freedom may nevertheless follow by implication; according to settled case law, account must be taken of the wording, the purpose and the structure of the directive.<sup>17</sup>

30. In my view the College van Beroep has correctly observed that Directive 85/511 does not provide for preventive killing of animals suspected of being infected or contaminated with FMD.

33. In that regard, The Netherlands Government, as well as the Greek, Irish, Italian and the United Kingdom Governments, believe that the directive's aim of combating immediately and effectively any outbreak of FMD

<sup>17</sup> — See e.g. Case C-128/94 *Hönig* [1995] ECR I-3389, paragraph 9; Case C-1/96 *World Farming* [1998] I-1251, paragraph 49; and Case C-52/00 *Commission v France* [2002] ECR I-3827, paragraph 16.

entails leeway for the Member States to take measures such as preventive killing. The Commission essentially supports this argument and emphasises that Directive 90/423 signified a choice between a policy of vaccination and a policy of stamping out, but did not prejudice other measures to control FMD.

34. Mr Tempelman and Mr and Mrs Van Schaijk put forward a number of reasons for concluding that Directive 85/511 provides exhaustive rules. First, they point to the difference between the wording of Article 1 of that directive before and after amendment by Directive 90/423. They note that, before amendment, that article expressly stated that the directive contained minimum Community control measures; with the amendment, the word 'minimum' was deleted. In addition, they refer to the preamble to Directive 90/423, especially where it states that 'it is essential that a uniform policy should be implemented throughout the Community'.

35. I do not find these arguments convincing. Article 1 of Directive 85/511, before amendment by Directive 90/423, provided: 'This Directive defines the minimum Community control measures to be applied in the event of outbreaks of foot-and-mouth dis-

ease, whatever the type of virus concerned ... This Directive does not affect Member States' prophylactic vaccination policies.' Directive 85/511 was amended to introduce a non-vaccination policy throughout the Community, as well as strict rules and conditions for emergency vaccination in emergency situations.<sup>18</sup> The amending Directive 90/423 expressly rejects the policy of prophylactic vaccination and imposes a uniform non-vaccination policy for the Community as a whole, accompanied by a policy of total slaughter and destruction ('stamping out') of infected animals.<sup>19</sup> Article 1 of Directive 85/511 was replaced and the reference to 'minimum' measures and to Member States' vaccination policies was dropped. As the Netherlands Government argues in its written submissions to the Court, the amendment of Article 1 should principally be seen in the light of the introduction of a Community non-vaccination policy. Directive 85/511, as amended by Directive 90/423, must be understood as seeking to establish the internal market in agricultural products, for which, as the preamble to the latter directive expresses, a uniform vaccination policy was considered essential. As the Economic and Social Committee commented in its Opinion on the proposal for amending Directive 85/511, the existing system of various national vaccination policies could not go on if trade in animals was to be liberalised in the Community. It cannot be inferred from the

18 — See Article 13 of Directive 85/511.

19 — Preamble to Directive 90/423.

amendment of Article 1 and the preamble to Directive 90/423 that measures that pose no harm to the Community non-vaccination policy are precluded by Directive 85/511.<sup>20</sup>

36. Mr Tempelman and Mr and Mrs Van Schaijk emphasise that Directive 85/511 offers a detailed set of measures for specific situations. In particular, they point to Article 4, laying down detailed measures relating to suspected animals but not the killing thereof; to Article 5, prescribing measures relating to contaminated animals including their slaughter; and to Article 6, containing an exception to Article 5 for specific situations.

37. In this respect, it should first be stressed that the fact that the directive does not provide for the slaughter of possibly contaminated animals does not automatically mean that it precludes such measures. Bearing that in mind, I do not think the level of detail of Directive 85/511 justifies the conclusion that, *a contrario*, the possibility of taking supplementary measures is ruled out. The contrary argument is permissible only where no other interpretation appears appropriate.<sup>21</sup> In the present context that is not the case.

20 — On some occasions the wording of Directive 85/511 clearly indicates minimum standards. Article 9 prescribes a 'minimum radius' for protection and surveillance zones; Article 5 imposes a period of 'at least 21 days' before animals may be reintroduced on a disinfected holding.

21 — See also Case 9/56 *Meroni v High Authority* [1957-1958] ECR 133, at 140.

38. Firstly, as I have already stated above, the wording of Article 10(1) of Directive 90/425 follows partly from the premiss that Community rules for the control of animal diseases may not be exhaustive.

39. Secondly, according to Article 249 EC, a directive 'leaves to the national authorities the choice of form and methods', which in principle indicates leeway for the Member States. The result which Directive 85/511 sets out to achieve is the effective suppression of FMD in the context of a non-vaccination policy. This means that certain measures for the control of FMD are prescribed, while some measures are expressly prohibited. Yet, this does not preclude the adoption of other control measures, as long as they do not interfere with the aim and provisions of the directive — and with the uniform non-vaccination policy in particular. It seems to me, having regard to the result Directive 85/511 sets out to achieve, that if the Community legislature had intended to prohibit measures aimed at combating FMD, such as the ones in issue, it would have included an express provision to that effect.<sup>22</sup>

22 — Cf. Case C-376/90 *Commission v Belgium* [1992] ECR I-6153, paragraph 27.



40. Finally, Council Directive 2003/85/EC, by which Directive 85/511 was repealed, contains an even more extensive and more detailed regime for the control of FMD — including a preventive eradication programme — but nevertheless affords Member States freedom to take more stringent action.<sup>23</sup>

41. According to Mr and Mrs Van Schaijk, it should be taken into account that the killing of animals is perceived as undesirable in the Community, as Council Directive 2003/85, which was adopted in the aftermath of the 2001 outbreak, has confirmed.<sup>24</sup>

42. Certainly, one cannot but agree with the view that the protection of the life and welfare of livestock merits careful consideration. However, Mr and Mrs Van Schaijk's argument that the killing of animals is generally considered undesirable in the Community does not lead to the conclusion that Directive 85/511 leaves no room for preventive killing. In fact, Directive 2003/85, to which Mr and Mrs Van Schaijk refer, makes provision for preventive eradication

programmes,<sup>25</sup> as do a number of other directives on the control of animal diseases.<sup>26</sup>

43. Hence, I am of the view that Directive 85/511 does not preclude Member States from taking additional measures for the control of FMD, such as the preventive killing of animals suspected of being infected or contaminated with FMD.

*D — Limits to the power of Member States to adopt additional control measures*

44. By its third question, the College van Beroep enquires as to the limits which Community law sets with regard to the adoption by Member States of measures for the control of FMD other than those provided for in Directive 85/511.

45. As I have stated above, Directive 85/511 has to be seen in the context of the

<sup>23</sup> — See Article 1(1)(a) and 1(2) of Directive 2003/85.

<sup>24</sup> — Council Directive 2003/85/EC of 29 September 2003 on Community measures for the control of foot-and-mouth disease repealing Directive 85/511/EEC and Decisions 84/531/EEC and 91/665/EEC and amending Directive 92/46/EEC (OJ 2003 L 306, p. 1).

<sup>25</sup> — Article 8 of Directive 2003/85.

<sup>26</sup> — See e.g. Articles 5(1)(a) and 5(2) of Directive 92/40 and Articles 5(1)(a) and 5(2) of Directive 92/66.

procedure of Article 10 of Directive 90/425, which aims to ensure that Member States will not unilaterally adopt and maintain precautionary measures which create a barrier to intra-Community trade. It follows from the judgment in *Commission v Portugal* that Member States do not have the power to implement precautionary measures against FMD outside the system provided for by Article 10 of Directive 90/425.<sup>27</sup> Consequently, such national measures must be adopted in a manner consistent with the requirements of that provision.<sup>28</sup> This means that they must be notified without delay to the other Member States and to the Commission, as required by the last subparagraph of Article 10(1) of Directive 90/425. The Commission and the Member State concerned must, by virtue of the duty of genuine cooperation which underlies Article 10 EC, work together in good faith when protective measures are adopted.<sup>29</sup>

46. Moreover, it is settled case-law that national measures falling within the scope

of Community law must be compatible with the general principles thereof, such as the principle of proportionality.<sup>30</sup> By virtue of that principle, the measures adopted by a Member State must be appropriate and necessary in order to achieve the objectives legitimately pursued; 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.<sup>31</sup>

47. As Mr and Mrs Van Schaijk contended at the hearing, the general principles of Community law include fundamental rights such as the right to property.<sup>32</sup> In that regard, it is for the national court to verify that, taking into account the objective sought, the restrictions on the right to property resulting from additional national FMD control measures do not constitute a disproportionate and intolerable interference impairing the very substance of the right to property.<sup>33</sup>

27 — Case C-52/92, cited above, paragraph 19. See also the Opinion of Advocate General Tesouro in that case, points 8 and 9. The Court also stated in paragraph 50 of Case C-241/01 *National Farmers' Union* [2002] ECR I-9079, that 'in the European Community, which is a community based on law, a Member State is bound to comply with the provisions of the Treaty and, in particular, to act within the framework of the procedures provided for by the Treaty and by the applicable legislation'.

28 — See, regarding interim protective measures adopted by a Member State of destination: Case C-220/01 *Lennox* [2003] ECR 7091, paragraphs 68-76.

29 — See, by analogy, *National Farmers' Union*, cited above, paragraph 60, and Case C-428/99 *Van den Bor* [2002] ECR I-127, paragraph 47.

30 — *Lennox*, cited above, paragraph 76. See also Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraph 96, and Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13. It should be noted that in the present context the Netherlands was exercising a discretion left to it by a Community provision which it was implementing, i.e. Article 10(1) of Directive 90/425. See supra, point 20, in particular footnote 10. Cf. Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case C-292/97 *Karlsson* [2000] ECR I-2737, paragraph 37.

31 — *Fedesa and Others*, cited above, paragraph 13.

32 — See e.g. Case 44/79 *Hauer* [1979] ECR 3727, points 15 and 17, and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] I-7411, paragraph 65 and 67.

33 — Cf. *Booker*, cited above, paragraphs 79 and 88.

#### IV — Conclusion

48. I am therefore of the view that the Court should give the following answers to the questions raised by the College van beroep voor het bedrijfsleven:

- 1) Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease does not provide for preventive killing of animals suspected of being infected or contaminated with foot-and-mouth disease.
  
- 2) Directive 85/511 does not preclude Member States from taking additional measures for the control of foot-and-mouth disease, such as the preventive killing of animals suspected of being infected or contaminated with foot-and-mouth disease.
  
- 3) Measures for the control of foot-and-mouth disease, taken by Member States in addition to the measures prescribed by Directive 85/511, must be adopted in a manner consistent with the requirements of Article 10 of 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, in genuine cooperation with the Commission and must be compatible with the general principles of Community law, such as the principle of proportionality and the right to property.