

JUDGMENT OF THE COURT (Third Chamber)

8 May 2008*

In Case C-491/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Vestre Landsret (Denmark), made by decision of 23 November 2006, received at the Court on 28 November 2006, in the proceedings

Danske Svineproducenter

v

Justitsministeriet,

intervening party:

Den Europæiske Dyre- og Kødhandelsunion (UECBV),

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus, J. Klučka (Rapporteur), A. Ó Caoimh and P. Lindh, Judges,

* Language of the case: Danish.

Advocate General: Y. Bot,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 November 2007,

after considering the observations submitted on behalf of:

- Danske Svineproducenter, by H. Sønderby Christensen, advokat,
- Den Europæiske Dyre- og Kødhandelsunion (UECBV), by J.-L. Mériaux, assisted by J. Seeger Perregaard, advokat,
- the Danish Government, by B. Weis Fogh, acting as Agent, assisted by P. Biering, advokat,
- the Belgian Government, by A. Hubert, acting as Agent,
- the Greek Government, by I. Chalkias and S. Papaioannou, acting as Agents,
- the Commission of the European Communities, by F. Erlbacher and H. Støvlbæk, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 The reference for a preliminary ruling concerns the interpretation of point 2(b) of Title A of Chapter I, section D of point 47 in Chapter VI, and the third indent of point 48(3) in Chapter VII of the annex to Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC (OJ 1991 L 340, p. 17), as amended by Council Directive 95/29/EC of 29 June 1995 (OJ 1995 L 148, p. 52) ('Directive 91/628').

- 2 The reference has been made in the course of proceedings between the professional body Danske Svineproducenter and the Justitsministeriet (Ministry of Justice) concerning the implementation of Directive 91/628 in Danish law.

Legal context

Community legislation

Directive 91/628

- 3 The third and fourth recitals in the preamble to Directive 95/29 read as follows:

'... some Member States have rules on journey times, feeding and watering intervals, resting periods and space allowances; ... these rules are, in some cases, extremely

detailed and are used by some Member States to restrict intra-Community trade in live animals; ... persons involved in the transport of animals need clearly defined criteria to enable them to operate on a Community-wide basis without coming into conflict with differing national provisions;

... in order to eliminate technical barriers to trade in live animals and to allow the market organisations in question to operate smoothly, while ensuring a satisfactory level of protection for the animals concerned, it is necessary in the context of the internal market to modify the rules of Directive 91/628/EEC with a view to harmonising travelling times and resting periods, feeding and watering intervals, and space allowances, for certain types of animal’.

4 By virtue of Article 1(1)(a) thereof, Directive 91/628 applies to domestic animals of the porcine species.

5 Article 3(1)(aa) of Directive 91/628 provides that Member States are to ensure that ‘space allowances (loading densities) for animals at least comply with the figures laid down in Chapter VI of the Annex, in respect of the animals and the means of transport referred to in that Chapter’ and that ‘travelling times and rest periods and feeding and watering intervals for certain types of animals comply with those laid down in Chapter VII of the Annex, in respect of the animals referred to in that Chapter, without prejudice to the provisions of Regulation (EEC) No 3820/85’.

6 Pursuant to Article 5(A)(1)(c) of Directive 91/628, Member States are to ensure that any transporter uses, for the transport of animals referred to in that directive, means

of transport that will ensure compliance with Community requirements concerning welfare during transport, and in particular the requirements laid down in the annex to that directive and those to be laid down in accordance with Article 13(1) thereof.

- 7 Chapter I of the annex to Directive 91/628 contains provisions applicable to the transport of, inter alia, domestic animals of the porcine species. Point 2(a) to (c) of Title A of that chapter provides:

‘(a) Animals shall be provided with adequate space to stand in their natural position and, when necessary, partitions to protect the animals from motion of the means of transport. Unless special conditions for the protection of animals require otherwise, room to lie down shall be provided.

(b) The means of transport and containers shall be constructed and operated so as to protect animals against inclement weather and marked differences in climatic conditions. Ventilation and air space shall be in keeping with the conditions of transport and appropriate for the species of animals carried.

Sufficient space should be provided inside the animals’ compartment [“the compartment”] and at each of its levels to ensure that there is adequate ventilation above the animals when they are in a naturally standing position without on any account hindering their natural movement.

(c) Means of transport and containers shall be easy to clean, escape-proof and shall be so constructed and operated as to avoid injury and unnecessary suffering to

animals and to ensure their safety during transport. ... They shall allow for the inspection and care of the animals and shall be stowed in a way which does not interfere with ventilation. ...'

8 Section D of point 47 in Chapter VI of the annex to Directive 91/628 provides that, for the transport of pigs by rail and by road, '[a]ll pigs must at least be able to lie down and stand up in their natural position' and that, '[i]n order to comply with these minimum requirements, the loading density for pigs of around 100 kg should not exceed 235 kg/m²'. Furthermore, '[t]he breed, size and physical condition of the pigs may mean that the minimum required surface area given ... has to be increased; a maximum increase of 20% may also be required depending on the meteorological conditions and the journey time'.

9 Pursuant to point 48(2) and (3) in Chapter VII of the annex to Directive 91/628:

'2. Journey times for animals belonging to the species referred to in [paragraph] 1 shall not exceed eight hours.

3. The maximum journey time in [paragraph] 2 may be extended where the transporting vehicle meets the following additional requirements:

...

- there is direct access to the animals,

- adequate ventilation is possible which may be adjusted depending on the temperature (inside and outside),

...'

- ¹⁰ On 5 January 2007, Directive 91/628 was repealed and replaced by Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 (OJ 2005 L 3, p. 1).

Regulation (EC) No 411/98

- ¹¹ Article 1 of Council Regulation (EC) No 411/98 of 16 February 1998 on additional animal protection standards applicable to road vehicles used for the carriage of livestock on journeys exceeding eight hours (OJ 1998 L 52, p. 8) provides:

‘Where the journey time of eight hours laid down in Chapter VII(2) of the Annex to Directive 91/628/EEC is exceeded, road vehicles used for the transportation of domestic solipeds and animals of the bovine, ovine, caprine and porcine species

within the Community must comply with the additional requirements set out in the Annex to this Regulation.’

12 Point 3 of the annex to Regulation No 411/98 provides:

‘Access

Vehicles used for transport must be equipped so that at all times there can be direct access to all the animals being transported so that they can be inspected and given all appropriate care, including feeding and watering in particular.’

National legislation

13 Directive 91/628 was transposed in Danish law by Decree No 201 of 16 April 1993 on the protection of animals during transport. That decree was subsequently amended by Decree No 734 of 13 July 2005 (‘Decree No 734’), by which the Justitsministeriet introduced new rules governing the transport of pigs. Under Paragraph 2(1) thereof, Decree No 734 entered into force on 15 August 2005, with the exception of the provisions relating to loading density, which entered into force on 15 August 2006, in accordance with Paragraph 2(2) of that decree.

The provisions of Decree No 734 relating to compartment height

14 Paragraph 6a of Decree No 734 provides:

‘1. In the case of the transport of pigs weighing 40 kg or over, the internal height between each deck — measured from the highest point on the floor to the lowest point on the roof (e.g. the underside of any crossbeams or struts) — shall at least satisfy the following requirements during transport:

Pigs		
Average weight in kg	Internal height where mechanical ventilation system is used	Internal height where another ventilation system is used
40	74 cm	89 cm
50	77 cm	92 cm
70	84 cm	99 cm
90	90 cm	105 cm
100	92 cm	107 cm
110	95 cm	110 cm
130	99 cm	114 cm
150	103 cm	118 cm
170	106 cm	121 cm
190	109 cm	124 cm
210	111 cm	126 cm
230	112 cm	127 cm

...

3. The mechanical ventilation system shall provide sufficient and evenly distributed ventilation with a nominal ventilation capacity of at least $61 \text{ m}^3/\text{h}$ per 100 kg of pig. Where the total journey time for pigs weighing 40 kg and over exceeds eight hours, the rules set out in point 2 of section A in Annex 3 shall also be complied with in so far as a mechanical ventilation system is used.

4. There must at all times be sufficient space inside the animals' compartment and at each of its levels to ensure that there is adequate ventilation above the pigs where they are in a naturally standing position and their natural movements must not be inhibited under any circumstances.

5. Where the total journey time for pigs weighing 40 kg and over exceeds eight hours, means of transport shall be used which — for example by means of a raisable roof combined with movable decks or similar construction — ensure at all times that an internal inspection height of at least 140 cm can be established on each deck — measured from the highest point on the floor to the lowest point on the ceiling (e.g. the underside of any crossbeams or struts). When setting the internal inspection height at 140 cm, there shall still be at least the height referred to in subparagraph 1 on the upper decks in the case of the transport of animals on several decks.'

¹⁵ Paragraph 3 of Decree No 734 contains the following transitional provisions:

'1. As regards light goods vehicles, heavy goods vehicles, trailer vehicles and semi-trailers etc. which are registered for the first time no later than 15 August 2005,

transport operators may, until 15 August 2010 in the case of transport of pigs of more than eight hours' duration, choose to transport pigs weighing 40 kg and above in accordance with the following rules:

In the case of the transport of pigs weighing 40 kg or over, the internal height between each deck — measured from the highest point on the floor to the lowest point on the roof (e.g. the underside of any crossbeams or struts) — shall at least satisfy the following requirements during transport:

Pigs		
Average weight in kg	Internal height where a mechanical ventilation system is used	Internal height where another ventilation system is used
Pigs over 40 kg up to and including 110 kg	100 cm	107 cm
Pigs over 110 kg and up to and including 150 kg	110 cm	118 cm
Pigs over 150 kg up to and including 230 kg	112 cm	127 cm
Pigs over 230 kg	> 112 cm	> 127 cm

2. The mechanical ventilation system shall provide sufficient and evenly distributed ventilation with a nominal ventilation capacity of at least 61 m³/h per 100 kg of pig.

3. There must at all times be sufficient room inside the animals' compartment and at each of its levels to ensure that there is adequate ventilation above the animals where they are in a naturally standing position and their natural movements must not be inhibited under any circumstances.

4. During the period before the space requirement referred to in subparagraph 2 applies, there shall be, in the case of the transport of pigs at an internal height of 100 cm, at least 0.42 m² per 100 kg of pig.’

The provisions of Decree No 734 concerning loading density

¹⁶ Annex I to Decree No 734, replacing Annex II to Decree No 201 of 16 April 1993, provides:

‘D. Pigs

Transport by rail and by heavy goods vehicle, including trailer vehicles

1. Transport of less than eight hours’ duration:

Live weight (kg)	Space (m ²) per animal
25	0.17
50	0.26
75	0.33
100	0.42
200	0.70
250 or more	0.80

The breed, size and physical condition of the animals may mean that the minimum required surface area given above has to be increased. A maximum increase of 20% may also be required depending on the meteorological conditions and the journey time.

2. Transport of over eight hours' duration:

Live weight (kg)	Space (m ²) per animal
25	0.20
50	0.31
75	0.39
100	0.50
200	0.84
250 or more	0.96'

The dispute in the main proceedings and the questions referred for a preliminary ruling

¹⁷ The decision for reference makes it clear that Danske Svineproducenter is a professional body which looks after the interests of Danish pig producers. It represents approximately 1 700 members, whose overall production represents two thirds of Danish pig production.

¹⁸ On 14 May 2005, Danske Svineproducenter brought an action against the Justitsministeriet before the Vestre Landsret (Western Regional Court), arguing that the Danish legislation transposing Directive 91/628, as amended by Decree No 734, is

not compatible with the provisions of that directive or with Articles 28 EC to 30 EC and 49 EC or Regulation No 1/2005. Danske Svineproducenter takes the view, in particular, that various requirements laid down by Decree No 734, which had not yet been promulgated when it brought its action, are unlawful.

¹⁹ Taking the view that the decision in the case turns on the interpretation of certain provisions of Directive 91/628, the Vestre Landsret decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Are the provisions contained in point 2(b) of Title A in Chapter I and the third indent of point 48(3) in Chapter VII of the annex to ... Directive 91/628 ... to be interpreted as meaning that a Member State is not entitled to introduce national transitional rules under which, in the case of the transport of pigs weighing from 40 kg to 110 kg where the journey time exceeds eight hours, there must be an internal height in respect of each deck — measured from the highest point on the floor to the lowest point on the ceiling — of at least 100 cm where a mechanical ventilation system is used?

‘(2) Are the provisions contained in point 2(b) of Title A in Chapter I and the third indent of point 48(3) in Chapter VII of the annex to ... Directive 91/628 ... to be interpreted as meaning that a Member State is not entitled to introduce national rules under which, in the case of the transport of pigs weighing 40 kg and over where the total journey time exceeds eight hours, means of transport must be used which — for example by means of a raisable roof combined with movable decks or similar construction — ensure at all times that an internal inspection height of at least 140 cm can be established in respect of each deck — measured from the highest point on the floor to the lowest point on the ceiling — whereas the internal height on the other decks in the case of the transport of animals on several decks must still be at least 92 cm where the pigs being transported weigh on average 100 kg and where a mechanical ventilation system is used?

(3) Are the provisions contained in section D “Pigs” of point 47 of Chapter VI of the annex to ... Directive 91/628 ... to be interpreted as meaning that a Member State is not entitled to introduce national rules under which, in the case of transport operations of over eight hours’ duration, there must be at least 0.50 m² per 100 kg of pig?’

The application to have the oral procedure reopened

20 By letter of 27 December 2007, the applicant in the main proceedings requested that the oral procedure be reopened, submitting that photographs had been produced before the Court just before the hearing by the Danish Government, which did not allow it to defend its interests in relation to that production of evidence, which it describes as unfair, late and tendentious. In addition, it argues that the failure to send the annexes attached to its written observations to the other parties which lodged written observations constitutes a breach of its rights of defence.

21 First of all, it must be borne in mind that, in accordance with established case-law, the Court may of its own motion, on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 25; and Case C-466/03 *Albert Reiss Beteiligungsgesellschaft* [2007] ECR I-5357, paragraph 29).

22 Furthermore, Article 234 EC establishes direct cooperation between the Court of Justice and the national courts and tribunals by means of a non-contentious procedure excluding any initiative by the parties, during which the parties are free to

submit written observations and may be invited to submit their oral observations at a hearing (see, to that effect, order in Case 6/71 *Rheinmühlen Düsseldorf* [1971] ECR 719, paragraph 1, and Case C-496/04 *Slob* [2006] ECR I-8257, paragraph 34).

23 Moreover, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and tribunals and the Court of Justice, any assessment of the facts in the case is a matter for the national court or tribunal (see, inter alia, Joined Cases C-211/03, C-299/03 and C-316/03 to C-318/03 *HLH Warenvertrieb and Orthica* [2005] ECR I-5141, paragraph 96, and Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43). In particular, the Court is empowered to rule only on the interpretation or the validity of Community acts on the basis of the facts placed before it by the national court or tribunal (see, inter alia, Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4, and Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraph 41). It is for the national court or tribunal to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see, to that effect, Case 17/81 *Pabst & Richarz* [1982] ECR 1331, paragraph 12, and Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 18).

24 With regard to the disputed production of photographs before the Court, suffice it to point out that, at the meeting held between the Judges and lawyers prior to commencement of the hearing, the Court informed the latter that those photographs had not been forwarded to the Judges and that their production at the hearing would not be permitted.

25 With regard to the argument relating to the failure to send the documents annexed to the observations of the applicant in the main proceedings, those observations were notified, without those documents in view of their volume, to the other parties which had submitted written observations. It is also common ground that the latter were

aware of those annexes, since the list thereof formed the final part of those observations, and that consequently it was possible for those other parties to consult them at the Court Registry or to request their transmission.

- 26 Having regard to the foregoing, the application made by the applicant in the main proceedings to have the oral procedure reopened must be dismissed.

The questions referred

Preliminary comments

- 27 Under the third paragraph of Article 249 EC, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed but leaves to the national authorities the choice of form and methods.
- 28 In accordance with established case-law, each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective that it pursues (see, inter alia, Case C-336/97 *Commission v Italy* [1999] ECR I-3771, paragraph 19, and Case C-321/05 *Kofoed* [2007] ECR I-5795, paragraph 41).
- 29 In that regard, the Court has already held that the main objective pursued by Directive 91/628 is the protection of animals during transport (see, to that effect, Joined Cases C-37/06 and C-58/06 *Viamex Agrar Handel and ZVK* [2008] ECR I-69, paragraph 29). The fact none the less remains, as is apparent from the second recital

in the preamble to Directive 91/628 and the fourth recital in the preamble to Directive 95/29, that Directive 91/628 was adopted within the framework of the Community policy of eliminating technical barriers to trade in live animals and to allow the market organisations to operate smoothly.

30 In addition, it follows from the fourth recital in the preamble to Directive 95/29 that Directive 91/628 is intended to harmonise travelling times and rest periods, feeding and watering intervals, and space allowances, for certain types of animal. Nevertheless, the fact remains that, although Directive 91/628 includes some precise provisions, others are general (see, to that effect, Case C-350/97 *Monsees* [1999] ECR I-2921, paragraph 26).

31 In those circumstances, Directive 91/628 must be transposed in compliance with the objectives which it pursues and the margin of discretion available to the Member States depends on the level of precision of the provisions of that directive. Moreover, that transposition must be carried out in strict accordance with the principle of proportionality. In that regard the Court has held, in particular, that the principle of proportionality, which is a general principle of Community law and has been affirmed on numerous occasions in the case-law of the Court of Justice, in particular with regard to the common agricultural policy (see, inter alia, Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81, and Case C-310/04 *Spain v Council* [2006] ECR I-7285, paragraph 97), must be observed as such both by the Community legislature and by the national legislatures and courts which apply Community law (see, to that effect, *Viamex Agrar Handel and ZVK*, paragraph 33).

32 Accordingly, it is inherent in the transposition procedure that the Member States were required to comply with the main objective of protecting animals during transport without hindering the attainment of the other objectives pursued by Directive 91/628.

33 It is in the light of those comments that it is necessary to assess whether national measures such as those at issue in the main proceedings give full effect to the provisions of Directive 91/628, in accordance with the objectives which it pursues and with the principle of proportionality.

The first and second questions

34 By its first and second questions, which can be considered together, the national court asks whether the provisions of point 2(b) of Title A in Chapter I and of the third indent of point 48(3) of Chapter VII of the annex to Directive 91/628 are to be interpreted as meaning that they permit a Member State to introduce:

- national transitional rules under which, in the case of the transport of pigs weighing from 40 kg to 110 kg where the journey time exceeds eight hours, there must be an internal height in respect of each deck — measured from the highest point on the floor to the lowest point on the ceiling — of at least 100 cm where a mechanical ventilation system is used;

- national rules under which, in the case of the transport of pigs weighing 40 kg and over where the total journey time exceeds eight hours, means of transport must be used which ensure at all times that an internal inspection height of at least 140 cm can be established in respect of each deck, whereas the internal height of the other decks in the case of the transport of animals on several decks must be at least 92 cm where the pigs being transported weigh on average 100 kg and where a mechanical ventilation system is used.

35 It is appropriate to note that the provisions of Directive 91/628 require the Member States to adopt minimum rules ensuring that, during transport by road, pigs have sufficient space, in terms of surface, height and ventilation, requirements which are more stringent in the case of journeys lasting more than eight hours.

36 Article 5(A)(1)(b) of Directive 91/628 requires the Member States to ensure that any natural or legal person transporting animals for profit transports animals covered by that directive using means of transport meeting the requirements laid down in the annex thereto. Article 3(1)(aa) of Directive 91/628 provides that the Member States must ensure that, inter alia, space allowances (loading densities) for animals at least comply with the figures laid down in Chapter VI of that annex. Chapter VI, which, in section D of point 47, fixes the loading density for pigs, states that, for transport by road, all pigs must at least be able to lie down and stand up in their natural position. Section D also provides that, in order to comply with those minimum requirements, the loading density for pigs of around 100 kg should not exceed 235 kg/m^2 . That provision further states that the breed, size and physical condition of the pigs may mean that the minimum required surface area has to be increased; a maximum increase of 20% may also be required depending on the meteorological conditions and the journey time.

37 It must also be pointed out that Directive 91/628 merely provides, in point 2(b) of Title A of Chapter I of its annex, that the means of transport must provide sufficient space inside the compartment and at each of its levels to ensure that there is adequate ventilation above the animals when they are in a naturally standing position, without on any account hindering their natural movement. The third indent of point 48(3) in Chapter VII of that annex permits the transport of animals where the journey time is more than eight hours only if the means of transport meets additional conditions, in particular that of direct access to the animals.

38 Accordingly, since the Community legislature did not itself lay down, in Directive 91/628, the precise height of the compartments, the Member States must be recognised as having a clear margin of discretion to adopt national provisions which allow the provisions of that directive to have their full effect, in accordance with the objectives pursued by it and in compliance with Community law.

39 With regard to the provisions at issue in the main proceedings, as is apparent from the observations submitted to the Court in the written and oral procedure, the Kingdom of Denmark sought to convert the very general requirements regarding compartment height laid down in Directive 91/628 to precise requirements in its national law. To that end, it considered it appropriate to rely on the recommendations in the opinion on the welfare of animals during transport, issued on 11 March 2002 by the Scientific Committee on Animal Health and Animal Welfare, which is a Community committee, on the ground that that opinion takes account of scientific data more recent than those used as the basis for drafting Directive 91/628. Those recommendations therefore constitute, in the view of the Danish Government, the best basis on which to lay down the standards of that directive and ensure protection of animals.

40 Rules such as those at issue in the main proceedings, comprising figures for the compartment height in order that transporters may refer to more exact standards than those given in Directive 91/628, fall, in principle, within the margin of discretion conferred on the Member States by Article 249 EC, on condition, however, that those rules, to the extent to which they are liable to impact adversely on the attainment of the directive's objectives of eliminating technical barriers to trade in live animals and allowing market organisations to operate smoothly, remain objectively necessary and proportionate in order to ensure the attainment of the directive's main objective of protecting animals during transport.

41 In that regard, it is apparent from the observations of the Danish Government that, by the rules in issue in the main proceedings, the Kingdom of Denmark attached

priority to attaining the objective of protecting animals during transport over the other objectives of Directive 91/628. The Danish Government also points out that, since the welfare of animals is a priority issue, it chose to avoid unnecessary suffering for animals during their transport, while taking into account, so far as possible, the economic interests involved, in particular those of the transporters and their ability to adapt to the new requirements.

⁴² Furthermore, it is apparent from the information supplied by the national court that one of the objectives of those rules was to make it more difficult and onerous to meet the conditions for satisfying the requirements for animal transport and, thus, indirectly to reduce the number of animals transported for long periods to slaughterhouses. The provisions at issue in the main proceedings would involve, *inter alia*, conversion of the vehicles normally used for the transport of animals, which, according to the Danish Government's estimates, represents, for exporters, an additional cost of EUR 10 000 to EUR 20 000 per road train.

⁴³ In such circumstances, it cannot be ruled out that the additional cost which compliance with rules such as those at issue in the main proceedings may represent and the technical difficulties to which they may give rise are liable to prevent attainment of the objectives of eliminating technical barriers to trade in live animals and allowing market organisations to operate smoothly, thereby restricting the free movement of goods in respect of both imports and exports.

⁴⁴ In the absence, among the documents submitted to the Court, of data relating to the impact of the rules at issue in the main proceedings on the smooth operation of the common market, in particular with regard to pig producers from other Member States who transport animals on Danish territory, it is for the national court to determine whether those rules give rise to technical difficulties of such a kind to prevent attainment of the objectives of eliminating technical barriers to trade in live animals and allowing market organisations to operate smoothly pursued by Directive 91/628

and to assess, in the light of those various factors, whether, by adopting those rules, the Kingdom of Denmark exceeded the margin of discretion conferred on it by that directive. In particular, that court must be certain that those rules, to the extent to which they are liable to impact adversely on the attainment of those two objectives, remain objectively necessary and proportionate to ensure the attainment of the principal objective of protecting animals during transport pursued by Directive 91/628.

45 To that end, it must ascertain, first of all, that the additional cost and technical difficulties resulting from the provisions at issue in the main proceedings are not liable to disadvantage pig producers in the Member State which adopted them. Next, it must be satisfied that those provisions are not liable to penalise those producers who wish to export their products in comparison with exporters from other Member States, who would not have to bear the additional cost connected with the technical conversion of road trains. Finally, it must verify that those provisions do not disadvantage pig producers from other Member States which wish to transport animals to Denmark, or via that Member State, and who would also be required to convert road trains in order to comply with the Danish rules.

46 Having regard to the foregoing, the answer to the first and second questions referred must be that rules such as those at issue in the main proceedings, comprising figures for the animal compartment height in order that transporters may refer to more precise standards than those set out in Directive 91/628, may fall within the margin of discretion conferred on the Member States by Article 249 EC, on condition that those rules, which comply with the objective pursued by that directive of protecting animals during transport, do not, contrary to the principle of proportionality, prevent attainment of the objectives, also pursued by Directive 91/628, of eliminating technical barriers to trade in live animals and allowing market organisations to operate smoothly. It is for the national court to establish whether those rules comply with those principles.

The third question

47 By its third question, the national court asks essentially whether section D of point 47 in Chapter VI of the annex to Directive 91/628 is to be interpreted as meaning that a Member State is not entitled to introduce national rules under which, in the case of transport operations of over eight hours' duration, the available area must be at least 0.50 m² per 100 kg of pig.

48 In that regard, it should be borne in mind, first, that, in accordance with Article 3(1) (aa) of Directive 91/628, Member States must ensure that space allowances (loading densities) for animals at least comply with the figures set out in Chapter VI of the annex to that directive, in respect of the animals and the means of transport referred to in that chapter. Second, section D of point 47 in that chapter provides that, in order to comply with the minimum requirements laid down by that provision, that is to say, that pigs must at least be able to lie down and stand up in their natural position, the loading density for pigs of around 100 kg should not exceed 235 kg/m², which is equivalent to 0.42m² for a pig of 100 kg. That provision also states that the breed, size and physical condition of the pigs may mean that the minimum required surface area has to be increased; a maximum increase of 20% may also be required depending on the meteorological conditions and the journey time.

49 It is thus apparent from the wording of section D of point 47 in Chapter VI of the annex to Directive 91/628 that the Community legislature expressly laid down minimum standards for loading density for pigs of around 100 kg and, in particular, allowed the Member States to increase those standards by up to 20% depending on the meteorological conditions and the journey time.

50 A national provision which requires that, in the case of journeys lasting longer than eight hours, the surface available per animal be at least 0.50 m² for pigs of around 100 kg complies with the minimum and maximum standards laid down by the

provisions of Directive 91/628 referred to in paragraph 48 of the present judgment. The increase in the minimum required space laid down by such a provision is justified by the journey time and falls within the 20% limit authorised by the Community legislature in those provisions.

- 51 In those circumstances, the answer to the third question referred is that section D of point 47 of Chapter VI of the annex to Directive 91/628 must be interpreted as meaning that a Member State is entitled to introduce national rules under which, in the case of transport operations of over eight hours' duration, the available space per animal must be at least 0.50 m² per 100 kg of pig.

Costs

- 52 Since 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **National rules such as those at issue in the main proceedings, comprising figures for the animal compartment height in order that transporters may refer to more precise standards than those set out in Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC, as**

amended by Council Directive 95/29/EC of 29 June 1995, may fall within the margin of discretion conferred on the Member States by Article 249 EC, on condition that those rules, which comply with the objective pursued by that directive, as amended, of protecting animals during transport do not, contrary to the principle of proportionality, prevent attainment of the objectives, also pursued by that directive, as amended, of eliminating technical barriers to trade in live animals and allowing market organisations to operate smoothly. It is for the national court to establish whether those rules comply with those principles.

2. Section D of point 47 in Chapter VI of the annex to Directive 91/628, as amended by Directive 95/29, must be interpreted as meaning that a Member State is entitled to introduce national rules under which, in the case of transport operations of over eight hours' duration, the available space per animal must be at least 0.50 m² per 100 kg of pig.

[Signatures]