



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 10 September 2015¹

Case C-301/14

Pfotenhilfe-Ungarn eV

v

**Ministerium für Energiewende, Landwirtschaft, Umwelt und ländliche Räume des Landes
Schleswig-Holstein**

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany))

(Agriculture — Regulation (EC) No 1/2005 — Protection of animals during transport — Transport of animals ‘in connection with an economic activity’ — Directive 90/425/EEC — Veterinary and zootechnical checks in intra-Community trade — ‘Dealers engaging in intra-Community trade’ of animals — Non-profit association transporting stray dogs from one Member State to another Member State with a view to placing them with third parties for a fee)

1. This request for a preliminary ruling arises out of proceedings pending before the Bundesverwaltungsgericht (Federal Administrative Court, Germany; ‘the referring court’) between Pfotenhilfe-Ungarn, a German animal protection association, and the Ministry of Energy Transition, Agriculture, Environment and Rural Areas of the Land Schleswig-Holstein (‘the Ministry’). Pfotenhilfe-Ungarn transports stray dogs from Hungary to Germany with a view to placing them with third parties for a fee. The Ministry treats that transport and placing as an economic activity. As a result, it takes the view that Pfotenhilfe-Ungarn has disregarded the notification and registration requirements laid down in German legislation transposing the Directive on veterinary and zootechnical checks,² on the one hand, and the Regulation on animal protection during transport,³ on the other hand. Pfotenhilfe-Ungarn submits that such transport is not carried out for profit and that it is therefore subject instead to the less stringent regime set out in the Regulation on non-commercial movements of pet animals.⁴

1 — Original language: English.

2 — 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), as amended (‘the Directive on veterinary and zootechnical checks’).

3 — 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) (‘the Regulation on animal protection during transport’).

4 — Regulation (EC) No 998/2003 of the European Parliament and of the Council of 26 May 2003 on the animal health requirements applicable to the non-commercial movement of pet animals and amending Council Directive 92/65/EEC (OJ 2003 L 146, p. 1) (‘the Regulation on non-commercial movements of pet animals’). That regulation was repealed by Regulation (EU) No 576/2013 of the European Parliament and of the Council of 12 June 2013 on the non-commercial movement of pet animals (OJ 2013 L 178, p. 1), which did not apply at the material time (see point 33 below). The version of the Regulation on non-commercial movements of pet animals relevant to the facts in the main proceedings is that last amended by Commission Regulation (EC) No 898/2009 of 25 September 2009 amending Annex II to Regulation (EC) No 998/2003 of the European Parliament and of the Council as regards the list of countries and territories (OJ 2009 L 256, p. 10).

2. The referring court seeks guidance, in the first place, on whether the transport of animals without any profit motive may nevertheless take place ‘in connection with an economic activity’ and, for that reason, be governed by the Regulation on animal protection during transport. The referring court also asks whether an association such as Pfothenhilfe-Ungarn, in a situation such as that in the main proceedings, is a ‘dealer [...] engaging in intra-Community trade’ of animals within the meaning of the Directive on veterinary and zootechnical checks (if so, the association is subject to the notification and registration requirements under that directive).

3. This reference offers the Court the opportunity to clarify the scope and purpose of various European Union schemes governing the transport of animals between Member States. I shall therefore begin by outlining the requirements under those different schemes.

EU law

TFEU

4. Article 13 TFEU provides:

‘In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.’

The Regulation on animal protection during transport

5. The Regulation on animal protection during transport aims in essence, according to recital 6 in its preamble, to prevent the occurrence and spread of infectious animal diseases and to put in place more stringent requirements so as to prevent pain and suffering in order to safeguard the welfare and health of animals during and after transport. According to recital 11, the provisions of that regulation are to be interpreted and applied in accordance with the principle that animals must not be transported in a way likely to cause them injury or undue suffering.⁵

6. Recital 12 states that transport for commercial purposes is not limited to transport where an immediate exchange of money, goods or services takes place, but includes, in particular, transport which directly or indirectly involves or aims at a financial gain.

7. The Regulation on animal protection during transport applies to the transport of live vertebrate animals (thus including dogs) carried out within the European Union (Article 1(1)), without prejudice to EU veterinary legislation (Article 1(4)). Article 1(5) specifies, however, that the regulation does not apply, inter alia, to the transport of animals which does not take place in connection with an economic activity.⁶

5 — See also Article 3, first paragraph.

6 — The wording of Article 1(5) differs from the Commission’s original proposal to limit the scope of the Regulation on animal protection during transport to transport ‘for commercial purposes’. See Article 1(1) of the Proposal for a Council Regulation on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EEC, COM(2003) 425 final.

8. Article 2(m) defines ‘long journey’ as a journey that exceeds 8 hours, starting from when the first animal of the consignment is moved. Pursuant to Article 2(w), ‘transport’ means the movement of animals effected by one or more means of transport and the related operations, including loading, unloading, transfer and rest, until the unloading of the animals at the place of destination is completed. Article 2(x) defines ‘transporter’ as any natural or legal person transporting animals on his own account or for the account of a third party.

9. Pursuant to the first paragraph of Article 3, no person may transport animals or cause animals to be transported in a way likely to cause them injury or undue suffering. The second paragraph sets out a number of general conditions for the transport of animals, designed to minimise the burden of transport for the animals concerned.

10. The Regulation on animal protection during transport also lays down requirements concerning, inter alia: (i) transport documentation (Article 4); (ii) planning obligations for the transport of animals (Article 5); (iii) entitlement to operate as a transporter, including the authorisation to carry out long journeys (Articles 6 and 10 to 12); (iv) prior inspection and approval of means of transport, especially for a long journey (Article 7); (v) the duties of animal keepers at the place of departure, transfer or destination to ensure that certain technical rules in respect of the animals transported are met and the duties of animal keepers at a place of transit or a place of destination to check all animals in order to determine if the animals are or have been subject to a long journey (Article 8); (vi) checks to be carried out by the competent authority at any stage of a long journey on a random or targeted basis (Article 15); and (vii) the granting of certificates of approval of means of transport by road used for long journeys (Article 18).

11. Pursuant to Article 6(3), animals must be transported in accordance with the technical rules in Annex I. The latter rules provide in particular that animals that are injured or that present physiological weaknesses or pathological processes cannot be considered fit for transport (Annex I, Chapter I, paragraph 2). The means of transport, containers and their fittings are to be designed, constructed, maintained and operated so as to avoid injury and suffering and to ensure animal safety; protect the animals from inclement weather, extreme temperatures and adverse changes in climatic conditions; be cleaned and disinfected; ensure that air quality and quantity appropriate to the species transported can be maintained; and have a flooring surface that is anti-slip and minimizes the leakage of urine or faeces (Annex I, Chapter II, paragraph 1.1). Sufficient space must be provided inside the animals’ 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 (Annex I, Chapter II, paragraph 1.2).

12. The technical rules also prohibit, in particular, striking or kicking the animals, lifting or dragging them by head, ears, horns, legs, tail or fleece or using prods or other implements with pointed ends (Annex I, Chapter III, paragraph 1.8). Moreover, animals of significantly different sizes or ages, sexually mature males and females and animals hostile to each other must be handled and transported separately (Annex I, Chapter III, paragraph 1.12). Dogs and cats are to be fed at intervals of not more than 24 hours when they are transported and must be given water at intervals of not more than eight hours, in accordance with clear written instructions about feeding and watering (Annex I, Chapter V, paragraph 2.2).

The Directive on veterinary and zootechnical checks

13. The Directive on veterinary and zootechnical checks aims to complete the internal market. It replaces the barriers to free movement of animals and agricultural products which resulted from the veterinary and zootechnical checks that national authorities previously conducted at the Community's internal frontiers⁷ with a harmonised system for veterinary and zootechnical checks at the place of origin (or place of dispatch) and at the place of destination.⁸

14. Pursuant to the first paragraph of Article 1, Member States may no longer carry out veterinary checks at frontiers on live animals and products covered by, inter alia, the directives listed in Annex A, but are instead required to carry out such checks in accordance with that directive. Annex A refers in particular to Council Directive 91/628/EEC,⁹ which applied to dogs. That reference is now to be construed as a reference to the Regulation on animal protection during transport, which repealed and replaced that directive and which also applies to dogs.¹⁰ As a result, the Directive on veterinary and zootechnical checks applies to dogs.

15. The fourth paragraph of Article 1 states that the Directive on veterinary and zootechnical checks does not apply to veterinary checks on movements between Member States of pets accompanied by and under the responsibility of a natural person, where such movements are not the subject of a commercial transaction.

16. Article 2(3) defines 'trade' as 'trade between Member States within the meaning of Article 9(2) [EEC; now Article 28(2) TFEU]'.¹¹

17. Pursuant to Article 3(1), Member States must ensure that animals covered by the directive may be the subject of trade only if they fulfil a number of conditions. Those animals must, in particular, satisfy the requirements of the relevant directives listed in Annex A and come from holdings, centres or organisations which are subject to regular official veterinary checks. They must also be accompanied, when transported, by health certificates and/or any other documents as provided for by the relevant directives listed in Annex A, and issued by the official veterinarian responsible for the holding, centre or organisation of origin.

18. Under Article 4(1), Member States of dispatch must take the necessary measures to ensure in particular that animals covered by the directive are checked in principle at least as carefully, from a veterinary viewpoint, as if they were intended for the national market, and are transported in suitable means of transport which satisfy hygiene rules.

19. Pursuant to the second subparagraph of Article 5(1)(a), the competent authority in the Member State of destination may in particular carry out checks during the transport of animals when it has information leading it to suspect an infringement of any of the requirements under Article 3.

7 — Second recital in the preamble to the Directive on veterinary and zootechnical checks. In essence, veterinary checks aim to protect public or animal health, whereas zootechnical checks are intended for the direct or indirect improvement of the breeds. See Article 2(1) and (2) of that directive.

8 — Fifth recital.

9 — 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).

10 — Articles 1(1) and 33 of the Regulation on animal protection during transport.

11 — According to Article 28(2) TFEU, the abolition of customs duties on imports and exports and of charges having equivalent effect (Article 30 TFEU) as well as Article 33 TFEU concerning customs cooperation apply to 'products originating in Member States and to products coming from third countries which are in free circulation in Member States'.

20. Article 12 requires the Member States, *inter alia*, to ensure that all dealers engaging in intra-Community trade in the animals covered by the Directive on veterinary and zootechnical checks are required, at the request of the competent authority, to register beforehand in an official register and keep a record of deliveries.

The Directive on animal health in trade

21. The Directive on veterinary and zootechnical checks was completed by Council Directive 92/65/EEC of 13 July 1992 laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A(I) to Directive 90/425/EEC.¹² That directive aims to liberalise trade in animals and products of animal origin, without prejudice to recourse to possible safeguard measures.¹³

22. Pursuant to the first paragraph of Article 1, the Directive on animal health in trade lays down animal health rules for the placing on the market of, *inter alia*, animals other than cattle, swine, sheep and goats, equidae, poultry, fish, and bivalve molluscs.¹⁴ It therefore applies to placing dogs on the market.

23. Article 2(1)(a) states that ‘trade’ has the same meaning as in Article 2(3) of the Directive on veterinary and zootechnical checks.¹⁵

24. The first paragraph of Article 3 requires Member States to ensure that trade in the animals covered is not prohibited or restricted for animal health reasons other than those arising from the application of that directive or from EU legislation, and in particular any safeguard measures taken.

25. Pursuant to Articles 4 and 10(2), dogs may be the subject of trade in principle only if certain conditions are met. They must in particular satisfy the requirements set out in Article 5 of the Regulation on non-commercial movements of pet animals.¹⁶ The certificate accompanying the dogs must confirm that, 24 hours before dispatch of the animals, a clinical examination was carried out by a veterinarian authorised by the competent authority showing the animals to be in good health and able to withstand carriage to their destination. Furthermore, the dogs must come from holdings or businesses which are registered by the competent authority. These holdings or businesses undertake in particular: (i) to have the animals held examined regularly by the competent authority in accordance with Article 3(3) of the Directive on veterinary and zootechnical checks; (ii) to notify the competent authority of the outbreak of certain diseases; (iii) to place on the market for the purposes of trade only animals which show no signs of disease and which come from holdings or areas not subject to any ban on animal health grounds, and (iv) to comply with the requirements ensuring the welfare of the animals held.

26. Article 12(3) states that, for the purpose of trade, Article 12 of the Directive on veterinary and zootechnical checks applies to, *inter alia*, dealers who keep dogs on a permanent or occasional basis.

12 — OJ 1992 L 268, p. 54 (‘the Directive on animal health in trade’), as last amended, at the material time in the main proceedings, by Council Directive 2008/73/EC of 15 July 2008 simplifying procedures of listing and publishing information in the veterinary and zootechnical fields and amending Directives 64/432/EEC, 77/504/EEC, 88/407/EEC, 88/661/EEC, 89/361/EEC, 89/556/EEC, 90/426/EEC, 90/427/EEC, 90/428/EEC, 90/429/EEC, 90/539/EEC, 91/68/EEC, 91/496/EEC, 92/35/EEC, 92/65/EEC, 92/66/EEC, 92/119/EEC, 94/28/EC, 2000/75/EC, Decision 2000/258/EC and Directives 2001/89/EC, 2002/60/EC and 2005/94/EC (OJ 2008 L 219, p. 40).

13 — Ninth recital.

14 — See also the fourth and fifth recitals.

15 — See point 16 above.

16 — See point 29 below.

The Regulation on non-commercial movements of pet animals

27. Pursuant to Article 1 of the Regulation on non-commercial movements of pet animals, that regulation lays down the animal health requirements applicable to the non-commercial movement of pet animals and the rules applying to checks on such movement.

28. Article 3(a) defines ‘pet animals’ as ‘animals of the species listed in Annex I which are accompanying their owners or a natural person responsible for such animals on behalf of the owner during their movement and are not intended to be sold or transferred to another owner’. Part A of Annex I refers in particular to dogs. Pursuant to Article 3(c), ‘movement’ means ‘any movement of a pet animal between Member States or its entry or re-entry into the territory of the Community from a third country’.

29. Under Article 5(1), pet animals, when being moved between Member States, must be identified by a clearly readable tattoo or an electronic identification system and be accompanied by a passport issued by a veterinarian authorised by the competent authority certifying in particular anti-rabies vaccination.

German law

30. Paragraph 4 of the Binnenmarkt-Tierseuchenschutzverordnung (Order on Protection against Animal Diseases in the Internal Market; ‘the Verordnung’), which transposes into German law point (a) of Article 12 of the Directive on veterinary and zootechnical checks, provides in essence that anyone who, in the course of business (‘gewerbsmäßig’), intends to move animals within the Union or import them into the Union must notify his intention to do so to the competent authority. The competent authority then registers such persons and assigns a registration number to them.

Facts, procedure and question referred

31. Pfothenhilfe-Ungarn is an animal protection association registered in Germany. It is a charitable association for the purposes of German tax law.

32. Pfothenhilfe-Ungarn’s activities include placing stray dogs originating from animal protection facilities in Hungary with new masters in Germany. Pfothenhilfe-Ungarn publishes on its website advertisements concerning dogs needing placements. A person interested in adopting a dog concludes a ‘protection contract’ with Pfothenhilfe-Ungarn, whereby he undertakes to take responsible care of the animal and to pay a fee (usually EUR 270) to that association. The fee represents a contribution towards expenses that Pfothenhilfe-Ungarn incurs in caring for such dogs and transporting them to their new homes. Members of Pfothenhilfe-Ungarn transport the dogs to be placed in Germany and hand them over to their new masters. There is no transfer of ownership. Pfothenhilfe-Ungarn is entitled to reclaim the animal if the new master breaches the protection contract. At the hearing, Pfothenhilfe-Ungarn explained that the new master undertakes in particular to castrate the dog placed with him and not to pass it on to a third party. If a sick or elderly dog has to be put down, the new master is required first to contact Pfothenhilfe-Ungarn and obtain the latter’s authorisation.

33. On 29 December 2009, Pfothenhilfe-Ungarn transported a group of 39 dogs from Hungary to Germany. The Ministry discovered that evidence of the health and vaccination status of one of those dogs was lacking. It therefore sent a circular to the competent local veterinary inspection offices instructing them to check all the animals from that consignment. When Pfothenhilfe-Ungarn queried the circular, the Ministry stated that the transport and placing of dogs carried out by that association was an economic activity. As a result, that association had to comply with the registration and notification obligations set out in Paragraph 4 of the Verordnung and with the Regulation on animal protection during transport.

34. Pfothenhilfe-Ungarn's challenge to the Ministry's decision is now the subject of an appeal on a point of law before the referring court, which stayed the proceedings and requested a preliminary ruling on the following questions:

- (1) Is there a transport of animals which does not take place in connection with an economic activity within the meaning of Article 1(5) of [the Regulation on animal protection during transport] where that transport is effected by an animal protection association recognised as charitable and serves to place stray dogs with third parties for a remuneration ("fee") which:
 - (a) is less than the costs which the association incurs in connection with the animal, the transport and the placing, or just covers these; or
 - (b) is greater than those costs but the profit serves to finance the outstanding costs of placing other stray animals and the costs connected with stray animals or other animal protection projects?
- (2) Is an animal protection association recognised as charitable to be regarded as a dealer engaging in intra-Community trade within the meaning of Article 12 of [the Directive on veterinary and zootechnical checks] where it transports stray dogs to Germany and places them with third parties for a remuneration ("fee") which:
 - (a) is less than the costs which the association incurs in connection with the animal, the transport and the placing, or just covers these; or
 - (b) is greater than those costs but the profit serves to finance the outstanding costs of placing other stray animals and the costs connected with stray animals or other animal protection projects?

35. Written observations have been submitted by Pfothenhilfe-Ungarn, the Ministry, the Austrian and Italian Governments and the European Commission. Pfothenhilfe-Ungarn, the Ministry and the Commission presented oral argument at the hearing on 3 June 2015.

Assessment

Preliminary remarks

36. The referring court seeks guidance, in essence, on whether or not the concepts of 'economic activity' in Article 1(5) of the Regulation on animal protection during transport and of 'dealer ... engaging in intra-Community trade' of animals in Article 12 of the Directive on veterinary and zootechnical checks necessarily involve a profit motive.

37. In order to answer that question of principle, it is not necessary for the Court to determine what precisely the fee which Pfothenhilfe-Ungarn receives for each placed dog actually covers. The questions referred suggest that the fee might be lower than the costs which that association incurs for keeping a particular dog, providing it with care and transporting it to its new master, or just cover these costs. The fee might also be greater than those costs, in which case the surplus helps to finance outstanding costs for placing other stray dogs or to cover costs related to stray animals or other animal protection projects. That issue of fact is a matter for the competent national court to decide, where appropriate.

38. Next, Pfothenhilfe-Ungarn submits that the outcome of the reference is liable to have an impact on its status as a charitable organisation under German tax law. The only purpose of the present reference is however to provide the referring court with the necessary guidance to resolve effectively the dispute pending before it.¹⁷ That involves clarifying the scope of the Regulation on animal protection during transport and of the Directive on veterinary and zootechnical checks, not exploring the consequences which that interpretation might have for Pfothenhilfe-Ungarn outside the context of the main proceedings.

39. Lastly, the acts of EU secondary legislation which I have described above¹⁸ envisage in essence two types of situation, each of which is subject to a distinct regime. The first concerns movements of pet animals which are accompanying their owners or a natural person responsible for such animals on behalf of the owner during their movement. These movements are governed by the Regulation on non-commercial movements of pet animals, except where the animal is transported to be sold or transferred to a new owner.¹⁹ The second concerns cross-border movements of animals in the context of commercial transactions. These are subject to the much more stringent rules contained in the Regulation on animal protection during transport, the Directive on veterinary and zootechnical checks and the Directive on animal health in trade.

40. The underlying rationale of that distinction is, as I see it, twofold.

41. First, as the Commission explained at the hearing, cross-border movement of pets by their owners usually involves less contact with other animals and persons than transport of animals in the context of commercial transactions. As a result, the risk of spread of contagious diseases is lower in those cases and it is therefore not necessary to apply to such movements the Directive on veterinary and zootechnical checks and the Directive on animal health in trade.²⁰

42. Second, there is a presumption that a pet owner will transport his pet in a way that is not likely to cause it injury or undue suffering. The EU legislature thus considered that there was no need to apply the Regulation on animal protection during transport to such movements.²¹

43. Manifestly, the legislature did not specifically envisage the situation of non-profit associations which, like Pfothenhilfe-Ungarn, engage in the protection of animals by transporting and placing them with new masters for a fee.

44. It seems clear to me that, whatever answer is given to the questions referred, some of the consequences of this legislative lacuna are likely to be unfortunate. If the detailed requirements of the Regulation on animal protection during transport and the Directive on veterinary and zootechnical checks must be complied with, the additional financial and administrative burden on associations such as Pfothenhilfe-Ungarn may well limit their ability to promote animal welfare as they now do. If those requirements do not apply, there is a risk that animals may be transported under conditions which might allow the spread of disease and adversely affect animal (and human) health and welfare.

17 — See, inter alia, the judgments in *Foglia*, 244/80, EU:C:1981:302, paragraph 18, and *Pohotovost*, C-470/12, EU:C:2014:101, paragraph 29.

18 — See points 5 to 29 above.

19 — Article 3(a) of the Regulation on non-commercial movements of pet animals.

20 — I note, however, that Regulation No 576/2013 now subjects non-commercial movements of pet animals of species susceptible to rabies (including dogs) to stricter animal health requirements than the earlier Regulation on non-commercial movements of pet animals.

21 — However, national rules penalising maltreatment of animals may (and should) apply where an individual pet owner transports his pet in a way that disproves this presumption.

Question 1: transport of animals ‘in connection with an economic activity’ within the meaning of Article 1(5) of the Regulation on animal protection during transport

45. The Regulation on animal protection during transport governs only transport which takes place ‘in connection with an economic activity’.²² Does Pfortenhilfe-Ungarn’s placing activity considered as a whole (that is, collecting stray dogs, providing them with the necessary care, advertising dogs that need to be placed on its website, concluding protection contracts and transporting the dogs to their new masters for a fee) constitute an ‘economic activity’ even if it is not carried out for profit?

46. Whilst the concept ‘economic activity’ may not have exactly the same meaning across EU law,²³ the Court has held on numerous occasions that an activity can be economic even if the person who conducts it does not seek to make a profit.

47. Thus, it is settled case-law that activities consisting in offering goods or services on a market come within the scope of the Treaty rules on competition.²⁴ The fact that a person does not seek to make a profit does not prevent that person from being an ‘undertaking’ subject to, inter alia, the prohibitions on anti-competitive agreements or State aid if that person offers goods or services on the market which are in competition with those of profit-making operators.²⁵ As Advocate General Jacobs put it, the basic test in assessing whether an activity is economic in character and hence governed by EU competition rules is ‘whether it *could*, at least in principle, be carried on by a private undertaking in order to make profits’.²⁶

48. The Court has followed a similar approach in other contexts. For instance, the fact that a contractor has the legal form of an association governed by private law and that it is non-profit does not preclude it from carrying out an economic activity. Such circumstances are therefore irrelevant as regards the application of EU law on public contracts.²⁷ Likewise, the fact that a person is engaged in non-profit-making activities is not in itself sufficient to deprive such activities of their economic character and to remove them from the scope of EU law provisions concerning freedom to provide services.²⁸ Nor does it exonerate that person from requirements in EU law concerning safeguarding employees’ rights in the event of transfers of undertakings.²⁹ It is also clear from the first sentence of Article 9(1) of the VAT Directive³⁰ that, in principle, that directive applies regardless of whether or not an activity is conducted for profit. Under that provision, ‘taxable person’ means ‘any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity’. Article 132(l) and (m) of the VAT Directive, which exempt certain activities of non-profit organisations, further support that conclusion. Those activities would not need specific exemption if they were not economic activities.³¹

22 — Article 1(5).

23 — Judgment in *Meca-Medina and Majcen v Commission*, C-519/04 P, EU:C:2006:492, paragraphs 31 to 33. See, for an analysis of the concept ‘economic activity’ in various EU policies, Odudu, O., ‘Economic Activity as a Limit to Community Law’, in Barnard, C., Odudu, O. (Eds), *The Outer Limits of European Union Law*, Oxford, Hart Publishing, 2009, pp. 225-243.

24 — See, inter alia, the judgments in *Commission v Italy*, 118/85, EU:C:1987:283, paragraph 3; *Commission v Italy*, C-35/96, EU:C:1998:303, paragraph 36; and *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 75.

25 — See, inter alia, the judgments in *Albany*, C-67/96, EU:C:1999:430, paragraph 85; *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 123; and *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 57 and case-law cited.

26 — Opinion of Advocate General Jacobs in *AOK Bundesverband and Others*, C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2003:304, point 27 (emphasis added). The Court has considered that a compulsory sickness and maternity insurance does *not* fulfil that condition because it is based on the principle of national solidarity and it is entirely non-profit-making: see the judgment in *Poucet and Pistre*, C-159/91 and C-160/91, EU:C:1993:63, paragraphs 18 and 19.

27 — See, most recently, the judgment in *Centro Hospitalar de Setúbal and SUCH*, C-574/12, EU:C:2014:2004, paragraph 33 and case-law cited.

28 — See the judgments in *Schindler*, C-275/92, EU:C:1994:119, paragraphs 35 and 36; *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraphs 50 to 59; and *Jundt*, C-281/06, EU:C:2007:816, paragraph 33.

29 — Judgment in *Commission v United Kingdom*, C-382/92, EU:C:1994:233, paragraphs 44 and 45.

30 — Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

31 — See, for a recent illustration, the judgment in *The Bridport and West Dorset Golf Club*, C-495/12, EU:C:2013:861.

49. Both the wording and context of Article 1(5) and the purpose of the Regulation on animal protection during transport support the view that the concept of ‘economic activity’ in that provision is not to be construed differently from its normal meaning in EU law.

50. First of all, in stating that the regulation ‘shall not apply to the transport of animals which does not take place in connection with an economic activity’, Article 1(5) does not distinguish between economic activities which aim at a financial gain and those that do not. Nor does it use the concept of ‘transport for commercial purposes’.

51. Next, recital 12 in the preamble to the Regulation on animal protection during transport merely explains that ‘transport for commercial purposes’ is to be construed broadly. It does not therefore provide useful guidance when interpreting the concept of ‘economic activity’ in Article 1(5) of that regulation.

52. By contrast, recital 21 tends to indicate that certain activities which are not for profit can nevertheless be ‘economic’ within the meaning of Article 1(5). In the words of that recital, registered equidae are often transported ‘for non-commercial purposes’, for example for competition, races, cultural events or breeding. That justifies derogating from certain (but not all) provisions of the Regulation on animal protection during such transport. It is thus clear that transport of animals ‘for non-commercial purposes’ may take place ‘in connection with an economic activity’. Otherwise, no express derogations would have been necessary.

53. Moreover, limiting the scope of the Regulation on animal protection during transport to economic activities which are for profit would clearly risk jeopardising that legislation’s main objective of protecting animals during transport.³² In the situation giving rise to the main proceedings, a significant number of dogs were transported across the Union’s internal borders in a single consignment. Those animals were thus potentially exposed to at least some of the risks to animal health and welfare that the Regulation on animal protection during transport aims to address.³³ To the extent that — as Pfothenhilfe-Ungarn and the Commission in essence both submitted at the hearing — stray dogs are usually in a poorer health condition than other dogs, it seems to me that those risks cannot sensibly be disregarded.

54. Nor can I accept Pfothenhilfe-Ungarn’s submission that the Regulation on animal protection during transport should not apply to its placing activity merely because that association’s purpose is specifically to protect animals. That objective is entirely laudable. However, it does not of itself eliminate the possibility that — no doubt, involuntarily — such an association may transport animals in a manner liable to cause them injury or undue suffering or unwittingly exacerbate an undetected illness.

55. Lastly, that interpretation of Article 1(5) is consistent not only with Article 13 TFEU but also with Convention No 193 of the Council of Europe for the protection of animals during international transport (‘the Convention’), which the Union has signed³⁴ and to which reference is made in the preamble to the Regulation on animal protection during transport.³⁵ Although movements of animals between Member States are not as such governed by the Convention,³⁶ the latter and the Regulation on animal protection during transport in essence pursue the same objective of safeguarding the

32 — See judgment in *Danske Svineproducenter*, C-316/10, EU:C:2011:863, paragraph 44.

33 — Those risks might result for example from the use of inappropriate means of transport or the breach of technical rules concerning minimum space for each animal and feeding and watering during transport.

34 — See Council Decision 2004/544/EC of 21 June 2004 on the signing of the European Convention for the protection of animals during international transport (OJ 2004 L 241, p. 21).

35 — Recital 4.

36 — Article 1(1) of the Convention.

welfare of animals during transport.³⁷ The two instruments are also based on the same principles.³⁸ The explanatory report to the Convention, adopted by the Committee of Ministers of the Council of Europe on 11 June 2003, states explicitly that transport covered by the Convention ‘can be either for commercial or non-commercial purposes’.

56. I therefore conclude that a non-profit association transports animals ‘in connection with an economic activity’ in so far as that transport forms part of an offering of goods or services on a given market. Is that the case here?

57. It seems to me clear that a non-profit association is active on the market for pets when it carries out an activity such as that in issue in the main proceedings. The fact that products or services are, to a certain extent, capable of meeting identical needs leads to the conclusion that there is a certain degree of substitution between them³⁹ and that they are thus offered on the same market. Although the protection contract concluded by Pfothenhilfe-Ungarn and a given individual may not involve any transfer of property,⁴⁰ after paying the fee that person becomes the dog’s new master and commits himself to take responsible care of it. In those respects, the situation does not differ fundamentally from that in which the dog is purchased in a pet shop. Furthermore, associations such as Pfothenhilfe-Ungarn potentially offer a broad range of dogs of different breed, age and size.⁴¹ There is thus at least a certain degree of overlap between the activity of placing dogs with new masters for a fee, such as that in issue in the main proceedings, and the activity of selling dogs carried out by pet shops.⁴²

58. Consequently, I take the view that an association such as Pfothenhilfe-Ungarn transports animals in connection with an economic activity within the meaning of Article 1(5) of the Regulation on animal protection during transport when it transports dogs between Member States with a view to placing them with third parties for a fee, regardless of whether that activity is for profit or not.

Question 2: ‘intra-Community trade’ in animals within the meaning of the Directive on veterinary and zootechnical checks

59. By its second question, the referring court seeks guidance on Article 12 of the Directive on veterinary and zootechnical checks. Providing a useful answer to that question requires first examining whether a movement of animals such as that in issue in the main proceedings is covered by that directive at all. As I have explained, the latter is inapplicable to veterinary checks on movements between Member States of pets accompanied by and under the responsibility of a natural person, where such movements are not the subject of a commercial transaction.⁴³

37 — See in particular Article 4(1) of the Convention.

38 — See for example the following provisions of the Convention: Article 5 (‘Authorisation of transporters’), Article 6 (‘Design and construction’ of the means of transport), Article 7 (‘Planning’ of transport), Article 9 (‘Fitness for transport’) and Article 11 (‘Rest, water and feed prior to loading’).

39 — See the judgments in *De Landtsheer Emmanuel*, C-381/05, EU:C:2007:230, paragraph 30 and case-law cited, and *Lidl*, C-159/09, EU:C:2010:696, paragraph 32.

40 — See point 32 above.

41 — That appears clearly from Pfothenhilfe-Ungarn’s website: www.pfothenhilfe-ungarn.de/zu_vermitteln.html.

42 — To the extent that Pfothenhilfe-Ungarn, unlike a pet shop, is not seeking to derive any profit from placing a dog, the new master may pay less in order to acquire the pet. As against the lower obvious cost, however, he may potentially incur additional costs later if a dog of uncertain background becomes sickly or has been traumatised by its earlier experiences as a stray.

43 — Point 15 above.

60. It is clear from the wording of the fourth paragraph of Article 1 of the directive that that provision covers only movements of pets (i) accompanied by and (ii) under the responsibility of a *natural* person. Such movements are governed by the Regulation on non-commercial movements of pet animals provided that the animals are not intended to be sold or transferred to another owner.⁴⁴ As the Commission points out, the derogation which that provision contains therefore does not concern transport carried out under the responsibility of a *legal* person (even where the dogs are actually transported by a natural person, as in the main proceedings). It is for the national court competent to judge on the facts to verify, where appropriate, whether Pfothenhilfe-Ungarn (which appears to be a legal person under German law) remained responsible for the dogs during transport and until the moment they were handed over to their new masters, or whether there was some appropriate transfer of legal responsibility to the natural person(s) who effected the transport and subsequent operations.⁴⁵

61. Is an association such as Pfothenhilfe-Ungarn a ‘dealer engaging in intra-Community trade’ in animals within the meaning of Article 12 of the Directive on veterinary and zootechnical checks when it transports dogs between Member States with a view to placing them with third parties for remuneration but not for profit?

62. With regard first to the wording, the use in Article 12 of the word ‘Unternehmer’ (German version), ‘επιχειρήσεις’ (Greek version), ‘dealers’ (English version), ‘handelaars’ (Dutch version) and ‘handlare’ (Swedish version) is not decisive. Even assuming that each of those words automatically involves a profit motive (which is doubtful in itself), that is clearly not the case for the corresponding term in other language versions in which that provision was adopted in 1990.⁴⁶

63. The concept of ‘trade’ has the same meaning in the Directive on zootechnical checks as in the context of the Treaty provisions concerning free movement of goods.⁴⁷ Those Treaty provisions are an essential feature of the internal market, which is part of the European Union’s foundations. Accordingly, the concept of ‘trade in goods’ in Article 28 TFEU is to be interpreted broadly. In its judgment in *Commission v Italy*, the Court has defined the concept of ‘goods’ within the meaning of what is now Article 28 TFEU as ‘products which *can* be valued in money and which *are capable*, as such, of forming the subject of commercial transactions’.⁴⁸ In principle, therefore, Treaty provisions on free movement of goods apply irrespective of whether the goods concerned are being transported across national frontiers for the purposes of sale or resale, or rather for personal use or consumption.⁴⁹

64. A fortiori, whether a movement of ‘goods’ (including animals) forms part of a transaction aiming at a profit is irrelevant to whether that movement is governed by Treaty provisions on freedom of movement and, by extension, by Article 12 of the Directive on veterinary and zootechnical checks.

44 — See Article 3(a) of the Regulation. From the facts giving rise to the main proceedings, it seems that property in the dogs did not formally pass to their new masters. Nevertheless, in any individual case a payment was normally made and the dog was then ‘transferred’. That was, indeed, the whole purpose of the dog rescue operation. In those circumstances, it seems to me that the transfer must be assimilated to a [sale] or [transfer] to another owner’ within the meaning of that provision.

45 — For the reason set out in points 70 and 71 below, that might ultimately not be necessary here.

46 — See in particular the Spanish version (‘Agentes’), the Danish version (‘Ehrvervsdrivende’), the French version (‘opérateurs’), the Italian version (‘operatori’), and the Portuguese version (‘operadores’). See also the Romanian version (‘operatorii’).

47 — Article 2(3) of the Directive on veterinary and zootechnical checks.

48 — Judgment in *Commission v Italy*, 7/68, EU:C:1968:51 (emphasis added). That definition covers pet animals. See, for example, the judgment in *Commission v Belgium*, C-100/08, EU:C:2009:537, paragraph 42.

49 — Judgment in *Schumacher*, 215/87, EU:C:1989:111, paragraph 22. See also Opinion of Advocate General Jacobs in *Commission v Belgium*, C-2/90, EU:C:1991:344, point 15 and case-law cited.

65. That directive's purpose of replacing the previous system of veterinary and zootechnical checks at the Union's internal borders with a harmonised system of checks in the Member State of origin and in the Member State of destination further supports that approach. That harmonised system, which is based on increased confidence in the veterinary checks carried out by the State of origin,⁵⁰ aims both to complete the internal market and to safeguard public and animal health.⁵¹

66. The requirements laid down in Article 12 that all dealers engaging in intra-Community trade in the animals covered by the directive should register beforehand in an official register at the request of the competent authority and keep a record of deliveries contribute in an essential way to achieving those objectives. Thus, for example, the competent authority in the Member State of origin is under a duty to carry out checks on, *inter alia*, holdings, centres or organisations in order to satisfy itself that animals and products intended for trade comply with Community requirements, including the requirements set out in Article 3(1) of the Directive on veterinary and zootechnical checks.⁵² In particular, only animals which come from holdings, centres or organisations which are subject to regular official veterinary checks may be the subject of trade.⁵³ Against that background, it is clearly necessary for the competent authority in the Member State of origin to have a register of all places where it must conduct regular veterinary checks.

67. Furthermore, the competent authority in the Member State of destination may either carry out spot checks at the place of destination to verify that the requirements of Article 3 have been complied with, or carry out checks during the transport of animals and products in its territory where it has information leading it to suspect an infringement.⁵⁴ If it establishes the presence of, *inter alia*, a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans, the Directive on veterinary and zootechnical checks requires the competent authority to order that the animal or consignment of animals be put in quarantine or, if necessary, slaughtered.⁵⁵ That authority is under a duty to notify the competent authorities of the other Member States and the Commission immediately in writing of the findings arrived at, the decisions taken and the reasons for such decisions.⁵⁶ It must also contact the competent authorities of the Member State of origin without delay, in order to enable the latter to take all necessary measures.⁵⁷ If there is a risk of epidemic, those measures might involve, *inter alia*, putting livestock in quarantine at the holding of origin and informing competent authorities at all places where animals originating from that holding have been dispatched. These procedures underline the importance of both the official register of dealers and the record of deliveries in the general scheme of the Directive on veterinary and zootechnical checks.

68. That scheme could be jeopardised and the objectives of that directive undermined if Article 12 were not to apply in a situation such as that in the main proceedings. Distinguishing between transport of consignments of pet animals in connection with activities which are for profit and those which are not might also be difficult in practice (especially in the context of spot checks) and therefore entail a corresponding risk of fraud. The Union legislature has indeed explicitly recognised that risk. The preamble to Commission Regulation (EU) No 388/2010⁵⁸ refers to experience in the application of the Regulation on non-commercial movements of pet animals showing that there is a high risk of commercial movements of dogs, cats and ferrets being fraudulently disguised as

50 — Sixth recital.

51 — That latter objective appears from various provisions of the Directive on veterinary and zootechnical checks, in particular Articles 2(1), 8(1)(b), 9(1), sixth subparagraph, and 10(1), fourth subparagraph.

52 — Article 3(3), first subparagraph.

53 — Article 3(1)(b).

54 — Article 5(1)(a).

55 — Article 8(1)(a), first subparagraph.

56 — Article 8(1)(a), third subparagraph.

57 — Article 9(1), first subparagraph.

58 — Of 6 May 2010 implementing Regulation (EC) No 998/2003 of the European Parliament and of the Council as regards the maximum number of pet animals of certain species that may be the subject of non-commercial movement (OJ 2010 L 114, p. 3).

non-commercial movements.⁵⁹ In order to avoid such practices, the Commission decided to subject movements of more than five pet animals to the requirements and checks laid down in the Directive on animal health in trade. The same justification is reflected in the preamble to Regulation No 576/2013,⁶⁰ under which movements of more than five pet animals between Member States are in principle subject to the animal health requirements laid down in the Directive on animal health in trade and to the veterinary checks provided for in the Directive on veterinary and zootechnical checks.⁶¹

69. I therefore conclude that an association such as Pfothenhilfe-Ungarn is a dealer engaging in intra-Community trade of animals within the meaning of Article 12 of the Directive on veterinary and zootechnical checks when it transports dogs between Member States with a view to placing them with third parties for a fee, regardless of whether that activity is for profit or not.

70. That said, I entertain real doubt as to whether that provision can be relied upon against Pfothenhilfe-Ungarn in the main proceedings, which concern a dispute between that association and a public authority in Germany. It is settled case-law that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon directly against such a person before a national court.⁶² As a result, a national authority may not rely, as against an individual, upon a provision of a directive which has not yet been (correctly) implemented in national law.⁶³ That case-law seeks to prevent the State from taking advantage of its own failure to comply with EU law.⁶⁴

71. Paragraph 4 of the Verordnung, which transposed point (a) of the first paragraph of Article 12 of the Directive on veterinary and zootechnical checks into German law, applies only ‘in the course of business’ (‘gewerbsmäßig’). It is settled case-law that the obligation on the national courts to interpret their national law in the light of the wording and purpose of the directive is limited by the general principles of law which form part of EU law and in particular the principles of legal certainty and non-retroactivity. That obligation cannot serve as the basis for an interpretation of national law *contra legem*.⁶⁵ From the material before the Court, it seems to me that Pfothenhilfe-Ungarn’s activities are *not* ‘in the course of business’; and that construing that phrase so as to accord with the interpretation of the scope of the Directive on veterinary and zootechnical checks which I have suggested above would require an interpretation *contra legem*. Those are, however, ultimately matters for the national court to decide.

Postscript

72. The facts giving rise to the present reference demonstrate with stark clarity that there is a lacuna in the existing EU legislative schemes regulating the cross-border movement of animals. In recommending the answers that I have to the Court, I am acutely conscious of the fact that a non-profit association that rescues stray dogs in one Member State and places them with new masters in another Member State will have little in the way of spare resources with which to meet the detailed requirements of legislation that is aimed at guaranteeing animal health protection in the context of

59 — Recital 6.

60 — Recital 11.

61 — Article 5(4).

62 — See, inter alia, the judgments in *Marshall*, 152/84, EU:C:1986:84, paragraph 48; *Kolpinghuis Nijmegen*, 80/86, EU:C:1987:431, paragraph 9; and *Rieser Internationale Transporte*, C-157/02, EU:C:2004:76, paragraph 22.

63 — Judgments in *Kolpinghuis Nijmegen*, 80/86, EU:C:1987:431, paragraph 10, and *Arcaro*, C-168/95, EU:C:1996:363, paragraphs 36 to 38.

64 — Judgment in *Faccini Dori*, C-91/92, EU:C:1994:292, paragraph 22.

65 — See, inter alia, the judgments in *Kolpinghuis Nijmegen*, 80/86, EU:C:1987:431, paragraph 13, and *Mono Car Styling*, C-12/08, EU:C:2009:466, paragraph 61.

for-profit commercial activity. Some might think, indeed, that applying such legislation to associations like the applicant in the main proceedings borders on the perverse. And yet it would also not be right simply to apply the much less stringent legislation governing the cross-border movement of individual pets to this situation.

73. Sometimes it is possible to resolve an apparent problem by an inventive reading of an existing text. I have reached the conclusion that it is not possible to do so here. Nor do I think that the Court is equipped to strike the appropriate (new) balance between facilitating free movement of animals in a good cause and ensuring appropriate protection of animal and human health, bearing in mind also the need to guard against fraud and abuse. That task is one for the legislator to undertake. I hope that these proceedings have highlighted the need for it to do so.

Conclusion

74. For all the above reasons, I suggest that the Court should rule as follows in answer to the questions raised by the Bundesverwaltungsgericht (Germany):

- (1) An animal protection association transports animals in connection with an economic activity within the meaning of Article 1(5) of 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 when it transports dogs between Member States with a view to placing them with third parties for a fee, regardless of whether that activity is for profit or not.
- (2) In that situation, furthermore, such an association is a dealer engaging in intra-Community trade of animals within the meaning of Article 12 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. It is for the referring court to verify whether that provision can be invoked against Pfothenhilfe-Ungarn in the main proceedings.