

JUDGMENT OF THE COURT (Third Chamber)

12 January 2006\*

In Case C-504/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Schwerin (Germany), made by decision of 9 January 2004, received at the Court on 8 December 2004, in the proceedings

**Agrarproduktion Staebelow GmbH**

v

**Landrat des Landkreises Bad Doberan,**

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, J. Malenovský, A. La Pergola, A. Borg Barthet and A. Ó Caoimh, Judges,

\* Language of the case: German.

Advocate General: M. Poiares Maduro,  
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 19 October 2005,

after considering the observations submitted on behalf of:

- Agrarproduktion Staebelow GmbH, by Behr & Partner, Rechtsanwälte, and C. Columbus, Rechtsanwältin,
  
- the Greek Government, by V. Kontolaimos, S. Papaioannou and M. Tassopoulou, acting as Agents,
  
- the Netherlands Government, by H.G. Sevenster, acting as Agent,
  
- the European Parliament, by G. Mazzini and U. Rösslein, acting as Agents,
  
- the Council of the European Union, by F. Ruggeri Laderchi and Z. Kupčová, acting as Agents,

— the Commission of the European Communities, by A. Bordes and F. Erlbacher, 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 validity, in the light of the principle of proportionality, of the obligation to slaughter the cohort of a bovine animal in which bovine spongiform encephalopathy ('BSE') has been confirmed.
  
- 2 This reference was made in the course of proceedings between Agrarproduktion Staebelow GmbH ('Staebelow') and Landrat des Landkreises Bad Doberan ('Landrat') regarding the slaughter of 52 animals of Staebelow's livestock.

### **Community legislation**

- 3 Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain

transmissible spongiform encephalopathies (OJ 2001 L 147, p. 1) was adopted on the basis of Article 152(4)(b) EC, which provides for a procedure, by way of derogation from Article 37 EC, for the adoption of measures in the veterinary and phytosanitary fields which have the protection of public health as their direct objective.

4 That regulation brings together in one document a large part of the measures adopted since 1990 by the European Community based on the safeguard provisions in the directives concerning health policy measures to protect human and animal health from the risk of BSE.

5 The fourth recital in the preamble to that regulation is worded as follows:

‘The Commission has obtained scientific opinions, in particular from the Scientific Steering Committee and the Scientific Committee on Veterinary Measures relating to Public Health, on several aspects of [transmissible spongiform encephalopathies (TSEs)]. Those opinions include advice on measures to reduce the potential risk for humans and animals resulting from exposure to infected animal products.’

6 The obligation to slaughter the cohort to which a contaminated bovine animal belongs derives from Article 13(1), first sentence, (c), of Regulation No 999/2001, in combination with Annex VII(2)(a) of that regulation. ‘Cohort’ is defined in Annex I(c) of that same regulation.

7 Article 13 of Regulation No 999/2001 is worded as follows:

'1. When the presence of a TSE has been officially confirmed, the following measures shall be applied as soon as possible:

- (a) all parts of the body of the animal shall be completely destroyed in accordance with Annex V apart from material retained for records in accordance with Annex III, Chapter B, III, 2;
- (b) an inquiry shall be carried out to identify all animals at risk in accordance with Annex VII, point 1;
- (c) all animals and products of animal origin referred to in Annex VII, point 2, that have been identified as being at risk by the inquiry referred to in (b), shall be killed and completely destroyed in accordance with Annex V, points 3 and 4.

...

4. Owners shall be compensated without delay for the loss of the animals that have been killed or products of animal origin destroyed in accordance with Article 12(2) and paragraph 1(a) and (c) of this Article.

...'

- 8 Annex VII to Regulation No 999/2001 was amended by Commission Regulation (EC) No 1326/2001 of 29 June 2001 laying down transitional measures to permit the changeover to Regulation No 999/2001 and amending Annexes VII and XI to that regulation (OJ 2001 L 177, p. 60). That annex provides:

‘1. The inquiry referred to in Article 13(1)(b) must identify:

(a) in the case of bovine animals:

— all other ruminants on the holding of the animal in which the disease was confirmed,

— where the disease was confirmed in a female animal, all its embryos, ova and its progeny collected or born within two years prior to, or after, clinical onset of the disease,

— all animals of the cohort of the animal in which the disease was confirmed,

...

2. The measures laid down in Article 13(1)(c) shall comprise at least:

- (a) in case of confirmation of BSE in a bovine animal, the killing and complete destruction of bovine animals and the destruction of embryos and ova identified by the inquiry referred to in point 1(a), first, second and third indents. The Member State may decide not to kill and destroy all bovine animals on the holding of the animal in which the disease was confirmed as referred to in the first indent of point 1(a), depending upon the epidemiological situation and traceability of the animals on that holding;

...'

- 9 The 'cohort' is defined in Annex I(c) to Regulation No 999/2001 as meaning 'a group of bovine animals which were either born in the same herd as, and within 12 months preceding or following the birth of, the affected cattle or reared together with the affected animal at any time during the first year of their life and which may have consumed the same feed as that which the affected animal consumed during the first year of its life'.

- 10 The seventh recital in the preamble to Regulation No 1326/2001 is worded as follows:

'Annex VII to Regulation (EC) No 999/2001 sets out the detailed rules for the measures to be implemented following confirmation of the presence of a TSE. These rules should be updated to reflect the detailed technical eradication provisions applied by the Member States, taking into account the opinion of the Scientific Steering Committee (SSC) on BSE-related culling in cattle of 15 September 2000.

The SSC concluded in this opinion that “already (entire) herd culling is having some effect both in terms of eliminating otherwise not identified cases and in terms of preventing future cases to appear. However, ... largely the same effect can be reached by culling all animals born and/or raised in the same herds as the confirmed case within approximately 12 months before and after the date of birth of the index case (birth-cohort culling).” The SSC recommended the culling of at least the birth cohort whenever a domestic BSE case appears, irrespective of the prevailing epidemiological situation. It is therefore appropriate to amend the detailed eradication provisions accordingly by making the culling of the entire herd optional depending upon the prevailing local situation.’

### **The main proceedings and the question referred for a preliminary ruling**

- 11 On 29 January 2002, a test carried out on a slaughtered bovine animal from Staebelow’s holding gave a positive test result for BSE. Subsequently, two direct progeny of the infected bovine animal and 50 animals within the cohort of the animal were identified.
- 12 By decision of 5 February 2002, the Landrat ordered the immediate slaughter of the 52 bovine animals. Staebelow lodged an objection against that order but it was declared, by decision of 13 February 2002, to be unfounded.
- 13 Staebelow brought an action against that decision before the Verwaltungsgericht Schwerin (Administrative Court, Schwerin) on 13 March 2002.
- 14 A previous request for interim measures was rejected both by that court and, on appeal, by the Oberverwaltungsgericht Mecklenburg-Vorpommern (Higher Administrative Court, Mecklenburg-Western Pomerania). Consequently, the Landrat’s decision was carried out. The animals were slaughtered on 4 April 2002 and they were completely destroyed.

- 15 Staebelow has continued with the main proceedings with the aim of having the order for slaughter declared unlawful. It fears that, in a comparable situation, the Landrat would again order the slaughter of bovine animals belonging to the same cohort and of the progeny of the infected bovine animal. It submits that there is a sufficiently real danger of such a decision being repeated, as it continues to keep and breed bovine animals. That declaration is also important to it for reasons of rehabilitation.
- 16 Before the Verwaltungsgericht Schwerin, Staebelow maintained that the Community regulation is invalid, as it infringes the principle of proportionality.
- 17 It claims, first, that the removal of the specified risk materials, namely, the parts of the animal in which prions are concentrated, prevents the tissues containing prions from reaching the human food chain.
- 18 It also relies on the figures given by the Bundesverbraucherministerium (Federal Ministry for Consumers) for 2001, 2002 and January 2003 on the results of the BSE tests, which show:
- In 2001, the percentage figure for positive results for BSE amongst healthy slaughtered animals was 0.0014% (38 positive results from 2 593 260 animals tested). Amongst the animals slaughtered as part of the BSE cull, the percentage was 0.0446% (four positive results from 8 952 animals).

— In 2002, the percentage figure for positive results for BSE amongst healthy slaughtered animals was 0.0015% (42 positive results from 2 759 984 animals tested). Amongst the animals slaughtered as part of the BSE cull, the percentage was 0.1185% (three positive results from 2 530 animals).

— From January to October 2003, 779 animals were slaughtered as part of the cohort slaughter scheme. Only one further positive result was found amongst those animals.

<sup>19</sup> Relying on an opinion given on 15 December 2003 by Professor Staufenbiel of the Freie Universität Berlin Faculty of Veterinary Medicine, Staebelow concludes from those statistics that there was no significant difference in the results and that the slaughter of the cohorts can therefore be considered inappropriate.

<sup>20</sup> Lastly, Staebelow maintains that the rapid screening tests for BSE can be assumed to be 100% accurate, so that infected animals amongst the cohort would in any case have been discovered during the course of the normal slaughter of the animals.

<sup>21</sup> It is against that background that the Verwaltungsgerichtshof Schwerin decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

‘Is Article 13(1), first sentence, (c), in conjunction with Annex VII(2)(a) and the third indent of Annex VII(1)(a) of Regulation (EC) No 999/2001 ... as amended by

Article 3(1) of and Annex II to Regulation (EC) No 1326/2001 invalid because the measure infringes the principle of proportionality?

## **Consideration of the question**

### *Observations submitted to the Court*

- 22 On the basis of various scientific articles, Staebelow maintains that, for the reasons set out in the order for reference, the obligation to slaughter the cohort of the infected animal infringes the principle of proportionality as that measure does not improve the protection of consumers in a decisive way. Even though breeders receive compensation, this does not sufficiently cover the non-material damage suffered. The Community legislature did not take account of the differences in structure of the farms in the various Member States. The prohibition on killing animals unnecessarily, as well as the protection of animals enshrined in the German Basic (Constitutional) Law, should also be taken into consideration.
- 23 Staebelow also maintains that there is no proven link between BSE and risks to human health, which are, in any case, low, as is demonstrated by the information provided by certain scientists.
- 24 Staebelow further emphasises that the Community legislature is obliged continually to verify the measures that it lays down and to take account of developments in scientific information.

- 25 On the other hand, the Greek and Netherlands Governments, the European Parliament, the Council of the European Union and the Commission of the European Communities maintain that the obligation to slaughter the cohort of an infected animal does not infringe the principle of proportionality.
- 26 As a preliminary point, they note the broad discretion of the Community legislature, the high level of protection of human health which is to be ensured in the definition and the implementation of all Community policies and activities, the importance of the precautionary principle and the fact that the legality of a measure falls to be assessed on the basis of the situation existing at the time when the measure was adopted. In that regard, they observe that the information relied on before the referring court relates to a situation subsequent to the adoption of Regulation No 999/2001.
- 27 Those governments and institutions point, moreover, to the development of Community legislation directed at combating BSE and TSEs in general. At the hearing, those same institutions submitted that, contrary to the applicant's submissions in the main proceedings, a measure such as the obligation to slaughter the cohort and to destroy the animals is not motivated only by the protection of the consumer but also by the objective of eradicating BSE.
- 28 The above governments and Community institutions emphasise that Regulation No 1326/2001 was adopted after taking into account the opinion of the Scientific Steering Committee ('the SSC') of 15 September 2000, as is stated in the seventh recital in the preamble to that regulation. In that regard, they observe that, in its original version, Regulation No 999/2001 provided for the slaughter of the whole of the herd on the holding of the animal in which the disease was confirmed. Following the opinion of the SSC, and even before Regulation No 999/2001 became applicable, Annex VII was amended so as to require the slaughter of only the cohort.

- 29 They observe that the requirement to slaughter the cohort was confirmed on many occasions by different scientific committees. They cite in that regard the conclusions and key recommendations of the Joint WHO/FAO/OIE Technical Consultation on BSE: Public Health, Animal Health and Trade (OIE, Paris, 10-14 June 2001), the SSC opinion of 11 January 2002 on the additional safeguard provided by different culling schemes under the current conditions in the UK and Germany, as well as the opinion of the Scientific Panel on Biological Hazards on a request from the Commission on BSE-related culling in cattle (Question No EFSA-Q-2003-098), adopted on 21 April 2004.
- 30 In relation to the arguments made before the referring court, they maintain that, at the time of the adoption of Regulation No 999/2001, the distribution of the infection in the body and the organs of an infected animal was not well known. Since it cannot be precluded that, in the case of inadequate hygiene rules, contaminated tissue will enter the food chain, the removal of specific risk materials is not, in any event, a sufficient measure of protection.
- 31 The governments and the Community institutions submit, moreover, that the rapid screening tests for BSE do not allow the disease to be identified during the incubation period, but only when it is at a very advanced stage.
- 32 They dispute the conclusions drawn from the statistics by Staebelow. On the contrary, the statistics demonstrate that positive cases of BSE will most probably be found amongst healthy slaughtered animals of the cohort of an infected animal.

Thus, taking the statistics provided by the referring court, in 2001 there were 31.85 times (0.0446% divided by 0.0014%) more positive cases in the context of the slaughter of cohorts than in the context of those tests. In 2002 there were 79 times more of them (0.1185% divided by 0.0015%).

<sup>33</sup> In the light of those various elements, the above governments and institutions take the view that the obligation to slaughter the cohort in question is necessary for the protection of animal and human health and that other measures do not allow the same result to be achieved. Taking into account the compensation of breeders provided for in Article 13(4) of Regulation No 999/2001, that measure is not disproportionate to the objective pursued.

<sup>34</sup> They also state that Community legislation is adapted to developments in scientific knowledge. Thus, Annex VII to Regulation No 999/2001 was amended in 2002, 2003 and 2004, precisely in order to relax the measures relating to slaughter.

### *Reply of the Court*

<sup>35</sup> The principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Joined Cases

C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 41; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60; and Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81).

<sup>36</sup> With regard to judicial review of the conditions for application of such a principle, having regard to the broad discretion which the Community legislature is allowed in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 69).

<sup>37</sup> When examining the constraints relating to the various possible measures, it is appropriate to ascertain whether, apart from the main objective of the protection of public health, the Community legislature fully took into account all the interests involved and, in particular, the right to property and the welfare requirements of the animals (Joined Cases C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 48).

<sup>38</sup> In addition, it should be recalled that the validity of a Community act cannot depend on retrospective assessment of its efficacy. Where the Community legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question (*Jippes and Others*, cited above, paragraph 84).

- 39 Therefore, it must be accepted that, where there is uncertainty as to the existence or extent of risks to human health, the institutions, applying the principle of precaution and preventive action, may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent (see, to that effect, *National Farmers' Union and Others*, cited above, paragraph 63).
- 40 On the other hand, when new elements change the perception of a risk or show that that risk can be contained by less restrictive measures than the existing measures, it is for the institutions and in particular the Commission, which has the power of legislative initiative, to bring about an amendment to the rules in the light of the new information.
- 41 The rules laid down by Regulation No 999/2001 were established on the basis of the assumption of a link between BSE and the new variant of Creutzfeldt-Jakob disease. It is clear from the first recital that 'evidence continues to grow of the similarity between the BSE agent and that of the new variant of Creutzfeldt-Jakob disease'. In that regard, although the applicant in the main proceedings claims that proof of a causal link between that agent and that disease is not established, it does not contest, however, the fact that there is a geographic and temporal correlation between the appearance of BSE and that of the variant of the disease, which amounts to an indication of such a link.
- 42 As follows from the fourth recital in the preamble to that regulation, the rules which it lays down are based on various scientific opinions which recommend that the exposure of animals and humans to infected animal products be avoided. The state of scientific knowledge in that regard at the time of adoption of that regulation is apparent, in particular, from the 2001 Joint WHO/FAO/OIE Technical Consultation on BSE, cited above, in which it is stated that 'scientific consensus confirms that food is the main avenue of exposure' to BSE (p. 4 of that consultation).

- 43 Having regard to those elements, the measures adopted by the Community legislature, such as the slaughter and destruction of the cohort of the infected animal, which have the effect of reducing the exposure of animals and humans to the BSE agent, must be considered appropriate to the objective of the protection of public health.
- 44 It is not apparent that, at the time when the rule requiring the slaughter of the cohort was established, such a measure was superfluous in the light of the other existing protection measures. It must be noted in that connection that the total ban on the use of animal meal in animal feed has applied only since 1 March 2001, in accordance with Article 3 of Commission Decision 2001/25/EC of 27 December 2000 prohibiting the use of certain animal by-products in animal feed (OJ 2001 L 6, p. 16)
- 45 Moreover, as is clear from the SSC opinion of 15 September 2000, mentioned in the seventh recital in the preamble to Regulation No 1326/2001, the tests carried out on bovine animals were not capable of detecting the disease at the beginning of the incubation period.
- 46 As regards the proportionality of the measure at issue at the relevant time in the main proceedings, it is sufficient to state that, while Articles 23 and 24 of Regulation No 999/2001 made it possible, in principle, to adapt that measure, the opinion of 11 January 2002, cited above, adopted in the meantime by the SSC, reiterated the conclusion cited in the opinion of 15 September 2000. In that new opinion, the SSC emphasised that measures such as the ban on animal meal in animal feed and the removal of specified material reduced the risk for human health only in so far as they were actually put into place in an effective manner and that breaches, even of a minor nature, could significantly reduce the level of safety.

- 47 Further, asked about the usefulness of retaining the obligation to slaughter the cohort despite the existence of the other measures, the SSC, in that opinion of 11 January 2002, confirmed that the slaughter of at-risk animals reduced the risk to humans below the level attained by the use of rapid screening tests and the removal of specified material (see p. 4 of that opinion).
- 48 With regard to the statistics produced by the applicant in the main proceedings before the referring court, it is sufficient to state, as did the governments and Community institutions which submitted observations, that they show that the prevalence of affected individuals was higher amongst birth cohorts of infected bovine animals than amongst ordinary bovine animals. Statistics examined by the Scientific Panel on Biological Hazards, in its report of 21 April 2004, cited above, confirm that conclusion (see p. 1 of that report).
- 49 Moreover, it is not evident that the differences in farm structure between the Member States were a relevant factor which the Community legislature should have taken into account at the time of adopting the contested measure. Since the requirement to slaughter the cohort was based on the presumption that the animals in it received the same feedstuffs as the infected animal, there was no need to distinguish according to whether the cohort consisted of only 20 or more than 500 animals.
- 50 It is also appropriate to point out that Article 13(4) of Regulation No 999/2001 provides for compensation without delay for owners of animals destroyed in accordance with paragraph 1(c) of that article.

- 51 Finally, it is pointed out that, as is clear from the seventh recital in the preamble to Regulation No 1326/2001, the destruction of the entire herd to which an infected bovine animal belonged, a measure initially provided for by Regulation No 999/2001, was relaxed in order to take account of the opinion of the SSC of 15 September 2000 on BSE-related culling in cattle, which concluded that largely the same result could be achieved by slaughtering only the birth cohort of the infected animal instead of the whole of the herd.
- 52 It follows from those considerations that the rule in Regulation No 999/2001, amended by Regulation No 1326/2001, requiring the slaughter and the destruction of the cohort of an infected bovine animal, does not infringe the principle of proportionality in that it does not go beyond what was appropriate and necessary for the protection of animal and human health.
- 53 The answer to the question referred must therefore be that examination of that question has not revealed anything capable of affecting, in the light of the principle of proportionality, the validity of Article 13(1), first sentence, (c), of Regulation No 999/2001, as amended by Regulation No 1326/2001, in conjunction with Annex VII(2)(a) and the third indent of Annex VII(1)(a) to that regulation.

## **Costs**

- 54 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:

**Examination of the question referred has not revealed anything capable of affecting, in the light of the principle of proportionality, the validity of Article 13(1), first sentence, (c), of Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies, as amended by Commission Regulation (EC) No 1326/2001 of 29 June 2001 laying down transitional measures to permit the changeover to Regulation No 999/2001 and amending Annexes VII and XI to that regulation, in conjunction with Annex VII(2)(a) and the third indent of Annex VII(1)(a) to that regulation.**

[Signatures]