JUDGMENT OF THE COURT (Grand Chamber)

24 March 2009 *

In Case C-445/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 12 October 2006, received at the Court on 6 November 2006, in the proceedings

Danske Slagterier

v

Bundesrepublik Deutschland,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, M. Ilešič and A. Ó Caoimh, Presidents of Chambers, G. Arestis, A. Borg Barthet (Rapporteur), J. Malenovský, J. Klučka, U. Lõhmus and E. Levits, Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 21 May 2008,

after considering the observations submitted on behalf of:

— Danske Slagterier, by R. Karpenstein, Rechtsanwalt,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents, assisted by L. Giesberts, Rechtsanwalt,

— the Czech Government, by T. Boček, acting as Agent,

— the Greek Government, by V. Kontolaimos, S. Kharitaki and S. Papaioannou, acting as Agents,

— the French Government, by G. de Bergues and A.-L. During, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,

— the Polish Government, by E. Ośniecka-Tamecka and P. Kucharski, acting as Agents,

— the United Kingdom Government, by S. Lee, barrister,

— the Commission of the European Communities, by F. Erlbacher and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 September 2008,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 5(1)(o) and 6(1)(b)(iii) of Council Directive 64/433/EEC of 26 June 1964 on health conditions for the production and marketing of fresh meat (OJ, English Special Edition 1963-64, p. 185), as amended by Council Directive 91/497/EEC of 29 July 1991 (OJ 1991 L 268, p. 69) ('Directive 64/433'), of Articles 5(1), 7 and 8 of Council Directive 89/662/EEC of

11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13) and of Article 28 EC.

2 The reference was made in proceedings between Danske Slagterier and the Bundesrepublik Deutschland concerning a claim for compensation in respect of loss.

Legal context

Community legislation

3 Article 5(1) of Directive 64/433 provides:

'Member States shall ensure that the official veterinarian declares unfit for human consumption:

…

(o) meat which gives off a pronounced sexual odour.'

4 Article 6(1) of that directive provides:

‘Member States shall ensure that:

…

(b) meat from:

…

(iii) without prejudice to the cases provided for in Article 5(1)(o) uncastrated male pigs with a carcase weight in excess of 80 kilograms, except where the establishment is able to guarantee by means of a method recognised by the procedure laid down in Article 16, or in the absence of such a method by a method recognised by the competent authority concerned, that carcases giving off a pronounced boar taint may be detected,

bears the special mark provided for by [Commission] Decision 84/371/EEC [of 3 July 1984 establishing the characteristics of the special mark for fresh meat referred to in Article 5(a) of Directive 64/433/EEC (OJ 1984 L 196, p. 46)] and undergoes one of the treatments provided for in [Council] Directive 77/99/EEC [of 21 December 1976 on health problems affecting intra-Community trade in meat products (OJ 1977, L 26, p. 85)];

…

(g) the treatment provided for in the preceding points is carried out in the establishment of origin or in any other establishment designated by the official veterinarian;

…'

5 The provisions of Directive 64/433 had to be transposed into national law by 1 January 1993.

6 Article 5(1) of Directive 89/662 provides:

'Member States of destination shall implement the following measures:

(a) The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an

infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport;

…'

7 Article 7(1) of Directive 89/662 states:

'If, during a check carried out at the place of destination of a consignment or during transport, the competent authorities of a Member State establish:

…

(b) that the goods do not meet the conditions laid down by Community directives, or, in the absence of decisions on the Community standards provided for by the directives, by national standards, they may, provided that health and animal-health considerations so permit, give the consignor or his representative the choice of:

— destroying the goods, or

— using the goods for other purposes, including returning them with the authorisation of the competent authority of the country of the establishment of origin.

…'

8 Finally, Article 8 of Directive 89/662 provides:

'1. In the cases provided for in Article 7, the competent authority of the Member State of destination shall contact the competent authorities of the Member State of dispatch without delay. The latter authorities shall take all necessary measures and notify the competent authority of the first Member State of the nature of the checks carried out, the decisions taken and the reasons for such decisions.

…

2. …

Decisions taken by the competent authority of the State of destination and the reasons for such decisions shall be notified to the consignor or his representative and to the competent authority of the Member State of dispatch.

If the consignor or his representative so requests, the said decisions and reasons shall be forwarded to him in writing with details of the rights of appeal which are available to him under the law in force in the Member State of destination and of the procedure and time-limits applicable.

…'

National legislation

9 Paragraph 839 of the German Civil Code (Bürgerliches Gesetzbuch), in the version in force until 31 December 2001 ('the BGB'), stated:

'(1) If an official wilfully or negligently breaches the official duty incumbent upon him as against a third party, he shall compensate the third party for the damage arising therefrom. If the official is only negligent, a claim can be made against him only if the injured party is unable to obtain compensation in another way.

(2) If an official commits a breach of official duty in giving judgment in legal proceedings, he shall be liable for the damage arising therefrom only if that breach of duty constitutes a criminal offence. This provision shall not apply to a wrongful refusal to exercise official duties or to a wrongful delay in exercising them.

(3) The obligation to compensate shall not arise if the injured party has wilfully or negligently failed to avert the damage by utilising a legal remedy.'

10 Paragraph 852 of the BGB provided:

'(1) The limitation period in respect of a claim for compensation for damage that has arisen from an unlawful act shall expire three years from the date on which the injured party became aware of the damage and of the identity of the person liable to pay compensation and, irrespective of any such awareness, 30 years from the date on which the unlawful act was committed.

(2) If negotiations on the amount of compensation payable have commenced between the person liable to pay the compensation and the person entitled to it, the limitation period shall be suspended until one or other of the parties refuses to continue the negotiations.

(3) If through his unlawful act the person liable to pay compensation has acquired anything to the injured party's detriment, he shall be required even after the expiry of the limitation period to make restitution in accordance with the provisions on restitution in the case of unjust enrichment.'

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

11 Danske Slagterier, an industry association of Danish slaughterhouse companies organised in the form of cooperatives and pig farmers, which is acting pursuant to a right assigned to it by its members, claims from the Bundesrepublik Deutschland compensation for loss due to an infringement of Community law. It alleges that, in

breach of Community law, the Bundesrepublik Deutschland imposed an import ban on meat from uncastrated male pigs from 1993 to 1999. In its view, the ban led to a loss of at least DEM 280 000 000 for the pig farmers and slaughterhouse companies over the period concerned.

12 At the beginning of the 1990s, a project called the 'Male-Pig-Projekt', whose objective was the farming of uncastrated male pigs, was launched in Denmark. This type of farming, which is financially attractive, entails the risk of the meat, when heated, giving off a pronounced sexual odour. According to Danish researchers, the presence of this taint can already be determined in the course of slaughter, by measuring the skatol content. Accordingly, in Denmark all slaughter lines were fitted with skatol measuring equipment to enable meat affected by the taint in question to be identified and rejected. At the time, the Federal Republic of Germany considered, however, this taint to be attributable to the hormone androstenone, the formation of which can be avoided by castration at an earlier stage, and that the skatol content considered in isolation cannot in itself constitute a reliable method of detecting the sexual odour.

13 In January 1993, the Federal Republic of Germany informed the highest veterinary authorities of the Member States that the rule laid down in Article 6(1)(b) of Directive 64/433 had been transposed into national law in such a way that, irrespective of the weight limit, a threshold of 0.5 μg/g was fixed for androstenone; if that threshold were exceeded, the meat would give off a pronounced boar taint and would thus be unfit for human consumption. The Federal Republic of Germany also stated then that only Professor Claus's modified enzyme immunoassay was recognised as a specific method for identifying androstenone and that meat from uncastrated male pigs exceeding that threshold could not be transported as fresh meat into Germany.

14 Thus, numerous consignments of pigmeat from Denmark were subsequently checked by the German authorities and rejected because they exceeded the threshold for androstenone. Also, the pig farmers and slaughterhouse companies which had almost ceased production of castrated male pigs had to resume such production in order not to put exports to Germany at risk. Danske Slagterier submits that if the pigmeat exported

had come from uncastrated pigs as envisaged by the Male-Pig-Projekt, costs savings of at least DEM 280 000 000 could have been achieved.

15 On 6 December 1999, Danske Slagterier brought an action for damages against the Bundesrepublik Deutschland before the Landgericht (Regional Court) Bonn. The Landgericht held that the action was well founded in respect of the period commencing on 7 December 1996 and dismissed the action as time-barred in so far as it claimed compensation for losses which had arisen before that date. The Oberlandesgericht (Higher Regional Court) Cologne, before which an appeal was brought, upheld the entire claim on the merits. By its appeal on a point of law to the Bundesgerichtshof (Federal Court of Justice), the Bundesrepublik Deutschland seeks the dismissal of the claim in its entirety.

16 Also, by judgment of 12 November 1998 in Case C-102/96 *Commission* v *Germany* [1998] ECR I-6871, the Court held that the Federal Republic of Germany had failed to fulfil its obligations under Articles 5(1)(o) and 6(1)(b) of Directive 64/433 and under Articles 5(1), 7 and 8 of Directive 89/662 by imposing the obligation of marking the carcases of uncastrated male pigs and subjecting them to heat treatment whenever the meat, regardless of carcase weight, had an androstenone content of more than 0.5 µg/g, as shown by Professor Claus's modified enzyme immunoassay, and by regarding the meat as giving off a pronounced sexual odour and consequently unfit for human consumption if the threshold of 0.5 µg/g of androstenone was exceeded.

17 In that context, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Do Article 5(1)(o) and Article 6(1)(b)(iii) of … Directive 64/433 … in conjunction with Article 5(1), Article 7 and Article 8 of Directive 89/662 … place producers and distributors of pigmeat in a legal position which can give rise to a claim seeking to

establish State liability under Community law in the event of errors of transposition or application?

(2) May the producers and distributors of pigmeat — irrespective of the answer to the first question — rely on an infringement of Article 30 of the EC Treaty (Article 28 EC) in order to substantiate a claim seeking to establish State liability under Community law where the transposition and application of the above-mentioned directives are contrary to Community law?

(3) Does Community law require the limitation period for a claim seeking to establish State liability under Community law to be interrupted in the light of Treaty infringement proceedings under Article 226 EC or at any rate to be suspended pending the end of those proceedings where there is no effective domestic legal remedy to compel the Member State to transpose a directive?

(4) Does the limitation period for a claim which seeks to establish State liability under Community law and is based on the inadequate transposition of a directive and an accompanying (de facto) import ban commence, irrespective of the applicable national law, only with the full transposition of the directive, or can the limitation period begin to run, in accordance with national law, when the first injurious effects have already been produced and further injurious effects are foreseeable? If full transposition has a bearing on the commencement of the limitation period, is this true in general or only if the directive confers a right on individuals?

(5) Given that the Member States may not frame the conditions for reparation of loss and damage in respect of claims seeking to establish State liability under

Community law less favourably than those relating to similar domestic actions and it may not be made in practice impossible or excessively difficult to obtain reparation, are there, generally, objections to a national rule under which an obligation to pay compensation does not arise if the injured party has wilfully or negligently failed to avert the damage by utilising a legal remedy? Are there also objections to this "primacy of primary legal protection" where it is subject to the proviso that it must be reasonable for the party concerned? Is the fact that the relevant court is likely to be unable to answer the questions of Community law at issue without making a reference to the Court of Justice … or that Treaty infringement proceedings under Article 226 EC are already pending sufficient to make it unreasonable under European Community law?'

Consideration of the questions

Questions 1 and 2

18 By the first two questions, which it is appropriate to deal with together, the referring court essentially asks whether Articles 5(1)(o) and 6(1)(b)(iii) of Directive 64/433 in conjunction with Articles 5(1), 7 and 8 of Directive 89/662 place producers and distributors of pigmeat, in the event of incorrect transposition or application of those directives, in a legal position which can give rise to a claim seeking reparation on account of State liability for the breach of Community law and whether, in those circumstances, they can rely on a breach of Article 28 EC in order to substantiate a claim seeking reparation on account of such State liability.

19 It is to be recalled first of all that, in accordance with settled case-law, the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the EC Treaty (Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; and Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20).

20 The Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of Community law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals (see *Brasserie du pêcheur and Factortame*, paragraph 51; *Hedley Lomas*, paragraph 25; and *Dillenkofer and Others*, paragraph 21).

21 With regard to the first condition, the Court has had the opportunity to examine Member State liability for breach of Community law in the case of failure to transpose directives designed to complete the internal market (see, in particular, *Francovich and Others* and *Dillenkofer and Others*). However, unlike the cases giving rise to those two judgments, where only secondary law had created a legal framework according rights to individuals, the main proceedings concern an instance in which one of the parties thereto, namely Danske Slagterier, submits that Article 28 EC already confers upon it the rights which it invokes.

22 It should be recalled that it is undisputed that Article 28 EC has direct effect in the sense that it confers on individuals rights upon which they are entitled to rely directly before the national courts and that breach of that provision may give rise to reparation (*Brasserie du pêcheur and Factortame*, paragraph 23).

23 Danske Slagterier also relies on the provisions of Directives 64/433 and 89/662. As is apparent from the wording of the title of Directive 89/662 and of the first recital in its preamble, that directive was adopted with a view to the completion of the internal

market, and so was Directive 91/497 amending Directive 64/433, as made clear by the third recital in the preamble to Directive 91/497. The free movement of goods is thus one of the objectives of those directives, which, through the elimination of the differences existing between the Member States with regard to health requirements for fresh meat, are designed to encourage intra-Community trade. The right conferred by Article 28 EC is thus defined and given concrete expression by those directives.

24 Regarding the content of Directives 64/433 and 89/662, it should be noted that they govern, amongst other matters, health controls for, and certification of, fresh meat produced in one Member State and delivered to another. As is apparent in particular from Article 7(1)(b) of Directive 89/662, the Member States can prevent imports of fresh meat only where the goods do not meet the conditions laid down by Community directives or in certain very specific circumstances such as in the event of epidemics. The prohibition on the Member States' preventing importation gives individuals the right to market in another Member State fresh meat that complies with the Community requirements.

25 It is, moreover, apparent from Directive 64/433 in conjunction with Directive 89/662 that measures for the detection of a pronounced sexual odour from uncastrated male pigs have been harmonised at Community level (Case C-102/96 *Commission* v *Germany*, paragraph 29). This harmonisation consequently prevents the Member States, in the field harmonised exhaustively, from justifying an obstacle to the free movement of goods on grounds other than those envisaged by Directives 64/433 and 89/662.

26 Accordingly, the answer to the first two questions is that individuals who have been harmed by the incorrect transposition and application of Directives 64/433 and 89/662 may rely on the right to the free movement of goods in order to be able to render the State liable for the breach of Community law.

Question 3

27 By its third question, the referring court essentially asks whether, where the Commission of the European Communities has brought infringement proceedings under Article 226 EC, Community law requires the limitation period laid down by national legislation for a claim seeking reparation on account of State liability for breach of Community law to be interrupted or suspended during those proceedings, if there is no effective legal remedy in the State in question to compel it to transpose a directive.

28 Light can be shed on this question by setting out the chronology of the facts in the main proceedings. It is apparent from the order for reference that the infringement proceedings against the Federal Republic of Germany which gave rise to the judgment in Case C-102/96 *Commission* v *Germany* were brought on 27 March 1996. The first harmful effects were sustained by the injured parties in 1993, but it was not until December 1999 that they brought an action for damages against that State. If, as the referring court envisages, the three-year limitation period laid down in Paragraph 852(1) of the BGB is applied, that period would begin to run in the middle of 1996, when, according to the referring court, the injured parties became aware of the damage and the identity of the person liable to pay compensation. Consequently, in the main proceedings, the action against the State for damages is liable to be time-barred. For that reason, it is relevant for deciding the main proceedings to know whether the institution of infringement proceedings by the Commission had effects on that limitation period.

29 However, in order to give an answer that is helpful for the referring court, it is appropriate to examine first of all the question implicitly raised by it, namely whether Community law precludes the application by analogy of the three-year limitation period laid down by Paragraph 852(1) of the BGB in the main proceedings.

30 Regarding the application of Paragraph 852(1) of the BGB, Danske Slagterier has bemoaned the lack of clarity in the legal position in Germany as to the national limitation rule applicable to claims seeking reparation on account of State liability for breach of Community law, stating that this question has not yet been dealt with by any

legislative measure or any decision of the highest court, while academic legal writers are also divided on the issue as several legal bases are possible. In its view, application, for the first time and by analogy, of the time-limit laid down in Paragraph 852 of the BGB to actions for damages against a State for breach of Community law would infringe the principles of legal certainty and legal clarity as well as the principles of effectiveness and equivalence.

31 In that regard, it is settled case-law that, in the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law. It is thus on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions, including time-limits, for reparation of loss or damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it in practice impossible or excessively difficult to obtain reparation (principle of effectiveness) (see, inter alia, *Francovich and Others*, paragraphs 42 and 43, and Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27).

32 As regards the latter principle, the Court has stated that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned (Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 19 and the case-law cited). Such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law. In that regard, a national limitation period of three years appears to be reasonable (see, in particular, *Aprile*, paragraph 19, and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 35).

33 However, it is also apparent from *Marks & Spencer*, paragraph 39, that in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal uncertainty may involve a breach of the principle

of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty.

34 It is for the national court, taking account of all the features of the legal and factual situation at the time material to the main proceedings, to determine, in light of the principle of effectiveness, whether the application by analogy of the time-limit laid down in Paragraph 852(1) of the BGB to claims for reparation of loss or damage caused as a result of the breach of Community law by the Member State concerned was sufficiently foreseeable for individuals.

35 In addition, so far as concerns whether the application by analogy of that time-limit is compatible with the principle of equivalence, it is likewise for the national court to determine whether, as a result of its application, the conditions for reparation of loss or damage caused to individuals by the breach of Community law by that Member State would have been less favourable than those applicable to the reparation of similar domestic loss or damage.

36 As regards interruption or suspension of the limitation period when infringement proceedings are brought, it follows from the foregoing considerations that it is for the Member States to determine detailed procedural matters of this type in so far as the principles of equivalence and effectiveness are observed.

37 It should be observed that reparation of loss or damage cannot be made conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to the State (see *Brasserie du pêcheur and Factortame*, paragraphs 94 to 96, and *Dillenkofer and Others*, paragraph 28).

38 The finding of an infringement is admittedly an important factor, but is not indispensable when verifying that the condition that the breach of Community law must be sufficiently serious is met. Nor can rights for individuals depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to Article 226 EC or on the delivery by the Court of any judgment finding an infringement (see *Brasserie du pêcheur and Factortame*, paragraphs 93 and 95).

39 An individual may therefore bring an action seeking reparation under the detailed rules laid down for that purpose by national law without having to wait until a judgment finding that the Member State has infringed Community law has been delivered. Consequently, the fact that institution of infringement proceedings does not have the effect of interrupting or suspending the limitation period does not make it impossible or excessively difficult for individuals to exercise the rights which they derive from Community law.

40 In addition, Danske Slagterier pleads a breach of the principle of equivalence since German law provides for interruption of the limitation period when a domestic action under Paragraph 839 of the BGB is brought in parallel and proceedings under Article 226 EC must be treated in the same way as such an action.

41 As to those submissions, in order to decide whether procedural rules are equivalent, it is necessary to verify objectively, in the abstract, whether the rules at issue are similar taking into account the role played by them in the procedure as a whole, as well as the operation of that procedure and any special features of the rules (see, to this effect, Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 63).

42 When assessing whether the rules at issue here are similar, account must be taken of the specific features of proceedings under Article 226 EC.

43 In exercising its powers under Article 226 EC the Commission does not have to show that there is a specific interest in bringing an action (see Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15, and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 29). The Commission's function is to ensure, of its own motion and in the general interest, that the Member States give effect to Community law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (see *Commission* v *France*, paragraph 15, and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, paragraph 29).

44 Article 226 EC is not therefore intended to protect the Commission's own rights. It is for the Commission alone to decide whether or not it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations and, as the case may be, because of what conduct or omission those proceedings should be brought (Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraph 16 and the case-law cited). The Commission consequently has a discretion in this regard which excludes the right for individuals to require it to adopt a specific position (see Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 11).

45 It must accordingly be concluded that the principle of equivalence is observed by national legislation which does not provide that the limitation period for a claim seeking reparation on account of State liability for breach of Community law is interrupted or suspended when proceedings under Article 226 EC have been brought by the Commission.

46 In view of all the foregoing considerations, the answer to the third question is that, where the Commission has brought infringement proceedings under Article 226 EC, Community law does not require the limitation period laid down by national legislation for a claim seeking reparation on account of State liability for breach of Community law to be interrupted or suspended during those proceedings.

Question 4

47 By its fourth question, the referring court essentially asks whether the limitation period applicable to an action for damages against the State for incorrect transposition of a directive begins to run, irrespective of the applicable national law, only when the directive has been fully transposed, or whether that period begins to run, in accordance with national law, on the date on which the first injurious effects of the incorrect transposition have been produced and further injurious effects thereof are foreseeable. If full transposition has a bearing on the course of the limitation period, the referring court asks whether that is true generally or whether it applies only where the directive confers a right on individuals.

48 It should be recalled that, as is apparent from paragraphs 31 and 32 of the present judgment, in the absence of Community legislation, it is for the Member States to lay down the detailed procedural rules for legal proceedings intended to safeguard the rights which individuals derive from Community law, including the provisions governing limitation, in so far as those rules observe the principles of equivalence and effectiveness. It should further be recalled that the setting of reasonable time-limits for bringing proceedings observes those principles and cannot, in particular, be considered to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law.

49 The fact that the limitation period laid down by national law begins to run when the first injurious effects have been produced, although other effects of that kind are foreseeable, is likewise not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law.

50 The judgment in Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, to which Danske Slagterier refers, cannot cast doubt on that conclusion.

51 In paragraphs 78 and 79 of that judgment, the Court held that it is conceivable that a short limitation period for bringing an action for damages that runs from the day on which an agreement or concerted practice has been adopted could make it impossible in practice to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice. The Court stated that, where there are continuous or repeated infringements, it is thus possible for the limitation period to expire even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.

52 However, that is not the situation in the main proceedings. It is clear from the order for reference that the limitation period at issue in the main proceedings cannot begin to run until the injured party has become aware of the loss or damage and of the identity of the person required to pay compensation. In such circumstances, it is thus impossible for a person who has sustained loss or damage to find himself in a situation in which the limitation period begins to run, or indeed expires, without his even knowing that he has been harmed, as could have been the position in the context of the case which gave rise to the judgment in *Manfredi and Others*, where the limitation period began to run on the adoption of the agreement or concerted practice, of which certain persons concerned may not have been aware until much later.

53 As regards the possibility of setting the point at which a limitation period begins to run as being before the directive in question has been fully transposed, it is true that the Court held in Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 23, that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.

54 However, as was confirmed in Case C-410/92 *Johnson* [1994] ECR I-5483, paragraph 26, it is clear from the judgment in Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475 that the solution adopted in *Emmott* was justified by the particular circumstances of that case, in which a time-bar had the result of depriving the applicant in the main

proceedings of any opportunity whatsoever to rely on her right to equal treatment under a directive (see also Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 52; Joined Cases C-114/95 and C-115/95 *Texaco and Olieselskabet Danmark* [1997] ECR I-4263, paragraph 48; and Joined Cases C-279/96 to C-281/96 *Ansaldo Energia and Others* [1998] ECR I-5025, paragraph 20).

55 It is not apparent either from the documents before the court or from the hearing which took place in the oral procedure that, in the main proceedings, the existence of the time-limit at issue had the result, as in the proceedings which gave rise to the judgment in *Emmott*, of depriving the injured parties of any opportunity whatsoever to rely on their rights before the national courts.

56 Accordingly, the answer to the fourth question is that Community law does not preclude the limitation period applicable to an action for damages against the State for incorrect transposition of a directive from beginning to run on the date on which the first injurious effects of the incorrect transposition have been produced and the further injurious effects thereof are foreseeable, even if that date is prior to the correct transposition of the directive.

57 In the light of the answer given to the first part of the fourth question, there is no need to answer the second part.

Question 5

58 By its fifth question, the referring court essentially asks whether Community law precludes a rule such as that laid down in Paragraph 839(3) of the BGB which provides that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy. The referring court elaborates upon its question by asking whether such a national rule would be contrary to Community law in so far as it were applied subject to the proviso that recourse to that

remedy be reasonable for the person concerned. The referring court would like, finally, to ascertain whether recourse to a legal remedy may be regarded as reasonable when it is likely that the court before which a case is brought will make a reference for a preliminary ruling under Article 234 EC or when infringement proceedings under Article 226 EC have been brought.

59 As has been recalled when answering the previous two questions, it is for the Member States, in the absence of Community legislation, to lay down the detailed procedural rules for legal proceedings intended to safeguard the rights which individuals derive from Community law, in so far as those rules observe the principles of equivalence and effectiveness.

60 As regards utilisation of the available legal remedies, the Court held in *Brasserie du pêcheur and Factortame*, paragraph 84, in relation to liability of a Member State for breach of Community law, that the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.

61 Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the loss or damage himself (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 33, and *Brasserie du pêcheur and Factortame*, paragraph 85).

62 It would, however, be contrary to the principle of effectiveness to oblige injured parties to have recourse systematically to all the legal remedies available to them even if that would give rise to excessive difficulties or could not reasonably be required of them.

63 In Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 106, the Court indeed held that the exercise of rights conferred on private persons by directly applicable provisions of Community law would be rendered impossible or excessively difficult if their claims for compensation based on Community law were rejected or reduced solely because the persons concerned did not apply for grant of the right which was conferred by Community provisions, and which national law denied them, with a view to challenging the refusal of the Member State by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law. In a case of that kind, it would not have been reasonable to require the injured parties to utilise the legal remedies available to them, since they would in any event have had to make the payment at issue in advance, and even if the national court had held the fact that payment had to be made in advance incompatible with Community law, the persons in question would not have been able to obtain interest on that sum and they would have laid themselves open to the possibility of penalties (see, to this effect, *Metallgesellschaft and Others*, paragraph 104).

64 Consequently, it is to be concluded that Community law does not preclude the application of a national rule such as that laid down in Paragraph 839(3) of the BGB, provided that utilisation of the legal remedy in question can reasonably be required of the injured party. It is for the referring court to determine in light of all the circumstances of the main proceedings whether that is so.

65 As regards the possibility that the legal remedy utilised will give rise to a reference for a preliminary ruling, and the effect which that would have on the reasonableness of that legal remedy, it should be recalled that, in accordance with settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them (see Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20). The guidance thus obtained by the national court therefore facilitates its application of Community law, so that utilisation of that instrument of cooperation does not in any way contribute to making it excessively difficult for individuals to exercise the rights which they derive from Community law. Accordingly, it would not be reasonable not to utilise a legal remedy solely because that remedy would be likely to give rise to a reference for a preliminary ruling.

66 It follows that a strong likelihood that recourse to a legal remedy will give rise to a reference for a preliminary ruling is not in itself a reason for concluding that utilisation of that remedy is not reasonable.

67 As regards the reasonableness of the obligation to utilise the available legal remedies when infringement proceedings are pending before the Court, suffice it to state that the procedure under Article 226 EC is entirely independent of national procedures and does not replace them. As was stated when answering the third question, infringement proceedings amount in fact to an objective review of legality in the general interest. Although the result of such proceedings may serve an individual's interests, it none the less remains reasonable for him to avert the loss or damage by applying all the means available to him, that is to say utilising the available legal remedies.

68 It follows that the existence of infringement proceedings pending before the Court of Justice or the likelihood that the national court will make a reference to the Court of Justice for a preliminary ruling cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.

69 The answer to the fifth question therefore is that Community law does not preclude the application of national legislation which lays down that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy, provided that utilisation of that remedy can reasonably be required of the injured party, a matter which is for the referring court to determine in light of all the circumstances of the main proceedings. The likelihood that a national court will make a reference for a preliminary ruling under Article 234 EC or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.

Costs

70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Grand Chamber) hereby rules:

1. **Individuals who have been harmed by the incorrect transposition and application of Council Directive 64/433/EEC of 26 June 1964 on health conditions for the production and marketing of fresh meat, as amended by Council Directive 91/497/EEC of 29 July 1991, and Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market may rely on the right to the free movement of goods in order to be able to render the State liable for the breach of Community law.**

2. **Where the Commission of the European Communities has brought infringement proceedings under Article 226 EC, Community law does not require the limitation period laid down by national legislation for a claim seeking reparation on account of State liability for breach of Community law to be interrupted or suspended during those proceedings.**

3. **Community law does not preclude the limitation period applicable to an action for damages against the State for incorrect transposition of a directive from beginning to run on the date on which the first injurious effects of the incorrect transposition have been produced and the further injurious effects thereof are foreseeable, even if that date is prior to the correct transposition of the directive.**

4. **Community law does not preclude the application of national legislation which lays down that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy, provided that utilisation of that remedy can reasonably be required of the injured party, a matter which is for the referring court to determine in light of all the circumstances of the main proceedings. The likelihood that a national court will make a reference for a preliminary ruling under Article 234 EC or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.**

[Signatures]