

OPINION OF ADVOCATE GENERAL
LÉGER

delivered on 17 December 1998 *

1. In proceedings for infringement of Austrian legislation governing the transport of animals by road the Verwaltungsgerichtshof, Austria, is asking the Court to determine whether the provisions of Community primary law on the principle of the free movement of goods¹ and of secondary law on the protection of animals during transport² preclude the imposition, at national level, of a time-limit, in terms of journey time, and geographical limits, within national territory and fixing a maximum distance, for the transport of animals for slaughter.

exceed 130 km, unless a special derogation is granted.

3. That provision reads as follows:

‘Animals shall be transported by road along the shortest route which is normally used by traffic, is justifiable with regard to considerations of veterinary medicine and is permissible under the provisions of law regarding motor vehicles and traffic regulation. The drivers shall drive in a careful and considerate manner, which shall in particular avoid injury to the animals transported. Loading and unloading shall be carried out in a careful and considerate way; injuries to the animals shall be avoided.

National legislation

2. Paragraph 5(1) and (2) of the Tiertransportgesetz-Straße (Law on the Transport of Animals by Road — hereinafter ‘the TGSt’)³ allows such transport to be effected only as far as the nearest suitable abattoir within Austrian borders, the total duration of the journey not to exceed six hours and the total distance, on the shortest route, not to

Animals may be transported for slaughter only as far as the nearest suitable abattoir in Austria; if the provisions of law regarding motor vehicles and traffic regulation are observed and a total journey time of six hours and a distance of 130 km are not exceeded, animals may be transported for slaughter in

* Original language: French.

1 — Articles 30 to 36 of the EC Treaty.

2 — The secondary law is contained in Council Directive 91/628/EEC of 19 November 1991 concerning the protection of animals during transport and amending Council Directives 90/425/EEC and 91/496/EEC (OJ L 340, p. 17) and Council Directive 95/29/EC of 29 June 1995 amending Directive 91/628 (OJ 1995 L 148, p.52).

3 — BGBl. 1994, No 411.

any event. In calculating the distance, account shall be taken of only half of the kilometres actually travelled on a motorway'.

4. Paragraph 16(3) and (4) of that law provides:

'(3) Any person who ...

(4) Transports animals or causes animals to be transported contrary to Paragraph 5(1) or (2) commits an administrative offence and shall be fined between Austrian schillings 10 000 and 50 000.'

border control point at Arnoldstein, where a check was made. It was then found that the lorry transporting those animals for slaughter had not stopped at the nearest suitable abattoir in Austria, that the total duration of the journey had been 23 hours 15 minutes, without interruption,⁴ and that the distance covered was in any event more than 300 km, without any authorisation for exceeding the duration and length of the journey having been issued in accordance with the TGSt.

6. By an administrative decision of a penal nature (Straferkenntnis) issued by the Bezirkshauptmannschaft (District Administrative Authority) Villach on 9 January 1996, Mr Monsees was ordered to pay a fine, subject to imprisonment for non-payment. When his appeal against that decision was dismissed on 26 June 1996 by the Unabhängiger Verwaltungssenat Kärnten (Independent Administrative Board for Carinthia), Mr Monsees appealed to the Verwaltungsgerichtshof.

Facts and procedure

5. Mr Monsees, the accused in the main proceedings, is being prosecuted for infringing this legislation. Starting at 11.00 a.m. on 23 August 1995 in Breitenwisch in Germany, where he loaded 31 bulls which were to be transported to Istanbul in Turkey, the driver carried on driving his lorry until 10.15 a.m. on 24 August 1995 when he reached the

7. He contends in substance that the fact that his journey involved the international transport of animals precludes application of the

⁴ — It is simply noted that the animals were fed at 4.45 on 24 August at Samerberg; it is not known whether a stop was necessary for this.

Austrian legislation, otherwise 'every international shipment of cattle eastward out of Germany would end in the nearest abattoir in Salzburg'.⁵

no restriction on the transport of animals is laid down under that measure.

8. Whilst observing that such a restriction on trade is in principle prohibited, the national court points out that the protection of the health and life of animals may justify such a restriction, under Article 36 of the Treaty, unless the provisions in question are contrary to the principle of proportionality. In this regard, the national court expresses certain reservations, since more flexible means, such as more frequent rest periods, or an obligation to feed and water animals at regular intervals, would have been sufficient to provide the protection sought.

10. The Verwaltungsgerichtshof has therefore stayed proceedings until the Court has ruled on the following question:

'Are Articles 30 to 36 of the EC Treaty (provisions on the freedom of movement of goods) and the other provisions of applicable Community law to be interpreted as preventing a Member State from restricting the transport of animals for slaughter so that animals may be transported for slaughter only as far as the nearest suitable abattoir in that State, and may be transported for slaughter in any event only if, upon observance of the motor vehicle and traffic regulations a total journey time of six hours and a distance of 130 km are not exceeded, account being taken of only half the kilometres actually travelled on a motorway?'

9. As regards the provisions of secondary law referred to elsewhere, it considers, however, that Directive 95/29 is inapplicable in this case, since the period for its transposition had not expired on the date of the facts in question.⁶ It considers that only Directive 91/62, if any, is relevant in this case, but notes that

Relevant Community provisions

⁵ — Fourth paragraph of the grounds of the order for reference.

⁶ — The period for transposition, laid down in Article 2 of the directive, expired only on 31 December 1996. That period could even be extended until 31 December 1997 in order to apply the provisions relating to extension of the maximum duration of the journey.

11. Three different sets of rules may be relevant in the circumstances of this case.

Article 30 et seq. of the Treaty

12. The Verwaltungsgerichtshof first makes express reference in its question to Article 30 of the Treaty, which prohibits both quantitative restrictions on imports as well as other measures having equivalent effect '... which may impede, directly or indirectly, actually on potentially, intra-Community trade'.⁷

13. By way of derogation from that provision, only certain measures contrary to the principle of a free movement of goods may nevertheless be justified, either by reference to Article 36, or — as regards measures which are applicable without distinction, such as in this case — as overriding requirements of the national legislation pursuing a '... purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods ...'.⁸ According to the Verwaltungsgerichtshof, the dual legitimate aim of protecting the health of animals and ensuring the safety of road users⁹ could constitute such an overriding requirement if the national measures adopted for meeting that overriding requirement were proportionate to the objective pursued, about which it is doubtful.¹⁰ Article 36 covers in particular '... prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of health and life of ... animals ...'.

14. The accused in the main proceedings also relies on secondary law provisions relating to the protection of animals during transport.

Directive 91/628

15. First of all, Directive 91/628 is mentioned. Its preamble refers to the aim of protecting and caring for animals during transport over long distances. Although the directive does not in itself lay down any restriction, in terms of duration in particular, on the transport by road of live animals (only the regularity of intervals for feeding and watering is regulated¹¹), it does provide, in Article 13(1), that:

'Before 1 July 1992, the Commission shall submit a report drawn up on the basis of an opinion from the Scientific Veterinary Committee, possibly accompanied by proposals, on:

— the question of fixing maximum journey times for certain types of animal;

7 — Judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

8 — Judgment in Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraph 14.

9 — Page 5 of the English translation of the order for reference.

10 — Here the Verwaltungsgerichtshof states: '... it may be doubted whether the measures specified in ... the TGS are required in order to achieve the objective of the protection of animals; more restrained means, such as more frequent rest periods and watering and feeding the animals from time to time would, instead be sufficient' (p. 5 of the English translation of the order for reference).

11 — Under Chapter 1, part A, point 2(d) of the Annex: 'During transport the animals must receive water and appropriate food at suitable intervals. These intervals shall not exceed 24 hours unless an extension of this period by not more than two hours is required in specific cases in the animals' interest in view in particular of the species being transported, the means of transport used, and the proximity of the place of unloading.'

— the intervals laid down [for feeding and watering animals] ...

in particular from the third recital of its preamble:

— the length of the rest provided for [for journeys exceeding 24 hours, from the place of departure and taking into account the place of destination, along the itinerary envisaged] ...

‘Whereas some Member States have rules on journey times, feeding and watering intervals, resting periods and space allowances; whereas these rules are, in some cases, extremely detailed and are used by some Member States to restrict intra-Community trade in live animals; whereas persons involved in the transport of animals need clearly defined criteria to enable them to operate on a Community-wide basis without coming into conflict with differing national provisions’.

...’

Directive 95/29

16. It was on the basis of the latter provision that Directive 95/29, amending Directive 91/628, was adopted which has also been mentioned during the national proceedings.

18. In order to achieve this objective, ‘... while ensuring a satisfactory level of protection for the animals concerned’, Directive 95/29 provides for the ‘... harmonising [of] travelling times and resting periods, feeding and watering intervals, and space allowances, for certain types of animal’.¹²

17. In this regard, it may be observed that the aim of this directive is *precisely* to prevent measures having an effect equivalent to quantitative restrictions on imports which the Member States might be tempted to adopt in the guise of measures to provide care to live animals during transport. That emerges

19. That is why a new point (aa) was inserted in Article 3(1) of Directive 91/628, the second indent of which requires Member States to ensure that travelling times and rest periods and feeding and watering intervals for certain

¹² — Fourth recital.

types of animals comply with those laid down in Chapter VII of the Annex to Directive 95/29.¹³

account in particular of proximity to the place of destination.

20. The chapter in question fixes, in particular, in points 1 and 2, the maximum duration of road journeys authorised for animals of the bovine species as being no more than eight hours.

However, point 3 allows a prolongation of that period if the vehicle used for transport fulfils certain additional conditions.¹⁴ In that case, pursuant to point 4(d), the watering and feeding intervals, as well as the journey times and rest periods can be extended. First, cattle must then '... after 14 hours of travel, be given a rest period of at least one hour sufficient for them in particular to be given liquid and if necessary fed. After this rest period, they may be transported for a further 14 hours.' It is to be noted that those journey times may be extended yet again by two hours, under point 8, in the interests of the animals, taking

Finally, Member States are allowed, under point 9, to adopt *special arrangements* for the transport of animals destined for slaughter *taking place entirely on their own territory*, for which the derogating provisions cannot apply. A maximum non-extendable journey time of eight hours may thus be provided for in the case of animals destined for slaughter transported exclusively from a place of a departure to a place of destination situated on the Member States' own territory, 'whilst complying with the general provisions of the Treaty', as it is stated in the fifth recital of the preamble to Directive 95/29.

21. As the Verwaltungsgerichtshof points out, that directive is nevertheless inapplicable in principle *rationae temporis* to the facts of this case, its deadline for transposition having expired on the date of the facts in question. However, as the Commission rightly emphasises, it was already in force at the time of those facts and 'its content may therefore be taken into consideration in the legal assessment'.¹⁵

13 — Article 1, point 3, of Directive 95/29.

14 — Those conditions are the following:

- there is sufficient bedding on the floor of the vehicle,
- the transporting vehicle carries appropriate feed for the animal species transported and for the journey time,
- there is direct access to the animals,
- adequate ventilation is possible which may be adjusted depending on the temperature (inside and outside),
- there are moveable panels for creating separate compartments,
- vehicles are equipped for connection to a water supply during stops,
- sufficient water is carried for watering during the journey'.

15 — In point II(3) of part 2 of its observations.

The European Convention on the Protection of Animals during International Transport

22. Finally, I should mention the European Convention for the Protection of Animals during International Transport,¹⁶ to which reference is made in the third recital of the preamble to Directive 91/628. That Convention, adopted within the Council of Europe on 13 December 1968, contains prescriptions, in particular in Article 6, point 4 — similar to those provided for in Chapter 1, part A, point 2(d) of the Annex to Directive 95/29 in relation to watering and feeding intervals for cattle during transport.

23. Although it does not lay down binding journey times, the Convention does provide, in Article 14, that: 'Animals shall be transported to their destination as soon as possible, and delays, particularly in transshipment and marshalling yards, shall be reduced to a minimum.'

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24. There is scarcely any doubt that the Austrian legislation, in making it obligatory, in particular, for any international transport of animals for slaughter to stop in Austria at the

nearest abattoir for the animals to be killed, constitutes a measure having an effect equivalent to a quantitative restriction on imports. This is, in fact, not really contested by any of the parties to the proceedings.¹⁷ It may also be pointed out, as does the accused in the main proceedings,¹⁸ that the legislation in question in fact not only prevents imports but also exports, that is to say in the present case any international transport from Austria, and even any transit through Austria. Therefore, in requiring any transport of this type to stop at the nearest abattoir within Austria, the national provisions are in breach of both Article 30 and Article 34 of the Treaty.

25. The Court has nevertheless stated, in particular in its judgment in the *Hedley Lomas* case, that: 'Article 36 of the Treaty allows the maintenance of restrictions on the free movement of goods, justified on grounds of the protection of the health and life of animals, which constitutes a fundamental requirement recognised by Community law'.¹⁹

17 — See p. 10 of the observations in French of the Commission and paragraph 1(2) of the observations in French of the accused in the main proceedings. The Austrian Government itself focused its observations on the justifications which may be put forward to defend the obstacle to free movement in which the application of its legislation results, but without necessarily addressing this point in any depth. It does accept that 'it does not appear to be completely ruled out that a measure, such as that laid down in Paragraph 5(2) of the TGS, may be regarded as a measure having equivalent effect within the meaning of Article 30 of the Treaty ...' (point III.2 of its observations).

18 — Point 1(3) of his observations.

19 — Judgment in Case C-5/94 *The Queen v MAFF, ex parte Hedley Lomas* [1996] ECR I-2553, at paragraph 18. See also the judgment in Case C-1/96 *Compassion in World Farming* [1998] ECR I-1251, at paragraph 47.

16 — European Treaties Series, No 65.

26. However, any justification under Article 36 may not be accepted where 'Community directives provide for harmonisation of the measures necessary to achieve the specific objective which would be furthered by reliance upon this provision'.²⁰ In such a case, the appropriate checks must be carried out and the protection measures taken along the lines indicated by the harmonising directive.

27. It remains to consider, in the case before us, whether the provisions of secondary law relied upon provide for the harmonisation of the measures necessary for the protection of the health of cattle destined for slaughter during transport, which is a specific object pursued by Article 36.

28. That is manifestly not the case with Directive 91/628, which, as we have seen, lays down no binding measure in relation to the Member States. The reference it makes elsewhere, in Article 13, to the subsequent adoption of additional legislation, makes it clear that it cannot constitute the complete harmonising instrument in relation to the national legislation in this field. Moreover, Article 13(4) states, if this were needed, that: 'Pending implementation of the provisions referred to in paragraphs 1 and 2, the relevant national rules shall apply subject to the general rules laid down by the Treaty.'

29. As far as Directive 95/29 is concerned, although it does harmonise in particular the maximum journey time for the carriage of

cattle and the feeding and watering intervals, the period for its transposition had not, as I have pointed out, expired at the time of the facts in question. The Court has held that a directive does not have the effect of removing the competence which Article 36 of the Treaty confers on Member States where the period which it gives them for adopting the necessary provisions for complying with it has not expired.²¹ Until the period for transposition of the directive has come to an end, Member States may therefore rely on Article 36 of the Treaty to justify action on the grounds of considerations relating to the protection of the health and life of animals.

30. However, it must be noted — quite incidentally, since this is not the subject of this reference — that, even after expiry of the period for transposition of Directive 95/29, it certainly could not be interpreted as authorising, for international transport, a Member State to impose, upon penalty of sanction, a compulsory stop at the nearest slaughterhouse within its frontiers, as the legislation in question does.²² Whilst such a compulsory requirement is, it is true, provided for and authorised under that directive, the requirement provided for there is a special regime put in place only in relation to *national* transport of animals for slaughter, from and to places located within the same national territory, pursuant to point 9 of chapter VII of the Annex. For those journeys, only, a maximum non-extendable journey time of

20 — Ibid. See also the judgment in *Compassion in World Farming*, cited above, at paragraph 47.

21 — Judgments in Case 35/76 *Simmenthal* [1976] ECR 1871, paragraph 36, and Case 251/78 *Denkavit Futtermittel* [1979] ECR 3369, paragraphs 18 to 21.

22 — In this regard, see also p. 16 and 17 of the French translation of the Commission's observations.

eight hours may be laid down by a Member State.

the basis of Article 36 of the Treaty are justified only if they take account of the requirements of the free movement of goods, as laid down by the Treaty, and in particular by the last sentence of that article.²⁵

31. Since none of the provisions of secondary law applicable in the present case harmonise the measures necessary for achieving the specific aim of recourse to Article 36, we must therefore return to the examination of a justification for the Austrian legislation — which in principle is contrary to the principle of free movement of goods — under that article, having regard to the protection of the health and life of animals.

34. Could the aim of protecting, during their transport, animals destined for slaughter be achieved by less restrictive measures, and in a way which is just as effective?

32. It is only then that it might be necessary to examine whether the measures adopted may be justified by an overriding requirement. We must remember that a derogation under Article 36 of the Treaty is to be taken into consideration before that of a justification by an overriding requirement related to the general interest.²³

35. According to established case-law,²⁶ it is for the party relying on application of Article 36 of the Treaty to demonstrate the existence of a threat to the health of animals.

33. Measures adopted under Article 36 of the Treaty are 'only justified provided that the measures adopted are in reasonable proportion to the aim pursued and that the protection of health cannot be achieved as effectively by measures which restrict intra-Community trade to a lesser extent'.²⁴ In other words, national measures adopted on

36. I do not doubt, as the Austrian Government points out,²⁷ that the provisions of the TGSt in question are capable of achieving the aim of protecting, during transport, the health of animals going to slaughter. Limiting the duration of transport and the distance covered clearly fall under that aim, by reducing

23 — Judgment in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I-4151, paragraph 16.

24 — Case 73/84 *Denkavit Futtermittel* [1985] ECR 1013, paragraph 14.

25 — Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 44, and Case 54/85 *Mirepoix* [1986] ECR 1067, paragraph 13.

26 — Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 22, and Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 40.

27 — Point III.3 of its observations.

in particular the state of stress and exhaustion which such transport might occasion.

the Austrian Government tries to suggest,²⁸ that no transport of animals, except of dead animals, is good, but there again I am not convinced that this is necessarily a solution which best reconciles protection of the health of animals with the requirements of the internal market.

37. However, it seems no less evident to me that, in order to achieve that aim, the national provisions should undertake a proper balancing of the interests involved. The application of the Austrian legislation to cases of international transport leads to the aberrant result of preventing in practice any transit through Austria, except if it is made the final destination. Any transport of animals for slaughter, whether from Austria to another Member State or whether simply through Austrian territory in mere international transit from and to other Member States, is in fact made impossible by requiring the transport to end at the nearest slaughterhouse in Austria. Even imports of animals for slaughter in Austria are substantially impeded, since the place of final destination cannot be freely chosen. Consequently, any international transport of animals for slaughter by road is made impossible in Austria by application of the provisions in question.

38. Thus, if the reasoning of the Austrian Government were followed, it would have to be accepted that the protection, during the course of international transport, of animals intended for slaughter cannot be better ensured ... except by prohibiting all international transport. Such an approach is necessarily bound to produce successful results ... I cannot help pointing out, however, that it is somewhat radical. Of course, it could also be argued, as

39. The fact is that this is not the approach adopted, in particular by the States signatory to the Convention adopted within the Council of Europe, cited above, or by the Community legislature, for the purposes of achieving the same protective aim.

40. Let me reiterate, on this last point, that Directive 91/68 is aimed at reducing as far as possible the duration of transport of animals over long distances. The same aim underlies Directive 95/29. In order to ensure better protection of animals undergoing transport, the maximum transport journeys in particular are harmonised.²⁹ These may be extended to 30 hours if certain conditions regarding the equipment of the lorry are observed. Pursuit of this aim is also partially behind the harmonisation of the intervals at which animals must be fed and watered, rest periods,

28 — In point III.5 of its observations it states: '... the alternative solution, to give but one example, of employing refrigerator transport would be a practicable solution capable of reducing unnecessary suffering of animals during transport'.

29 — See paragraph 20 of this Opinion.

available space and the standards which must be met by vehicles as regards the transport of certain types of animals.

41. As for the Convention, without going into the question of its enforceability in this case — which has hardly been touched upon in the legal argument³⁰ — I would merely point out that the draftsmen have suggested and adopted other means for guaranteeing the protection of the health and life of animals than those, more radical, adopted or proposed by the Austrian Government. As we have seen,³¹ it envisages provisions which are in substance similar to those provided for in the Annex to Directive 95/29.

42. Those two examples clearly illustrate how the aim of protecting the health and life of animals intended for slaughter, during their transport by road, may be attained by means more compatible with the requirements of free movement than all those provisions in the Austrian legislation. The latter does not in fact exclude measures for attaining the aim in view whilst being reconcilable with the requirements of the common market, since it contains maximum time-limits.

30 — When asked in the *Compassion in World Farming* case, cited above, to assess the binding force of a similar Convention — the European Convention on the Protection of Animals Kept for Farming Purposes — the Court held: '... It became an integral part of the Community legal order upon its entry into force' (paragraph 31). Nevertheless, the Court considered that the particular Convention which it had to consider at that time did not contain any legally binding provisions for the contracting parties and therefore for the Community (paragraphs 32 to 37).

31 — Paragraphs 22 and 23 of this Opinion.

43. I therefore conclude that the national measures in question, equivalent to quantitative restrictions on trade, may not be justified on the grounds of the protection of the health and life of animals pursuant to Article 36 of the Treaty.

44. I have also pointed out that overriding requirements relating to the general interest have been put forward during the national proceedings as well as before this Court as justification for those provisions. However, none of them appear to me to justify the obstacle to free movement found to exist.

45. The twin aim of protecting the health of animals and ensuring the safety of road users, relied on as justification for the national measures, whilst they may appear legitimate, do not appear to me to constitute an 'overriding requirement' capable, in the circumstances of this case, of removing the national legislation from the scope of the prohibition of measures having equivalent effect, despite its restrictive effect on trade.

46. Here again, the reason is that the means used to seek to attain the aim in view are not appropriate. Without going back to the aim of protecting animals, which has already been considered in the examination of the application of Article 36 of the Treaty, I would point

out that the concern about road safety — notwithstanding the question whether it may constitute an overriding requirement within the meaning of *Cassis de Dijon*³² — could have been met by means more compatible with the principle of free movement. It is sufficient to point out in this regard that the Community legislature, in the directives on the protection of animals during transport, could have incorporated the aim of ensuring road safety, without this justifying a disproportionate obstacle to trade. This concern emerges, for example, through the reference, in the second indent of Article 1(3) of Direc-

tive 95/29, to Regulation (EEC) No 3820/85,³³ adopted, precisely, for considerations of road safety.³⁴

47. I accordingly consider that the national measures in question, equivalent to quantitative restrictions on trade, likewise cannot be justified as overriding requirements relating to the protection of the health of animals and to road safety.

Conclusion

48. On the basis of the foregoing considerations I propose that the question submitted to the Court by the Verwaltungsgerichtshof be answered as follows:

Articles 30 to 36 of the EC Treaty are to be interpreted as precluding a Member State from restricting the transport of live animals intended for slaughter by providing that this type of transport may only be effected as far as the nearest suitable abattoir within national territory and that in any event such transport may be effected only if, in compliance with the motor vehicle and highway regulations, the total duration of the transport does not exceed six hours and the distance covered does not exceed 130 km, with only half the distance actually covered on a motorway being taken into account for the purposes of calculating the distance.

32 — The list of justifications enumerated by the Court, in particular in its judgment in *Cassis de Dijon*, cited above, in paragraph 8 — ‘... effectiveness of fiscal provision ... protection of public health ... fairness of commercial transactions and ... defence of the consumer’ — is not, of course, in any way exhaustive.

33 — Council Regulation (EEC) No 3820/85 of 20 December 1985 relating to the harmonisation of certain social provisions in the field of transport by road (OJ 1985 L 370, p. 1).

34 — It is clear from a reading of its first recital that this directive has a triple aim of ensuring road safety, harmonising competitive conditions and ensuring social progress.