JUDGMENT OF 20. 3. 2003 — CASE C-3/00

JUDGMENT OF THE COURT

Kingdom of Denmark

V

Commission of the European Communities

Keywords

1. Approximation of laws — Article 95 EC — Approval procedure for derogating national provisions — Purpose — (Art. 95(1), (4), (6) and (7) EC)

2. Approximation of laws — Article 95 EC — Approval procedure for derogating national provisions — Application of the principle of the right to be heard — Not applicable — (Art. 95(4) and (6), second and third subparas)

3. Approximation of laws — Article 95 EC — Approval procedure for derogating national provisions — Distinction between national provision existing prior to the harmonisation measure and those introduced subsequently — Conditions for the application of Article 95(4) EC — Obligation for the Member State seeking derogation to provide new scientific evidence — No such obligation — Conditions for the application for Article 95(5) EC — Obligation for the Member State seeking derogation to establish the need to introduce new national provisions on grounds of a problem specific to that Member State — (Arts 30 EC and 95(4) and (5) EC)

4. Approximation of laws — Article 95 EC — Approval procedure for derogating national provisions — Application to maintain existing national provisions — Possibility for a Member State seeking derogation to base its application on an assessment of the risk to public health different from that made by the Community legislature — Obligation to establish a level of health protection higher than that in the Community harmonisation measure — Obligation to comply with the principle of proportionality — (Art. 95(4) and (7) EC)

5. Approximation of laws — Article 95 EC — Approval procedure for derogating national provisions — Application to maintain existing national provisions — Assessment as regards the conditions laid down in Article 95(4) and (6) EC — (Art. 95(4) and (6) EC).

Summary

1. While it is true that a Commission decision adopted under the procedure for approving national derogating provisions referred to in Article 95(4) and (6), which approves the maintenance of a national provision which derogates from a Community measure of general application, results in the modification erga omnes of the scope of that measure, the procedure which leads to such a decision cannot be considered as part of a legislative process resulting in the adoption of a measure of general application.

That approval procedure is different from that which results in the adoption of the harmonisation measure derogated from. Under Article 95(1) EC, such a measure is adopted, under the co-decision procedure referred to in Article 251 EC, by the Council and the European Parliament acting on a Commission proposal after consulting the Economic and Social Committee. By contrast, the approval procedure is initiated, under Article 95(4) EC, after the legislature adopts the harmonisation measure. Its purpose is to assess the specific needs of a Member State, since the Commission is required, under Article 95(7) EC, to examine whether to propose to the Community legislature an adaptation of the harmonisation measure, immediately after approving national provisions which derogate from it.

see paras 39-40

2. The principle of the right to be heard does not apply to the procedure provided under Article 95(4) and (6) EC. That procedure is initiated at the request of a Member State seeking the approval of national provisions derogating from a harmonisation measure adopted at Community level. In its request, the Member State is at liberty to comment on the decision it asks to have adopted, as is quite clear from Article 95(4) EC, which requires that Member State to state the grounds for maintaining the national provisions in question. The Commission in turn must be able, within the prescribed period, to obtain the information which proves to be necessary without being required once more to hear the applicant Member State.

That conclusion is confirmed by the second subparagraph of Article 95(6) EC, according to which the derogating national provisions are deemed to have been approved if the Commission does not take a decision within a certain period. In addition, under the third subparagraph of Article 95(6) EC, no extension of that period is allowed where there is a danger for human health.

It is therefore clear that the authors of the Treaty intended, in the interest of both the applicant Member State and the proper functioning of the internal market, that the procedure laid down in that article should be speedily concluded. That objective would be difficult to reconcile with a requirement for prolonged exchanges of information and observations.

see paras 48-50

3. Article 95 EC distinguishes between notified provisions according to whether they are national provisions which existed prior to harmonisation or national provisions which the Member State concerned wishes to introduce. In the first case, provided for in Article 95(4) EC, the national provisions existed prior to the harmonisation measure. They were known to the Community legislature, which could not or did not seek to be guided by them for the purpose of harmonisation. It is therefore considered acceptable for the Member State to request that its own rules remain in force. To that end, the Treaty requires that such national provisions must be justified on grounds of the major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment. By contrast, in the second situation, provided for in Article 95(5) EC, the adoption of new national legislation is more likely to jeopardise harmonisation. The Community institutions could not, by definition, have taken account of the national text when drawing up the harmonisation measure. In that case, the requirements referred to in Article 30 EC are not taken into account, and only grounds relating to protection of the environment or the working environment are accepted, on condition that the Member State provides new scientific evidence and that the need to introduce new national provisions results from a problem specific to the Member State concerned arising after the adoption of the harmonisation measure.

It follows that neither the wording of Article 95(4) EC nor the broad logic of that article as a whole entails a requirement that the applicant Member State prove that maintaining the national provisions which it notifies to the Commission is justified by a problem specific to that Member State. However, when a problem specific to the applicant Member State in fact exists, that circumstance can be highly relevant in guiding the Commission as to whether to approve or reject the notified national provisions. It is a factor which, in the present case, the Commission should have taken into account when it adopted its decision.

Analogous considerations apply to the requirement for new scientific evidence. That condition is imposed under Article 95(5) EC for the introduction of new derogating national provisions, but it is not laid down in Article 95(4) EC for the maintenance of existing derogating national provisions. It is not one of the conditions imposed for maintaining such provisions.

see paras 57-62

4. A Member State may base an application under Article 95(4) EC to maintain its already existing national provisions on an assessment of the risk to public health different from that accepted by the Community legislature when it adopted the harmonisation measure from which the national provisions derogate. To that end, it falls to the applicant Member State to prove that those national provisions ensure a level of health protection which is higher than the Community harmonisation measure and that they do not go beyond what is necessary to attain that objective.

That interpretation of Article 95(4) EC is confirmed by Article 95(7) EC, under which, when a Member State is authorised to maintain derogating national provisions, the Commission is immediately to examine whether to propose an adaptation of the harmonisation measure. Such an adaptation could be appropriate when the national provisions approved by the Commission offer a level of protection which is higher than the harmonisation measure as a result of a divergent assessment of the risk to public health.

see paras 64-65

5. An application by a Member State under Article 95(4) EC seeking to maintain national provisions which existed prior to a harmonisation measure adopted at the Community level must be assessed in the light of the conditions laid down in both that paragraph and paragraph 6 of that article. If any one of those conditions is not met, the application must be rejected without there being a need to examine the other conditions.

see para. 118