1. The Commission of the European Communities has applied for a declaration that the French Republic has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC) in so far as:

— French legislation fails to guarantee the free movement of general foodstuffs and foodstuffs intended for special nutritional purposes, which are lawfully manufactured and/or marketed in other Member States but contain additives (such as vitamins, minerals and other ingredients) not provided for under that legislation;

— the French authorities have impeded the marketing of the above foodstuffs in France without establishing that they would pose a risk to public health.

I — Legal background

— French legislation fails to guarantee the free movement of general foodstuffs and foodstuffs intended for special nutritional purposes, which are lawfully manufactured and/or marketed in other Member States but contain additives (such as vitamins, minerals and other ingredients) not provided for under that legislation;

2. There is no Community legislation governing the addition of nutrients in general foodstuffs.

— in particular, French legislation fails to provide for a simplified procedure for having a substance entered on the national list of permitted additives, which is necessary if the above foodstuffs are to be marketed in France;


1 — Original language: English.

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particular nutritional uses, the Commission adopted four specific directives, which are not however relevant to the present case.

4. Under Article 10(1) of Directive 89/398 ‘Member States shall not, for reasons related to their composition, manufacturing specifications, presentation or labelling, prohibit or restrict trade in products referred to in Article 1 which comply with this directive and, where appropriate, with directives adopted in implementation of this directive.’ Paragraph 2 of the same article provides that ‘paragraph 1 shall not affect national provisions which are applicable in the absence of directives adopted in implementation of this directive.’

5. It is also apparent from the documents before the Court that the nutrients concerned in the present case are not covered by Council Directive 89/107/EEC of 21 December 1988 on the approximation of the laws of the Member States concerning food additives authorised for use in foodstuffs intended for human consumption, which concerns only the intentional addition of substances to food for a technological purpose.

6. It may be concluded therefore that the present case is exclusively within the scope of Articles 30 of the Treaty and 36 of the EC Treaty (now, after amendment, Article 30 EC), as they were in force at the time of the expiry of the time-limit set in the reasoned opinion.

7. It will be remembered that, under Article 30 of the Treaty, ‘quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States...’, and that Article 36 reads as follows:

‘The provisions of Articles 30 to 34 inclusive shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.’

National law

8. The French legislation applicable to the marketing of food supplements and general foodstuffs fortified with vitamins, minerals and other nutrients such as amino acids is...
the Decree of 15 April 1912 implementing the Law of 1 August 1905 on offences relating to food standards and adulteration of goods or services concerning foodstuffs, and in particular meat, prepared meat products, fruit, vegetables, fish and preserved foods.

9. Article 1 of the Decree, as amended by Decree No 73-138 of 12 February 1973 (JORF of 15 February 1973, p. 1728), provides:

'It shall be an offence to possess with a view to sale, to put on sale or to sell any goods or foodstuffs intended for human consumption to which chemical products have been added other than those whose use has been declared lawful by orders made jointly by the Minister for Agriculture and Rural Development, the Minister for the Economy and Finance, the Minister for Industrial and Scientific Development and the Minister for Public Health, on the advice of the Conseil supérieur d'hygiène publique de France (French Public Health Authority, “the CSHPF”) and the Académie nationale de médecine (National Academy of Medicine).'

10. Article 1 of Decree No 91-827 of 29 August 1991 on foodstuffs intended for particular nutritional uses (JORF of 29 August 1991, p. 11424) provides: ‘Foodstuffs are regarded as being intended for particular nutritional uses if, as a result of their particular composition or of a particular process in their manufacture, they are clearly different from foodstuffs for daily consumption, are suitable for the stated nutritional purpose and are marketed in such a way as to indicate that they fulfil that purpose.’

11. Article 3 of the same decree reads as follows:

‘Joint orders made by the ministers responsible for consumer affairs, agriculture and health after obtaining the opinion of the [CSHPF] shall determine:

(a) The list and the conditions for the use of substances with a nutritional purpose, such as vitamins, minerals, amino acids and other substances, which it is lawful to incorporate in foodstuffs intended for particular nutritional uses, as well as the standards of purity applicable to those substances; ...’

12. On the basis of the two decrees which in turn preceded the Decree of 29 August 1991, namely Decrees Nos 75-85 of 24 July
1975 and 81-574 of 15 May 1981, two implementing orders were adopted — the Order of 20 July 1977, as amended, implementing Decree No 75-85, relating to health-food or dietary products, and the Order of 4 August 1986, as amended, on the use of additives in the manufacture of foodstuffs intended for special nutritional purposes.

13. The parties agree that, as stated by the French Government, 'the French order establishes a system of positive lists and, if a trader wishes to market in France a foodstuff containing a substance not included on the positive list, it must secure an amendment of the positive list of additives permitted in France'.

II — Facts

14. The Commission states that its attention was drawn, in particular by complaints by traders, to the French legislation on the addition of nutrients and certain ingredients in foodstuffs, and also to its application by the competent national authorities to products from other Member States.

15. By nutrients, the Commission means vitamins, minerals, amino acids and other nitrogenous compounds and also other nutrients of the kind included in Annex III to Commission Directive 91/321/EEC of 14 May 1991 on infant formulae and follow-on formulae. As regards other ingredients, the complainants described in particular the difficulties linked to the addition of caffeine to foodstuffs.

16. The first exchange of letters and discussions having proved unfruitful, the Commission sent the French Republic, on 23 December 1997, a letter calling on it to submit its observations within two months.

17. The French Republic replied by letters of 9 March and 15 May 1998 stating that, in its opinion, the French legislation in question complied with Community law.

4 — Italicised in the original text.  
5 — OJ 1991 L 175, p. 35.
18. The Commission notified a reasoned opinion on 26 October 1998, to which the French Republic replied, disputing its contents, on 31 December 1998. The French Republic nonetheless mentioned that it intended to adopt a statutory provision to clarify the position, describing the authorisation procedure for use of additives.

19. Having found that the French authorities had not complied with the reasoned opinion within the requisite time-limits, the Commission brought the present action, in which it claims that the Court should:

- in particular, French legislation fails to provide for a simplified procedure for having a substance entered on the national list of permitted additives, which is necessary if the above foodstuffs are to be marketed in France:

- the French authorities have impeded the marketing of the above foodstuffs in France without establishing that they would pose a danger to public health;

- order the French Republic to pay the costs of the proceedings.'

20. The French Republic contends that the Court should dismiss the action.

III — Findings of the Court

- French legislation fails to ensure the free movement of general foodstuffs and foodstuffs intended for special nutritional purposes, which are lawfully manufactured and/or marketed in other Member States of the European Community but contain additives (such as vitamins, minerals and other ingredients) not provided for under the French legislation;

Admissibility of the action

21. Without raising a formal plea of inadmissibility, the French Government questions the admissibility of the action. It considers that it could amount to an abuse
of process, on the ground that the Commission, at the same time as it makes public a draft directive on additives for specific nutritional purposes, has brought an action for failure to fulfil obligations against one of the few Member States which has national legislation on the subject.

22. The Commission replies that the existence of projects for Community harmonisation cannot relieve Member States of their obligation to comply with the Treaty. In addition, the Commission considers that the proposed directive does not cover the principal aspects of the failure to fulfil obligations alleged by the Commission in the context of the present action.

23. I consider that the French Government’s objection cannot be upheld.

24. As stated in the judgment in Case 7/71 Commission v France, an action seeking to establish that a Member State has not complied with its obligations under the Treaty ‘serves to ensure the application of the Treaty, and cannot constitute a misuse of procedure’. 6

25. Moreover, the sole fact that the Commission exercises two powers simultaneously in the same area, namely the power to bring proceedings before the Court on the basis of Article 226 EC and the power to set out legislative proposals, does not prove in any way that the Commission has misused one of those two powers.

26. The action must therefore be held to be admissible.

The Commission’s first plea

27. The precise scope of the Commission’s first plea is not easy to grasp, which is why I consider it necessary to quote fully what the Commission has stated on that subject.

28. The first plea is entitled:

‘French legislation fails to provide for the free movement of foodstuffs lawfully manufactured and/or marketed in other Member States but containing additives not provided for under that legislation.’

29. The Commission explains its reasoning as follows:

The French legislation does not cater for foodstuffs to which nutrients not permitted in France have been added but which have been lawfully manufactured and/or marketed in another Member State, which entitles them as a matter of course to benefit from the principle of free movement of goods, subject to the exceptions provided for in the Treaty.

The French legislation thus makes no provision for mutual recognition in this area, with a view to ensuring the free movement of products lawfully manufactured or marketed in another Member State and which meet standards equivalent to those set in France for the protection of consumer health, even if those products do not wholly satisfy the requirements of the French legislation.

In the absence of such a system, French legislation can impose a prior authorisation system for the addition of nutrients only if the system complies with the requirements set by the Court for food additives.

In any event, such a system would be acceptable, in the light of the case-law cited above, only in so far as it would allow, taking into account the specific nature of the French legislation, general status to be given to an authorisation for use relating to a substance through its addition to the list of permitted substances.'

30. It appears to me that the plea comprises several separate stages of reasoning.

31. If one relies solely on the title of the plea, it appears that the Commission wishes to give the 'Cassis de Dijon' case decisive influence, and that it is denying Member States the right to rely on Article 36 of the

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Treaty in order to retain a measure having equivalent effect to a quantitative restriction in the interest of 'the protection of health and life of humans'.

32. Nonetheless, at the end of the first paragraph of the plea, the Commission refers to 'exceptions laid down in the Treaty'. This can only concern the exceptions referred to in Article 36 of the Treaty and also the 'overriding requirements' recognised by the Court.

33. However, in the form of order sought in the application, the Commission reproduces the cut and dried formula of the title of the plea.

34. In the second paragraph of the plea, the Commission alleges that the French legislation makes no provision for mutual recognition in this area, with a view to ensuring the free movement of products lawfully manufactured or marketed in another Member State and which meet standards equivalent to those set in France for the protection of consumer health, even if those products do not wholly satisfy the requirements of the French legislation.

35. In the reply, the Commission stated that 'under the "Foie gras" case the absence in the legislation in question of provisions on the subject is sufficient to demonstrate the failure to fulfil obligations'.

36. During the hearing, finally, the Commission confirmed that this was indeed a question of applying the findings of the Court in the judgment of 22 October 1998 in Commission v France, known as 'Foie gras', 8 to the present case.

37. That judgment was given in the context of an action for failure to fulfil obligations brought by the Commission against the French Republic contesting a decree reserving the use of a series of trade descriptions to preparations with foie gras as a base which comply with the requirements imposed by the decree in respect of the composition and quality of, in particular, the following product descriptions: whole foie gras, foie gras, blocks of foie gras, liver parfait, liver medallions or paté, galantine of liver and liver mousse. The decree specifies for each of those products the minimum foie gras content, and also the ingredients which are permitted, the maximum saccharose and seasoning content, the maximum percentage of fat rendered and of homogenate and/or water, the maximum degree of humidity and specific detailed rules concerning presentation or packaging. 9

8 — Case C-184/96 [1998] ECR I-6197, (the 'Foie gras case').
9 — See paragraph 7 of the judgment.
38. The *operative part* of the judgment reads:

‘By adopting Decree No 93-999 of 9 August 1993 relating to preparations with foie gras as a base without including in it a mutual recognition clause for products from a Member State and *complying with the rules laid down by that State*, the French Republic has failed to fulfil its obligations under Article 30 of the Treaty.’

39. As the title of the Commission’s first plea in the present case shows, the Commission appears to have been guided by the operative part of the judgment which, on a literal interpretation, could signify that any product complying with the rules of the manufacturing Member State must *always* be allowed in the other Member States without their being able to rely, where relevant, on a higher standard of health protection which they seek to maintain or a higher standard of consumer protection.

40. Nonetheless, the *grounds of judgment* in the same case refer to the greater or lesser degree of compliance of goods with the legislation of the importing State and not with that of the exporting State.

41. The Court stated in paragraph 18 of the judgment that ‘national legislation prohibiting a product from a Member State which complies with the rules laid down by that State but which does not *fully* satisfy the requirements imposed by that legislation from being marketed under a given trade description must be regarded as capable of hindering, at least potentially, inter-State trade’.

42. In paragraph 24, the Court added that ‘the mere fact that a product does not *wholly* conform to the requirements laid down in national legislation on the composition of certain foodstuffs with a particular denomination does not mean that its marketing can be prohibited’.

43. The Court nonetheless reserved the possibility for the competent national authorities to monitor imported preparations and ‘to bring proceedings against those responsible for selling foodstuffs which bear descriptions identical to those provided for by national legislation, but which are so different in content as to give rise to suspicion of deceit’.  

10 — The author’s italics.

11 — The author’s italics.

12 — The author’s italics.

13 — Paragraph 25.
44. It is entirely reasonable for the Court to have considered it inadmissible for a Member State to be able to prohibit the use of the 'foie gras' trade description for imported products whose composition differed only in minor detail from [that provided for by] the national legislation.

specifying, essentially, that ‘foodstuffs will also be permitted on the French market which do not wholly satisfy the requirements of the present legislation, if they meet standards equivalent to those set in France for the protection of public health’.

45. However, that case is distinguished from the present action on two important points.

49. It is immediately apparent that such a provision would give rise to great difficulties in interpretation.

46. Firstly, in the 'Foie gras' case, there was no question of the protection of public health.

50. Firstly, the provision would risk giving rise to disputes on the question of when the legislation of the country of origin of the product meets standards equivalent to those set in France for the protection of health, or to what extent those products may not ‘wholly’ satisfy the requirements of the French legislation.

47. Secondly, the French decree in question related to a group of clearly specified products (preparations with foie gras as a base). In the present action, however, the Commission alleges that the French Republic has not included a provision for mutual recognition in two decrees, one of which relates to ‘all goods and foodstuffs intended for human consumption where chemical products have been added to them’ and the other to ‘foodstuffs intended for special nutritional purposes’.

51. Consequently, should it be admitted that a foodstuff incorporating an additive not permitted in France, and which, therefore, clearly does not ‘wholly’ satisfy the requirements of the French legislation, meets none the less a ‘standard of protection’ equivalent to that set in France?

48. The Commission’s argument therefore effectively claims that even such general legislation should lay down a provision

52. As the French Government rightly argued, ‘the point of reference’ is missing in relation to which the equivalent standard of protection should be assessed.
53. The inclusion of a provision for mutual recognition would therefore risk creating more problems than it could resolve.

54. Moreover, one cannot maintain that the necessity of including such a provision is apparent from the inherent logic of the relevant articles of the Treaty or that it is vital to make those articles fully operational. The articles are sufficient as they stand. Article 30 of the Treaty lays down a clear rule: the prohibition of measures having equivalent effect, and Article 36 of the Treaty allows certain exceptions.

55. Therefore, it is sufficient, in my opinion, to confine ourselves to the Court's case-law, under which it is for the importing Member State to establish, by means of relevant arguments and scientific reports, what in its view are the risks to health involved in the use of a particular substance, or to explain, on the basis of a detailed statement of reasons, why consumers may be misled as to the precise nature of the properties or effects of the foodstuff concerned.

56. The importer must then be able to challenge the decision of the competent authority. That is all that is required to ensure the free movement of goods.

57. I therefore suggest that the argument that the French Republic has failed to fulfil its obligations in making no provision for mutual recognition in the decrees in question should be dismissed.

58. However, the Commission's first plea includes two additional arguments.

59. In the third paragraph of its arguments, the Commission states that 'it would have been possible for French legislation to exempt from prior inclusion in the list of permitted substances additives permitted in another Member State, and confine itself to requiring that the national authorities should be notified, at the time of putting a foodstuff on the market, of the use in this of a substance not permitted in France...'.

60. That would thus mean that where they consider that the foodstuff in question would involve a risk to health, the French authorities would be obliged to embark on a nationwide action, in order to obtain the withdrawal of that product from shops where, in the extreme case, damage to health could have already occurred. I do not see on what basis such a system could be imposed on a Member State.

14 — The author’s italics.
61. The Commission continues: 'in the absence of such a system, French legislation can impose a prior authorisation system for the addition of nutrients only if the system complies with the requirements set by the Court for food additives'. I agree with that statement, which appears, however, to be confused with the second plea, analysed below.

64. For all those reasons, I suggest that the Commission's first plea should be dismissed.

62. Finally, the Commission states that 'such a system would be acceptable... only in so far as it would allow, taking into account the specific nature of the French legislation, general status to be given to an authorisation for use relating to a substance through its addition to the list of permitted substances'.

65. In the second plea, the Commission alleges that the French Republic has failed to fulfil its obligations under Article 30 of the Treaty in so far as the French legislation does not provide for a 'simplified procedure allowing the additives' which are the subject of these proceedings 'to be entered on the national list, a requirement for marketing foodstuffs in France'.

63. It appears to me that that is also the system established by France. Once an ingredient is included on that list, the marketing of a foodstuff may no longer be refused because it contains that ingredient. The Member State may still, of course, object to the marketing of a foodstuff if it also contains other ingredients not included on that list, or if consumers may be misled by labelling which attributes properties to the foodstuff which it does not have.

66. The Commission notes that 'a foodstuff containing a nutrient not permitted in France may be marketed there only if there has been a prior amendment of the relevant interdepartmental order implementing the Decree of 15 April 1912 as amended or the Decree of 29 August 1991'.
67. Given that the procedure is a particularly onerous one, the Commission considers that ‘applications for authorisation of additives or other ingredients in traditional foodstuffs or those intended for special nutritional purposes should be subject to a simplified procedure in the case of foodstuffs lawfully marketed in another Member State, or at the very least one including an express provision allowing authorisations already issued and the results of analysis already carried out in another Member State to be taken into account’.

68. According to the Commission, which refers to the judgment of 16 July 1992 in Commission v France relating to the addition of nitrate to cheese, the procedure for entering a new additive on the national list of permitted additives in foodstuffs should be readily accessible to traders. The national authorities should therefore list the items which must be included in the application for authorisation and set out the procedure for considering applications, in an officially published document which is binding on the national authorities.

69. The national procedure for authorisation should be capable of being completed within a reasonable time. The Commission argues that that condition is not satisfied in the present case, as the relevant provisions do not specify any time-limit for granting applications.

70. Finally, the Commission makes clear that the French legislation does not satisfy the requirement that any refusal of authorisation must be made in accordance with formal requirements ensuring in fact that it is capable of being challenged before the courts by the trader concerned.

71. The French Government considers that there is a simplified procedure even if it has not been formalised in practical terms, noting, first, the fact that the Conseil Supérieur de l’Hygiène Publique de France (the ‘CSHPF’) takes account of international scientific data in all cases where the applicants refer to these in their application and, secondly, the fact that the procedure is fast, in so far as an order is all that is required and traders are often informed by letter of a favourable outcome even before publication of the order.

72. The French Government adds that it had submitted to the Commission a draft notice to traders for the purpose of responding to the Commission’s observations. The draft covered the procedure for referral to the administration and the making and granting of applications for

use of additives in order to make the procedure completely transparent. However, the French Government states that in the absence of a favourable response from the Commission, it has not been possible to publish the notice.

73. Finally, the French Government considers that the Court 'in general supports simplified procedures where the product in question is already permitted on the national export market and where an operator wishes to make a parallel import of a product identical or similar to another product already permitted in the Member State concerned. That does not appear to be the situation in the present case, because the specific circumstances referred to by the Commission relate to other additives which were not yet permitted in France.' The French Government concludes that the Commission has not established that the procedure is not in fact simplified for a product which is already lawfully marketed in another Member State.

74. It should be noted that the Court found in its judgment of 16 July 1992 in Commission v France that legislation making the use of additives subject to authorisation 'must make provision for a procedure enabling traders to have the additive included on the national list of authorised additives. The procedure must be one which is readily accessible [and] can be completed within a reasonable period, and, if it leads to a rejection, that rejection must be open to challenge before the courts'.

75. That judgment is particularly interesting because it concerned the same Decree of 15 April 1912 and therefore the same kind of authorisation procedure as the procedure at issue in the present case. In that judgment, the Court dismissed the action for failure to fulfil obligations because the Commission had not argued that the procedure imposed by the decrees in question was contrary to Community law. By contrast, in the present case, the Commission does criticise that procedure in the light of Community law.

76. The procedure for authorisation must therefore be examined by reference to the conditions set out in the judgment in Commission v France.

77. As we have seen, the French Government considers that there is a procedure satisfying those conditions even if it is not formalised in practical terms.

78. It is self-evident that if the Court requires there to be a certain procedure in order to comply with Article 30 of the Treaty, the procedure concerned must

16 — Paragraph 9.
expressly create rights and obligations for both the operator and the authorities. A procedure which is not formalised clearly does not satisfy that criterion. It does not provide any legal certainty for the operator and amounts, therefore, — with reference to the procedure envisaged by the Court — to a non-existent procedure.

79. The examples provided by the Commission confirm the absence of a procedure such as that envisaged by the Court. The Commission refers, without being challenged by the French Government, to the case of the manufacturer of the ‘Red Bull’ drink, which waited seven months for acknowledgment of its application for authorisation to market its product, and more than two years for the refusal. One cannot consider that to be a procedure which can be completed within a reasonable time.

80. As regards the draft ‘notice to traders on the conditions for incorporation of additives in general foodstuffs’ which the French Government sent to the Commission, it should be noted, in so far as that notice satisfies the conditions of procedure referred to by the Court, that it has not been shown that it was in force on the expiry of the time-limit set in the reasoned opinion. The mere fact that the Commission has not approved such a draft — a fact which the French Government complained of only at the stage of the rejoinder — is not capable of justifying a failure by the French Republic to establish a procedure such as that laid down by the Court.

81. Furthermore, the draft notice, as mentioned in its title, concerns only additives in general foodstuffs. The notice, if it was adopted, therefore would not cover in any event additives in foodstuffs intended for special nutritional purposes, which are also the subject of these proceedings.

82. Finally, the French Government’s argument that it follows from case-law that the procedure is required only where the product in question is already permitted on the national export market and where an operator wishes to make a parallel import of a product identical or similar to one which is already permitted in the national territory concerned cannot be upheld.

83. That situation, as described by the French Government, is not the same as that in Commission v France, in which the Court specifically set out the requirement of an appropriate procedure. By contrast, the situation in that case, namely the addition of nitrate to cheese, is by its very nature almost identical to the problem in the present case.
84. Therefore if I suggest that it is necessary for all Member States to establish a procedure corresponding to the criteria set out by the Court, I will not employ the expression ‘simplified procedure’ used by the Commission, but which is not mentioned in the Court’s judgments.

85. In paragraph 31 of the reasoned opinion, the Commission stated that it considers that the expression means that, in the case of foodstuffs which have already been put on sale in another Member State in compliance with that State’s legislation, ‘it is not necessary that the product should still be subject to the full procedure, including the successive opinions of the CSHPF and the Académie Nationale de Médecine.’

86. Although I agree that for products lawfully put on the market in another Member State the competent authorities must begin by ‘taking that fact into account’ and enquire whether there is still room for doubt as to the innocuousness of the substance in question, it is possible that such doubts remain, or that the possible effects of the substance have not been the subject of any analysis in the country of manufacture of the foodstuff, or even that in that country there is no legislation on the matter and no relevant procedure.

87. The authorities in the importing country cannot therefore in principle be prohibited from requesting scientific opinions which they consider to be necessary.

88. That said, it follows from the foregoing arguments that the French Republic has failed to fulfil its obligations under Article 30 of the Treaty, by not having provided for a procedure which is readily accessible, can be completed within a reasonable time and is capable of being challenged before the courts if it has led to a refusal, with a view to having additives included on the list laid down by national legislation, as is required for marketing in France general foodstuffs and foodstuffs intended for special nutritional purposes which are lawfully manufactured and/or marketed in other Member States of the European Community but contain those substances.

89. In the third plea, the Commission alleges that the French Republic has impeded the marketing in France of the foodstuffs which are the subject of this action for failure to fulfil obligations with-
out establishing that they pose a danger to public health.

90. The Commission submits that it is the responsibility of the French authorities, in each case where authorisation to market a product from another Member State is refused, to set out the risks posed to public health. The Commission considers that, in several specific cases, the French authorities’ refusal to authorise marketing was not based on a demonstration of the existence of risks to public health.

91. The Commission recognises that consumer protection and efforts to curb misleading practices amount to an overriding requirement which merits protection. None the less, the Court has established that labelling suffices to ensure such protection.

92. Finally, in the reply, the Commission submits that ‘neither the Decree of 15 April 1912 nor that of 29 August 1991 makes the innocuousness of a substance a condition which must be satisfied in order for that substance to be entered on the positive lists.’ The Commission infers from this that the French authorities need not show that the products placed on the market are dangerous to health.

93. According to the French Government, its authorities seek, as required by the Commission, to establish in each case, by examining the specific features of each foodstuff fortified with additives, that the prohibition which they are adopting is a measure necessary to protect public health effectively. The risk to health is direct for some of the substances in question, such as amino acids derived from bovine protein. Failure to supervise intake of those substances involves, in addition, a risk to health which varies according to the basic diet of the population. The French Government states that the CSHPF refers expressly in its Opinions to the particular circumstances of the specific case and that it is automatically consulted.

94. As regards the Commission’s argument that the French authorities have not relied on any genuine reasons based on public health for not permitting the marketing of products from another Member State, the French Government notes that the effectiveness of the product or of the additive is also taken into account by numerous Community directives which target public health. It adds that the criteria of effectiveness and fairness allow national measures to be justified in terms of the overriding requirements recognised by the Court as being in respect of public health under Article 36 of the Treaty. In its opinion, the Commission has therefore failed to fulfil its obligation to prove that the disputed legislation does not serve aims of public health and/or consumer protection.
95. The question is whether the Commission has proved, as is incumbent upon it, the allegation that the French Republic has failed to fulfil its obligations.

96. On that point, the Commission refers to several specific cases which, in its view, demonstrate the failure to fulfil obligations. Those cases should therefore be considered. Three of them have been discussed in sufficient detail during the present proceedings.

97. The Commission refers, first of all, to the Opinion of the CSHPF of 12 July 1994 relating to the use of L-tartrate and L-carnitine in food supplements and dietary products.

98. In that Opinion, one finds in particular the following information:

- "to stimulate the metabolism of persons lacking in energy";
- "tiredness", and especially, circumstances where there may be a "reduction in the pool of carnitine in the body, such as an unbalanced diet, a drop in carnitine synthesis or intense physical exercise";
- "facilitation of lipid metabolism, in particular in sportsmen".

No proof of those extremely vague allegations is provided. The actual concept of a reduction in carnitine reserves after physical exercise is debatable: in that circumstance, the free muscular carnitine in fact decreases, the esterified carnitine increases but the total reserve of muscular carnitine does not alter.

99. According to the Commission, the Opinion merely considers the truthfulness of the allegations relating to the properties of the product, and its usefulness, but without considering whether it presents a risk to public health.

100. The French Government does not challenge that but considers that 'the effectiveness of the product or the substance is taken into account in the numerous directives which target public health' and,

referring to 'Cassis de Dijon', points out that 'consumer protection is one of the overriding requirements added to the list of exceptions laid down in Article 30 EC'.

101. As a preliminary matter, it is useful to note the judgment in Rombi and Arkopharma, in which the Court ruled that, 'in the absence, first, of Community rules on the authorisation of additives in general in foodstuffs intended for particular nutritional uses, and in particular on L-carnitine, and, second, of rules on the composition of such foodstuffs, Community law does not preclude national legislation on additives authorised in the manufacture of this type of foodstuff such as the legislation at issue in the main proceedings'.

102. Finally, as suggested by the French Government, reference should be made to 'Cassis de Dijon', cited above, in which the Court ruled that 'obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to... the defence of the consumer'.

103. I consider that consumer protection is in fact at stake where there is no proof, as it follows from the above Opinion, the content of which has not in any case been challenged by the Commission, that a substance has the effect that it is stated to have.

104. The Commission's argument that labelling is in such a case a measure less disproportionate than prohibition does not persuade me, since I do not see what information it would involve disclosing. Would a product surrounded in publicity drawing attention to the fact that it stimulates the metabolism of persons lacking in energy still be marketable if it carried the label: 'Caution, it is not proved that this product stimulates your metabolism'?

105. I therefore consider that the Commission has not proved that there is a failure to fulfil obligations in those circumstances.

19 — The author's italics.
20 — Paragraph 8.
106. The Commission then refers to two other Opinions of the CSHPF of 10 September 1996, one relating to sweets and drinks fortified with vitamins, and the other to so-called ‘energy’ drinks.

107. In the Opinion on energy drinks, it is stated as follows:

The [CSHPF] is concerned about current distribution and advertising of so-called “energy” drinks presented as drinks for general consumption. Whilst there is no standard toxicology argument to put forward against that kind of product, the risks must be made clear:

— of exceeding the safe limit for a certain number of vitamins. That risk is particularly important because other products, for example sweets, are also fortified,

— risks linked to excess consumption of caffeine: cardiovascular (cardiac arrhythmia, increase in blood pressure), neuropsychological (hyperkinesis, aggression, insomnia, source of sedative consumption), risks related to phosphorous and calcium metabolism (loss of calcium).

In addition to those considerations there is deceptive advertising, based on misleading allegations since these are not strictly speaking energy drinks but products containing a stimulant, caffeine, and a so-called protective substance (taurine, glucuronic acid). Yet no current study has provided evidence to demonstrate the existence of the so-called protective effect. Furthermore, those substances are not yet authorised in food.

The [CSHPF] considers that that kind of drink must not be authorised for the following reasons:

— excessive concentration of caffeine (300 mg/l), higher than that authorised (150 mg/l),

— risk of excessive consumption of caffeine in particular for pregnant women,

— untrue claim as to the “energising” nature of the product,

— risk of a positive anti-drugs test for sportsmen.
The [CSHPF] considers that the maximum level of caffeine in drinks must not exceed 150 mg/l in drinks and notes that caffeine consumption should not exceed 200 mg/day.

108. It appears beyond question that by listing the specific risks linked to excess consumption of caffeine the CSHPF, as a scientific authority, has shown that the drinks in question present public health problems. The same applies where it states that that kind of drink contains an ‘excessive concentration of caffeine (300 mg/l), greater than that authorised (150 mg/l)’.

109. As regards that limit, one cannot deny that the French Republic has the power to set it, given the fact that, ‘in the absence of harmonising rules, it is for the Member States to decide on the level of protection of human health and life they wish to ensure’. 21

110. In addition, the Commission does not put forward any scientific or other evidence capable of undermining the analysis of the French authorities in relation to the dangers posed by the drinks in question to public health. On the contrary, it follows from information supplied by the French Republic and which has not been challenged by the Commission that the latter received on 21 January 1999 from the Comité Scientifique de l’Alimentation Humaine an Opinion adverse to the presence of certain additives in energy drinks.

111. In so far as the Opinion refers, at the same time, to the ‘untrue claim as to the “energising” nature of the product’, it takes account, in my opinion, of the criterion of consumer protection which is justified in the light of ‘Cassis de Dijon’, as I have set out above.

112. Although ‘the principle of proportionality which underlies the last sentence of Article 36 of the Treaty requires that the power of the Member States to prohibit imports of products from other Member States should be restricted to what is necessary to achieve the objectives of protection being legitimately pursued’, 22 I am not convinced that it follows from this that the French Republic was not entitled to prohibit the drinks in question, but that it could, for example, merely require a particular type of labelling.


22 — Harpegnies, paragraph 34.
113. It does not appear to me to be disproportionate for a Member State to prohibit a product in which the concentration of one of the substances, in the present case caffeine, exceeds by 100% the concentration which that Member State has authorised under its powers to set the standard for public health protection.

114. I am therefore of the opinion that the Commission has not proved that the French Republic has failed to fulfil its obligations in the present case.

115. As regards the Opinion on sweets and drinks fortified with vitamins, the following is stated in particular:

'3. The French population is at risk of an excessive intake of a certain number of vitamins for a minimal, but significant proportion of its distribution.'

4. The distribution of that kind of product may lead to the overstepping of safe limits for intake of certain vitamins. It is important to consider that an individual might be encouraged to consume numerous products fortified with vitamins in addition to their normal intake: extra vitamins in a product must not exceed even a small proportion of the RDA for each 100 Kcal.'

116. In that context, the French Government draws our attention to the Opinion of the CSHPF of 12 September 1995 'on safe limits in food for vitamins and certain minerals'. The preamble to that Opinion indicates that the CSHPF set the safe limits for daily consumption of vitamins and minerals on the basis of 'bibliographical reviews and reports presented to the [CSHPF] on medical publications of the observations of secondary effects in man linked to the consumption of vitamins and minerals below,... the food toxicology rules,... the recommendations by French nutritional experts... [and] studies carried out in France to date'.

117. Having regard to Harpegnies, it cannot be denied that the French Republic has the power to set those safe limits and to ensure that those limits are not exceeded.

118. Moreover, the Commission does not show that it would have been more proportionate to the aim pursued — the protection of health — to label sweets and drinks fortified with vitamins instead of
prohibiting them. If the danger of exceeding the safe limits adopted by the Member State is real and significant, as can be inferred from the Opinion in question, that Member State must be able to prohibit the products in question.

119. On that point, it is instructive to revisit certain passages of the judgment of 30 November 1983 in Van Bennekom, in which the Court shared the concerns in relation to health standards linked to excessive consumption of vitamins:

'36 As the Court has had occasion to affirm in its judgment of 14 July 1983 (Officier Van Justitie v Sandoz, Case 174/82, [1983] ECR 2445), the excessive consumption of vitamins over a prolonged period may have harmful effects, the extent of which varies according to the type of vitamin, there being generally a greater risk with vitamins soluble in fat than with those soluble in water. It is further apparent that it is principally in high concentrations that vitamins constitute a serious risk to health. According to the observations submitted to the Court, however, scientific research does not appear to be sufficiently advanced to be able to determine with certainty the critical quantities and the precise effects.

37 In a consistent line of decisions the Court has stated that, in so far as uncertainties persist in the present state of scientific research, it is for the Member States, in the absence of harmonisation, to decide what degree of protection of health and life of humans they intend to ensure, having regard however to the requirements of the free movement of goods within the Community.

38 Those principles also apply to substances such as vitamins which are not as a general rule harmful in themselves but may have special harmful effects if taken to excess....'

120. The Commission has produced nothing to show that the concerns expressed in 1983 are no longer scientifically valid today.

121. I am therefore of the opinion that, in the case of vitamin-fortified sweets and drinks also, the Commission has not proved to the requisite legal standard that the French Republic has failed to fulfil its obligations under Article 30 of the Treaty.
122. Finally, in the reply, the Commission also alleges that the French legislation does not require the competent authorities to establish in each case and for each product that the prohibition which they adopt is a measure necessary for the protection of public health. Neither of the two decrees in question makes the innocuousness of a substance a condition which must be satisfied for that substance to be included on the lists of permitted substances. The procedure provided for by those provisions seeks to make the use of the substances at issue ‘legitimate’ without specifying any criteria, or defining what a legitimate product is. In no case is the ‘legitimate’ nature based on the innocuousness of the product in question. Consequently, the supervising authorities are not required to show that the products put on the market are dangerous to health and may confine themselves to relying on their ‘adulterated’ nature within the meaning of the Consumer Code.

123. I consider that the Commission’s plea is unfounded. As pointed out by the French Government, under the procedure provided for by the Decrees of 15 April 1912 and 29 August 1991 the substances are authorised by order after an opinion has been obtained from ‘the scientific authorities’. That means the CSHPF, whose role was taken over after the Law of 98-585 of 1 July 1998 by the Agence Française de Sécurité des Aliments, and the Académie Nationale de Médecine. The role of those authorities is specifically to assess the innocuousness of new substances for which authorisations for use are sought.

124. The Commission’s reply is ‘that the CSHPF is not automatically consulted. Where traders... forgo the procedure under the Decrees of 1912 and 1991, the legal proceedings to which they are subject are based on a simple statement of “adulteration” and not on a scientific analysis of the danger which could be presented by their products’.

125. I consider that, where foodstuffs containing a prohibited substance not permitted in France are put directly on the market without application having been made for the substance to be entered on the positive list, it is only normal for legal proceedings to be brought immediately by the competent authorities without their having to prove at the outset that the substance is harmful. Otherwise, the whole system of lists of permitted substances would be undermined.

126. It should be noted, finally, that it was concluded above that a Member State may also prohibit the marketing of a foodstuff where it is not an immediate danger to health, but where it is presented in such a way as to make the consumer believe that it has a beneficial effect which, in reality, it has not.
127. Lastly, the parties have also debated the question of whether the mere absence of nutritional value may also be a criterion justifying restriction of free movement.

128. I consider that the discussion is no longer relevant since, in my opinion, the French Republic has proved that the marketing of the products in question posed a risk to public health and/or to consumer protection.

129. In any event, the absence of nutritional value appears, in the light of the Court's case-law, also to be a criterion which may justify restricting free movement. In the judgment of 16 July 1992 in Commission v France, the Court ruled that 'an application to have an additive included on the list in question may be rejected by the competent administrative authorities only if the additive does not meet any genuine need, in particular a technological need, or presents a danger to public health'.

130. In summary, the Court accepts that Member States have the right to determine the standard of protection which they wish to ensure in the areas in which harmonisation has not occurred, which means necessarily that they may consider that there is a risk where other Member States do not or are not concerned even to analyse the effect of a given substance.

131. It also means that a Member State is not required to prove with complete certainty the existence of a serious risk. It is sufficient that it sets out specific plausible arguments to show that the protection of public health or consumer protection are in fact put at risk. I consider that the French Republic has accomplished that task and that the Commission has not put forward sufficient evidence to prove otherwise.

132. Therefore, I have reached the conclusion that the Commission's third plea, that the French authorities 'have impeded the marketing of the above foodstuffs in France without establishing that they would pose a danger to health', must be dismissed.

24 — The author's italics.
25 — Paragraph 10.
133. It follows from the foregoing arguments that, in my opinion, notwithstanding the fact that the French Republic has been unsuccessful on one of its three heads of claim, the Commission has been unsuccessful in its main submissions. Therefore, I suggest that on the basis of Article 69(3) of the Rules of Procedure each party should be ordered to pay its own costs.

IV — Conclusion

134. I propose that the Court should:

— find that the French Republic has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC) by not having provided for a procedure which is readily accessible, can be completed within a reasonable time and is capable of being challenged before the courts, if it leads to a refusal, for the purpose of having an additive entered on the list provided for by national legislation, which is necessary for marketing in France general foodstuffs and foodstuffs intended for special nutritional purposes, which are lawfully manufactured and/or marketed in other Member States of the European Community and which contain those substances;

— dismiss the remainder of the action;

— order each party to pay its own costs.