

JUDGMENT OF THE COURT

5 May 1998 <sup>\*</sup>

In Case C-180/96,

**United Kingdom of Great Britain and Northern Ireland**, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, assisted by Sir Nicholas Lyell QC, Paul Lasok QC and David Anderson, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

applicant,

v

**Commission of the European Communities**, represented by Dierk Boofß, Principal Legal Adviser, and James Macdonald Flett, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

**Council of the European Union**, represented by Arthur Brautigam and Moyra Sims, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

intervener,

<sup>\*</sup> Language of the case: English.

APPLICATION for annulment of Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy (OJ 1996 L 78, p. 47) and of certain other acts of the Commission,

## THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm, M. Wathelet, R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón (Rapporteur), Judges,

Advocate General: G. Tesauro,  
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 30 September 1997,

gives the following

## Judgment

- 1 By application lodged at the Court Registry on 24 May 1996, the United Kingdom brought an action under Article 173 of the EC Treaty for annulment of Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy (OJ 1996 L 78, p. 47, hereinafter 'the contested decision') and of certain other acts of the Commission.

2 By a separate document of the same date, it also applied for suspension of the operation of the contested decision and/or certain interim measures. That application was dismissed by order of the Court of 12 July 1996 in Case C-180/96 R *United Kingdom v Commission* [1996] ECR I-3903.

3 By order of the President of the Court of 12 September 1996, the Council was given leave to intervene in support of the form of order sought by the Commission.

4 According to the documents before the Court, bovine spongiform encephalopathy ('BSE'), or 'mad cow disease', was first detected in the United Kingdom in 1986. It is one of a group of diseases known as transmissible spongiform encephalopathies, which are characterised by brain degeneration with a sponge-like appearance of the nerve cells under microscopic analysis. Those diseases may affect both humans (kuru, in New Guinea, and Creutzfeldt-Jakob disease, which generally affects older people) and various animal species, including cattle, sheep (scrapie), domestic cats and farmed mink.

5 The probable origin of BSE is thought to have been a change in the method of preparing cattle feed containing proteins derived from carcasses of sheep affected by scrapie. There is an incubation period lasting several years, during which the disease cannot be detected in living animals.

6 In order to combat BSE, the United Kingdom has adopted a number of measures since July 1988, including a ban on the sale of feed for ruminants containing proteins derived from ruminants and on the feeding of ruminants with such feed (the 'ruminant feed ban' contained in the Bovine Spongiform Encephalopathy Order 1988, SI 1988/1039, as subsequently amended). Since the supposed origin of the disease was the ingestion of contaminated feed, scientists believed that such a ban should prevent any new case of BSE in animals born after it came into effect.

- 7 The United Kingdom has also taken a number of measures to reduce hazards to human health, including a ban on the sale or use of specified bovine offal, presumed to contain the infection (The Bovine Offal (Prohibition) Regulations 1989, SI 1989/2061, as subsequently amended). Banned parts include, in particular, the head and the spinal cord.
- 8 The Commission, too, has adopted a number of decisions relating to BSE in the United Kingdom, including Commission Decision 90/200/EEC of 9 April 1990 concerning additional requirements for some tissues and organs with respect to bovine spongiform encephalopathy (OJ 1990 L 105, p. 24), replaced by Commission Decision 94/474/EC of 27 July 1994 concerning certain protection measures relating to bovine spongiform encephalopathy and repealing Decisions 89/469/EEC and 90/200/EEC (OJ 1994 L 194, p. 96), itself amended by Commission Decision 95/287/EC of 18 July 1995 (OJ 1995 L 181, p. 40). Those measures concern the removal from bovine meat of tissue likely to contain the infective agent and the feeding of ruminants. In addition, Commission Decision 92/290/EEC of 14 May 1992 concerning certain protection measures relating to bovine embryos in respect of bovine spongiform encephalopathy (BSE) in the United Kingdom (OJ 1992 L 152, p. 37) imposed very strict conditions on the export of embryos.
- 9 In a statement dated 20 March 1996, the Spongiform Encephalopathy Advisory Committee ('SEAC'), an independent scientific body which advises the United Kingdom Government, referred to 10 cases of a variant of Creutzfeldt-Jakob disease identified in people aged under 42. It stated: 'Although there is no direct evidence of a link, on current data and in the absence of any credible alternative the most likely explanation at present is that these cases are linked to exposure to BSE before the introduction of the [specified bovine offal] ban in 1989. This is cause for great concern.'

- 10 In the same document, SEAC emphasised that it was imperative that the current measures to protect public health should be properly enforced and recommended constant supervision to ensure the complete removal of spinal cord. It further recommended a requirement that carcasses from cattle aged over 30 months be deboned in approved establishments supervised by the Meat Hygiene Service and that trimmings be classified as specified bovine offal, together with a prohibition on the use of mammalian-derived meat meal and bone meal in feed for all farm animals.
- 11 On the same day, the Minister of Agriculture, Fisheries and Food took the decision to prohibit the sale or supply of mammalian-derived meat meal and bone meal or its use in feed for any livestock, including poultry, horses and farmed fish, and to prohibit the sale of meat from bovine animals over 30 months old for human consumption.
- 12 At the same time, a number of Member States and third countries took measures banning imports of cattle or beef and veal from the United Kingdom or, in the case of some third countries, from the European Union.
- 13 On 22 March 1996, the Scientific Veterinary Committee of the European Union concluded that, on the available data, it was not possible to prove that BSE was transmissible to humans. However, in view of the possibility of such transmissibility, which the Committee had always considered, it recommended that the measures recently adopted by the United Kingdom concerning the deboning of carcasses from cattle aged over 30 months in approved establishments should be implemented for intra-Community trade and that the Community should adopt appropriate measures as regards the ban on the use of meat meal and bone meal in animal feed. The Committee further considered that any contact of spinal cord

tissue with fat, bone and meat must be excluded, failing which the carcass should be treated as specified bovine offal. Finally, the Committee recommended that research on the question of transmissibility of BSE to humans be continued. Annexed to that opinion was the following statement by one of the members of the Committee: 'On the basis of the limited scientific data, which are only based on the evaluation carried out with material from nine cattle, we cannot be confident indeed that muscle meat from cattle does not constitute a danger for transmission of BSE infection.'

- 14 On 24 March 1996 SEAC confirmed its previous recommendations: that carcasses be deboned in licensed plants; that trimmings comprising nervous and lymphatic tissue, the vertebral column and the head (with the exception of the tongue, provided that it is removed without contamination) be treated as specified bovine offal; and that the use of mammalian-derived meat meal and bone meal be prohibited in feed for ruminants or farmed animals (including fish and horses) or even as fertiliser on land to which ruminants have access. SEAC stressed, however, that it was not in a position to confirm whether or not there was a causal link between BSE and the recently discovered variant of Creutzfeldt-Jakob disease, a question which required further scientific research.
- 15 On 27 March 1996 the Commission adopted the contested decision, which is based on the EC Treaty, on Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29), as amended by Council Directive 92/118/EEC of 17 December 1992 laying down animal health and public health requirements governing trade in and imports into the Community of products not subject to the said requirements laid down in specific Community rules referred to in Annex A (I) to Directive 89/662/EEC and, as regards pathogens, to Directive 90/425/EEC (OJ 1993 L 62, p. 49), in particular Article 10(4) thereof, and on Council Directive 89/662/EEC of

11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13), as amended by Directive 92/118, in particular Article 9 thereof.

- 16 The first subparagraph of Article 10(1) and Article 10(4) of Directive 90/425 provide as follows:

‘1. Each Member State shall immediately notify the other Member States and the Commission of any outbreak in its territory, in addition to an outbreak of diseases referred to in Directive 82/894/EEC, of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health.

...

4. The Commission shall in all cases review the situation in the Standing Veterinary Committee at the earliest opportunity. It shall adopt the necessary measures for the animals and products referred to in Article 1 and, if the situation so requires, for the products derived from those animals, in accordance with the procedure laid down in Article 17. The Commission shall monitor the situation and, by the same procedure, shall amend or repeal the decisions taken, depending on how the situation develops.’

- 17 Article 1 of Directive 90/425 refers to live animals and products which are covered by the directives listed in Annex A and those referred to in the first paragraph of Article 21, that is to say, the products listed in Annex B to that directive.

- 18 The first subparagraph of Article 9(1) and Article 9(4) of Directive 89/662 provide as follows:

‘1. Each Member State shall immediately notify the other Member States and the Commission of any outbreak in its territory, other than an outbreak of diseases referred to in Directive 82/894/EEC, of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health.

...

4. The Commission shall in all cases review the situation in the Standing Veterinary Committee at the earliest opportunity. It shall adopt the necessary measures for the products referred to in Article 1 and, if the situation so requires, for the originating products or products derived from those products in accordance with the procedure laid down in Article 17. The Commission shall monitor the situation and, by the same procedure, shall amend or repeal the decisions taken, depending on how the situation develops.’

- 19 Article 1 of Directive 89/662 refers to products of animal origin which are covered by the directives listed in Annex A and those referred to in Article 14, that is to say, the products listed in Annex B to that directive.

- 20 The preamble to the contested decision refers to the publication of new scientific information, the announcement of additional measures taken by the United Kingdom Government (deboning of carcasses of bovine animals over 30 months of age in approved establishments supervised by the Meat Hygiene Service, classification of trimmings as specified bovine offal and prohibition of the use of mammalian-derived bone meal in feed for all farm animals), the measures banning imports



adopted by various Member States and the opinion of the Scientific Veterinary Committee. The fifth, sixth and seventh recitals read as follows:

‘Whereas, under current circumstances, a definitive stance on the transmissibility of BSE to humans is not possible; whereas a risk of transmission cannot be excluded; whereas the resulting uncertainty has created serious concern among consumers; whereas under the circumstances and as an emergency measure, the transport of all bovine animals and all beef and veal or derived products from the United Kingdom to the other Member States should be temporarily banned; whereas the same prohibitions should also apply to exports to non-Member countries so as to prevent deflections of trade;

Whereas the Commission will carry out in the coming weeks a Community inspection in the United Kingdom to evaluate the application of the measures taken; whereas the significance of the new information and the measures to be taken must be subjected to detailed scientific study;

Whereas this decision must therefore be reviewed once all the above elements have been examined’.

21 Article 1 of the contested decision provides as follows:

‘Pending an overall examination of the situation and Community provisions adopted to protect against bovine spongiform encephalopathy notwithstanding, the United Kingdom shall not export from its territory to the other Member States or third countries:

- live bovine animals, their semen and embryos,
- meat of bovine animals slaughtered in the United Kingdom,

- products obtained from bovine animals slaughtered in the United Kingdom which are liable to enter the animal feed or human food chain, and materials destined for use in medicinal products, cosmetics or pharmaceutical products,
- mammalian-derived meat [meal] and bone-meal.’

22 Under Article 3 of the contested decision, the United Kingdom is to send the Commission every two weeks a report on the application of the protective measures taken against BSE and, under Article 4, is invited to ‘present further proposals to control bovine spongiform encephalopathy in the United Kingdom’.

23 The United Kingdom seeks, primarily, annulment of the contested decision of the Commission, and in the alternative annulment of Article 1 of that decision in so far as it applies to: (a) live bovine animals permitted to be exported from the United Kingdom by Decision 94/474; and/or (b) the semen and/or embryos of live bovine animals; and/or (c) meat of bovine animals less than 30 months old slaughtered in the United Kingdom or meat from bovine animals certified to come from herds that have not experienced any case of BSE and have not been exposed to any actual or potential source of feed contaminated with the BSE agent; and/or (d) products obtained from bovine animals slaughtered in the United Kingdom which are liable to enter the animal feed or human food chain and materials destined for use in medicinal products, cosmetics or pharmaceutical products; and/or (e) gelatin and/or tallow; and/or (f) exports to third countries (save to the extent that there is a real risk of deflection of trade, where appropriate). It also seeks annulment of each of the other contested acts and an order requiring the Commission to pay the costs.

24 The Commission and the Council seek to have the action dismissed and the United Kingdom ordered to pay the costs.

**The admissibility of the action in so far as it concerns the ‘other contested acts’**

25 The United Kingdom seeks annulment not only of the contested decision but also of various statements of position made by the Commission, namely its announcement of 10 April 1996 that it did not intend to lift the ban, the statement made on 13 April 1996 by Commissioner Fischler, in which he announced that the lifting of the export ban depended on ‘how quickly Britain could put in place measures to ensure that cattle potentially infected with BSE were removed from the food chain’, and the Commission’s announcement of 8 May 1996 that it would propose the lifting of the export ban in respect of certain products, which implied that the ban was not to be lifted with regard to the other products. According to the United Kingdom, those statements of position are challengeable in proceedings under Article 173 of the Treaty because they constitute, or reveal, the exercise by the Commission of actual or claimed powers under Directives 90/425 and 89/662. Furthermore, in a situation in which the Commission is under a continuing obligation to keep matters under review, such statements of position constitute acts which may be contested under Article 173 of the Treaty, since they do not merely confirm a decision taken previously but are separate acts adopted by the Commission in the exercise of its powers, producing legal effects so far as the person affected by the existing state of affairs is concerned.

26 The Commission, on the other hand, considers that those events do not constitute challengeable acts within the meaning of Article 173 of the Treaty, since they have no legal effect on the position in the United Kingdom. If, at a given moment, the United Kingdom considered that the established facts imposed an obligation on the Commission to act, it was open to it to bring an action under the procedure laid down in Article 175 of the EC Treaty.

27 It is settled case-law that, in order for an act of the Council or the Commission to form the subject-matter of an action for annulment, it must be intended to have legal effects (Case 114/86 *United Kingdom v Commission* [1988] ECR 5289, paragraph 12).

- 28 That is not the position in the case of an act of the Commission which reflects its intention, or that of one of its departments, to follow a particular line of conduct (*United Kingdom v Commission*, cited above, paragraph 13) or which merely confirms a previous act in such a way that annulment of the confirmatory act would follow from annulment of the previous act (Case 26/76 *Metro v Commission* [1977] ECR 1875, paragraph 4).
- 29 The statements of position by the Commission against which the United Kingdom's action is directed were mere declarations of intent which had no legal effect and which, moreover, merely reflected an intention to confirm the contested decision.
- 30 It follows that the United Kingdom's action is not admissible in so far as it is directed against the Commission's statements of position of 10 April, 13 April and 8 May 1996.

## Substance

- 31 The United Kingdom advances numerous pleas in law in support of its application for annulment of the contested decision. The first three pleas allege, first, failure by the Commission to observe the limits placed on the powers conferred on it by Directives 90/425 and 89/662, second, disregard of the principle of the free movement of goods and, third, misuse of powers. By its fourth plea, the United Kingdom alleges failure to state reasons for the contested decision. The United Kingdom pleads, fifth, breach of the principle of proportionality, sixth, infringement of Articles 6 and 40(3) of the EC Treaty and, seventh, infringement of Article 39(1) of that Treaty. By its eighth plea, it alleges that the third indent of Article 1 of the contested decision is defective, in particular because it fails to respect the principle of legal certainty. The ninth plea alleges that Directives 90/425 and 89/662 are illegal, in that they are founded on an inappropriate legal basis, namely Article 43 of the EC Treaty.

*The first three pleas in law, alleging failure to observe the conditions governing the exercise by the Commission of its powers, breach of the principle of the free movement of goods and misuse of powers*

- 32 The United Kingdom denies that there has been an ‘outbreak’ of any ‘zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health’ within the meaning of Article 10(1) of Directive 90/425 and Article 9(1) of Directive 89/662, which empower the Commission to adopt the contested decision as a safeguard measure in accordance with Articles 10(4) and 9(4) respectively. According to the United Kingdom Government, BSE was in existence several years before the adoption of the contested decision and was already the subject of measures taken by the United Kingdom and the Commission. Nor was the contested decision justified by any information suggesting that the measures already taken against BSE were ineffective or by information pointing to a threat which had not already been considered (since the measures previously taken were already based on the assumption that BSE was a zoonosis). The idea that BSE could be transmitted from one animal to another was based solely on conjecture. The risk to human health (if any) did not justify the contested decision since it was negligible, having regard to the measures already adopted, or related to the period before steps to control BSE had been taken.
- 33 The United Kingdom submits that, since the powers conferred on the Commission by Directives 90/425 and 89/662 must be exercised with a view, in particular, to establishing and maintaining the internal market, the Commission is not empowered to prohibit exports to third countries. As regards the risk of re-importation of the products, the United Kingdom argues that the existence of Community legislation applicable to imports into the Community renders it unnecessary — and, indeed, contrary to principle — to interpret the Community legislation relating to intra-Community trade in such a way as to make it applicable also to imports into the Community. The United Kingdom further states that third countries have their own priorities and their own health and safety standards, which are often based on recognised international standards.
- 34 The powers conferred by Directives 90/425 and 89/662 must also be exercised with a view to protecting public and animal health. The United Kingdom infers from

that reference to Article 36 of the EC Treaty and from the wording of Directives 90/425 and 89/662 that the grounds which may be relied on in order to justify an obstacle to the free movement of goods are limited. Economic reasons are not enough to authorise the Commission to act.

35 Lastly, the United Kingdom maintains that there was a misuse of powers inasmuch as the Commission exercised the power conferred on it by Directives 90/425 and 89/662 for purposes other than those provided for by the directives in question. In particular, it is apparent from the fifth recital in the preamble to the contested decision and from the statements made by the Commission at the time of its adoption that it was presented as an economic measure aimed at stabilising the situation, reassuring consumers and safeguarding the beef industry.

36 The Commission states in reply that, although BSE already existed, the SEAC announcements reclassified the disease: it was no longer regarded merely as affecting cattle, but as a hazard to human health. The new information modified the risk assessment and justified the Commission's intervention pursuant to Directives 90/425 and 89/662. The Commission further emphasises that there is nothing to suggest that the new cases of Creutzfeldt-Jakob disease resulted from exposure prior to the ban on specified bovine offal; on the contrary, SEAC recommended that additional steps be taken. Moreover, infected feed is not necessarily the main route of transmission. Finally, the 1988 feed ban had taken a long time to become effective, the 1989 specified bovine offal ban was ineffective and the bovine control system was inadequate since over 11 000 cases of BSE had never been traced to their herd of origin.

37 With regard to the measures which it was empowered to adopt under Directives 90/425 and 89/662, the Commission observes, first, that in matters concerning the common agricultural policy the Community legislature has a broad discretion. The Council may be prompted to confer on the Commission wide implementing powers, since the Commission alone is able continually and closely to monitor trends on the agricultural markets and to act with urgency if the situation so requires. Such powers are all the more justified when they are to be exercised in accordance

with a procedure which allows the Council to reserve its right to intervene. Finally, Article 10(4) of Directive 90/425 and Article 9(4) of Directive 89/662 are drafted in very wide terms and empower the Commission to act 'in all cases' and to adopt 'the necessary measures'. In so far as it imposes a ban on the movement of animals and products outside a specified area of the Community, that is to say, a containment measure, the contested decision is appropriate.

38 The Commission further considers that the applicant is seeking to draw an artificial distinction between public health and the proper operation of the internal market. Considered in the long term, the measures taken were necessary in order to fulfil the aims of Directives 90/425 and 89/662, namely the protection of public and animal health in the context of the proper operation of the internal market.

39 Next, it submits that a careful reading of Article 10(4) of Directive 90/425 and Article 9(4) of Directive 89/662 reveals no provision which precludes it from taking such measures as may be necessary in relation to third countries. Given the urgency of the situation and the fact that BSE was essentially a problem in the United Kingdom, it would clearly have been inappropriate and ineffective to seek to use legislation relating to animals and products from third countries, since that would have necessitated the amendment of the directives relating to imports into the Community or negotiations with third countries.

40 Rejecting the allegation of misuse of powers, the Commission observes that the reasons for the contested decision are clear from the recitals in its preamble and are perfectly consistent with the measures adopted. It maintains that the fifth recital must be considered as a whole, and not merely with reference to the phrase relating to consumer concern.

- 41 The Council states that Directives 90/425 and 89/662 form part of a coherent and exhaustive body of law established in order to substitute a set of common rules for unilateral action on the part of each Member State pursuant to Article 36 of the Treaty. As regards the implementing powers conferred on the Commission, it follows from the context of the EC Treaty itself in which Articles 145 and 155 must be placed, and also from practical requirements, that the concept of implementation must be given a wide interpretation, particularly in the context of the common agricultural policy, and *a fortiori* in urgent cases. In circumstances such as those of the present case, the Council retains in any event a degree of control by virtue of the actual composition of the Standing Veterinary Committee, and may intervene pursuant to Procedure III(b) of the 'Comitology' decision (Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1987 L 197, p. 33).
- 42 The Council considers that, in the present case, the Commission based its decision on the best available technical and scientific advice, by means of the obligatory consultation of the Standing Veterinary Committee and also by exercising its option to consult the Scientific Veterinary Committee. In any event, the Commission could not have ignored the information made public by SEAC. In those circumstances, it did not make any manifest error in its initial assessment of the risk to either animal or human health.
- 43 According to the Council, the wording of Directives 90/425 and 89/662 relating to safeguard measures does not restrict the Commission's choice of measures, the method of dealing with the situation or the duration of the measures adopted. Containment measures are provided for by those directives and have, indeed, been the subject of decisions relating to foot-and-mouth disease and African horse sickness. BSE is different from those infectious diseases, but isolation measures were nevertheless justified having regard to the widespread nature of the disease throughout much of the territory of the United Kingdom coupled with the difficulties resulting from inadequate identification of the animals, inadequate controls on their movements and under-reporting prior to 1988.



- 44 The Council considers, therefore, that the emergency measures were correctly applied to Community exports to third countries. Article 43 of the Treaty constitutes an appropriate and sufficient legal basis in relation to trade in agricultural products with third countries and there is nothing in Directives 90/425 and 89/662 to warrant the conclusion that the Council has expressly limited the powers of the Commission under the safeguard clause by explicitly excluding exports to third countries. Moreover, public health requirements are indivisible and universal and it would have been indefensible to apply dual standards, depending on whether the products were destined for the Community or for third countries. In any event, the extension of an export ban to third countries was already justified for the sole reason of preventing deflections of trade.
- 45 According to the Council, the Commission's powers not only cover all the products defined in Directives 90/425 and 89/662 but also extend to originating and derived products which may not be specifically mentioned in those directives.
- 46 As regards the argument that there was a misuse of powers inasmuch as the decision was adopted to allay consumer concern, the Council submits that this draws a false distinction, and cites in that regard point 4 of the Opinion of Advocate General La Pergola in Case C-27/95 *Woodspring v Bakers of Nailsea* [1997] ECR I-1847, in which he states: 'The fact of having introduced an appropriate system of hygiene and health controls for meat also makes a decisive contribution to ensuring in the market-place confidence in the quality and healthiness of the product.'
- 47 In order to determine whether, in adopting the contested decision, the Commission was acting within the framework of the powers conferred on it by Directives 90/425 and 89/662, it is necessary to determine whether the conditions governing the adoption of safeguard measures in accordance with those directives were fulfilled, whether it was open to the Commission to ban exports, whether that ban could extend to third countries and, finally, whether the Commission acted with a view to achieving an objective other than that laid down, thereby misusing its powers.

- 48 Article 10(1) of Directive 90/425 and Article 9(1) of Directive 89/662 provide that the adoption of safeguard measures is permitted where there is an 'outbreak ... of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health'.
- 49 In the present case, it is necessary to determine in particular whether the announcements by SEAC that BSE was 'the most likely explanation' for the outbreak of the new variant of Creutzfeldt-Jakob disease justified the adoption of safeguard measures, given that BSE had already existed for a number of years, that measures had been adopted both by the United Kingdom and by the Community and that the risk which that disease posed to humans had already been taken into consideration.
- 50 According to Directives 90/425 and 89/662, the Commission's power to adopt safeguard measures is justified by the fact that a zoonosis, disease or other cause is likely to constitute a serious hazard.
- 51 The objective of Directives 90/425 and 89/662 is to enable the Commission to intervene rapidly in order to prevent the propagation of a disease affecting animals or a threat to human health. It would be contrary to that objective if the Commission were to be precluded from adopting the necessary measures in response to the publication of new information significantly altering what is known about a disease, particularly as regards its transmissibility or its consequences, on the ground that the disease had been in existence for a long time.
- 52 In the present case, the new information contained in the SEAC announcements was that a link between BSE and Creutzfeldt-Jakob disease had ceased to be a theoretical hypothesis and had become a possibility. According to 'the most likely explanation', the cases of Creutzfeldt-Jakob disease were linked to exposure to BSE before the introduction of the specified bovine offal ban in 1989.

- 53 Despite the fact that BSE previously existed, the new information provided by SEAC significantly altered the perception of the risk which that disease represented for human health, and thus authorised the Commission to adopt safeguard measures in accordance with Directives 90/425 and 89/662.
- 54 As regards the Commission's powers, Directives 90/425 and 89/662 are drafted in very wide terms, inasmuch as they authorise the Commission to adopt 'the necessary measures' for live animals, products derived from such animals, products of animal origin and products derived from those products, without imposing any restrictions as to the temporal or territorial scope of those measures.
- 55 It follows from the provisions of Directives 90/425 and 89/662 that only animals and products of animal origin which fulfil the conditions laid down by those directives may be the subject of trade. The authorities of the Member States of dispatch are required to check that those conditions are fulfilled before issuing export authorisations (Articles 3 and 4 of Directive 90/425 and Articles 3 and 4 of Directive 89/662).
- 56 Directives 90/425 and 89/662 provide that, in the event of discovery, at the place of destination of a consignment or during transport, of the presence of a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans, the competent authorities of the Member State of destination may order that the animal or consignment of animals be put in quarantine at the nearest quarantine station or slaughtered and/or destroyed (first subparagraph of Article 8(1)(a) of Directive 90/425) or that the batch of products of animal origin be destroyed or used in any other way laid down by Community rules (first subparagraph of Article 7(1)(a) of Directive 89/662).
- 57 Those provisions suffice to show that, in the event of a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans, the immobilisa-

tion of the animals and/or products and their containment within a specified territory constitutes an appropriate measure, since it may result from decisions taken by the authorities either of the Member State of export or of the Member State of import.

58 It is clear that, in order for such containment to be effective, it may in some cases be necessary to impose a total ban on the movement of animals and products outside the frontiers of the Member State concerned, thereby affecting exports to third countries.

59 It should be noted in that regard that Directives 90/425 and 89/662 do not expressly preclude the Commission from banning exports to third countries. Nor, as the Advocate General states in point 23 of his Opinion, can such a restriction be inferred from the fact that the directives in question refer to checks 'applicable in intra-Community trade', since the powers of the Commission are linked only to the need for the measures adopted in order to ensure the protection of health in a single market.

60 Lastly, it must be recalled that, since the Commission enjoys a wide measure of discretion, particularly as to the nature and extent of the measures which it adopts, the Community judicature must, when reviewing such measures, restrict itself to examining whether the exercise of such discretion is vitiated by a manifest error or a misuse of powers or whether the Commission did not clearly exceed the bounds of its discretion (Case 98/78 *Racke v Hauptzollamt Mainz* [1979] ECR 69, paragraph 5).

61 In the present case, the publication of new scientific information had established a probable link between a disease affecting cattle in the United Kingdom and a fatal disease affecting humans for which no known cure yet exists.

- 62 Having regard, first, to the uncertainty as to the adequacy and effectiveness of the measures previously adopted by the United Kingdom and the Community and, second, to the risks regarded as a serious hazard to public health (see paragraph 63 of the order of 12 July 1996 in Case C-180/96 R *United Kingdom v Commission*, cited above), the Commission did not clearly exceed the bounds of its discretion in seeking to contain the disease within the territory of the United Kingdom by banning the export from that territory to other Member States and to third countries of bovine animals, meat of bovine animals and derived products.
- 63 Although a measure of that kind affects the free movement of goods, it is not necessarily contrary to Community law, since it is adopted in accordance with directives the very aim of which is to ensure the free movement of agricultural products (see, to that effect, Case 37/83 *Rewe-Zentrale v Landwirtschaftskammer Rheinland* [1984] ECR 1229, paragraph 19), provided that it respects the general principles of Community law, in particular the principle of proportionality, which will be examined in the context of the fifth plea.
- 64 As regards the plea alleging misuse of powers, it must be recalled that misuse of powers is defined by settled case-law as the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see, in particular, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 69).
- 65 As the Advocate General states in point 21 of his Opinion, it would not be right, for the purposes of describing the objective of the contested decision, to isolate, from amongst all the recitals in the preamble to that decision, the phrase relating to concern among consumers.

- 66 Whilst the objective of a decision is to be determined by an analysis of the recitals in its preamble, that analysis must relate to the whole of the text, and not to a single element taken in isolation. In the present case, the recitals in the preamble to the contested decision, read as a whole, show that the Commission was prompted to adopt the provisional measures by concern as to the risk of transmissibility of BSE to humans, after examining the measures adopted by the United Kingdom and consulting the Scientific Veterinary Committee and the Standing Veterinary Committee.
- 67 Furthermore, none of the documents before the Court supports the argument that the Commission's exclusive or main purpose was of an economic nature rather than to protect health.
- 68 Consequently, the first three pleas, alleging failure to observe the conditions governing the exercise by the Commission of its powers, breach of the principle of the free movement of goods and misuse of powers, must be rejected.

*The fourth plea, alleging failure to state reasons*

- 69 The United Kingdom considers that, in breach of Article 190 of the EC Treaty, the contested decision fails to state reasons justifying the ban on exports, and, in particular, that it fails to explain the reasons for which the Commission considered that the measures previously adopted to protect human and animal health against BSE were inadequate or inappropriate.
- 70 Whilst it is true, as the Court has consistently held, that the statement of grounds required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the

measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Court to exercise its power of review, it is not necessary for details of all relevant factual and legal aspects to be given. The question whether the statement of the grounds for a decision meets the requirements of Article 190 must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision (see, in particular, Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraphs 15 and 16).

- 71 In the present case, it is apparent from the second recital in the preamble to the contested decision — which, it will be recalled, was adopted as an emergency measure — that the Commission gave as one of the reasons for that decision the fact that, as a result of the SEAC announcements, the United Kingdom had taken additional measures to protect consumers against BSE. That reference to the adoption of measures by the Member State with the greatest experience of BSE constituted in itself a sufficient statement of reasons for the decision by the Commission likewise to adopt additional measures.
- 72 The way in which the fifth recital in the preamble to the contested decision is worded, however, shows the need for the emergency measures still more clearly, in that it expressly refers to the risk of transmissibility of BSE to humans.
- 73 As regards the reasons for the ban on exports from the United Kingdom, it must be borne in mind that the contested decision was adopted in the context of the problems posed by BSE and that there was no longer any need to state the reasons for which the United Kingdom was particularly concerned. Moreover, the reasons for the export ban were sufficiently demonstrated by the uncertainty as to the risk, by the urgency and by the provisional nature of the measure; the prevention of deflections of trade was additionally stated as a reason for the application of that ban to exports to third countries (fifth recital).

74 There can be no doubt that that statement of grounds was sufficient to make the United Kingdom aware of the reasons for the measures adopted and to enable the Court to exercise its power of review with regard to the legality of those measures.

75 Consequently, the plea alleging failure to state reasons must be rejected.

*The fifth plea, alleging breach of the principle of proportionality*

76 In the context of its plea alleging breach of the principle of proportionality, the United Kingdom submits that the contested decision was inappropriate for the purpose of protecting public or animal health, since it had already adopted adequate measures which had also been taken at Community level and which had been shown to be effective by the sharp decline in the incidence of BSE in the United Kingdom.

77 Nor was there any need for the ban on exports of live animals. Since the adoption of Decision 94/474, the only live animals which could still be exported were cattle aged under six months born to females not known or suspected to be affected by BSE, that is to say, animals which would at no time have been fed on mammalian-derived meat meal and which would never have been exposed to sources of BSE.

78 The Scientific Veterinary Committee had already concluded that semen did not present a risk of transmission of BSE. In the case of embryos, a decision was already in existence prohibiting the export of embryos derived from female bovines born before 18 July 1988 and from females which were themselves the offspring of females in which BSE was suspected or had been confirmed.

79 As regards fresh meat, Article 4 of Decision 94/474, as amended by Decision 95/287, already prohibits the United Kingdom from sending to other Member States fresh meat other than: (i) meat derived from animals aged less than two and



a half years at slaughter; (ii) meat derived from bovines which, while in the United Kingdom, have resided only on holdings on which no case of BSE has been confirmed during the previous six years; or (iii) deboned meat from bovines aged over two and a half years at slaughter which have resided on a holding on which one or more cases of BSE have been confirmed during the previous six years and from which adherent tissues, including obvious nervous and lymphatic tissues, have been removed. There is no evidence to suggest that such measures were inappropriate and that it was necessary to take further measures. Moreover, independent research has shown that muscle meat, even from clinically affected animals, has no detectable infectivity.

80 As regards products obtained from bovine animals slaughtered in the United Kingdom which are liable to enter the animal feed or human food chain and materials destined for use in medicinal products, cosmetics or pharmaceutical products, the United Kingdom considers that there is no justification for an export ban where such products and materials can be certified to have come from herds which have not experienced a case of BSE and have not been exposed to sources of the BSE agent.

81 As regards the ban on exports to third countries, the United Kingdom considers that the risk of re-importation into the Member States is non-existent for a number of practical reasons, namely the restricted number of third countries authorised to export bovine animals, fresh bovine meat and meat products to the Member States of the Community, the strict conditions applied to exports, the checks carried out pursuant to the rules on export refunds and the existence of import duties. The requirements imposed in respect of bovine semen and embryos make it impossible to import any products from the United Kingdom into a Member State via a third country.

82 The United Kingdom further considers that the contested decision is discriminatory because it imposes an export ban only in respect of United Kingdom beef, without imposing any safeguards of any kind on other Member States which have

experienced cases of BSE and in which, moreover, the measures in respect of the removal of offal are not as comprehensive as in the United Kingdom. The contested decision is also discriminatory because it is capable of promoting consumer confidence only in Member States other than the United Kingdom, at the expense of consumer confidence in the United Kingdom.

- 83 Lastly, the United Kingdom argues that the ban was excessive and that the Commission could have taken a number of alternative courses of action. In particular, it could have introduced on a Community-wide basis a comprehensive ban on the use of bovine tissues most likely to harbour the infective agent of BSE, could have applied at Community level a ban (already imposed by the United Kingdom) on the sale for human consumption of beef from United Kingdom cattle aged over 30 months, or could have supplemented the latter option by imposing tighter conditions on the export to other Member States of beef from younger animals.
- 84 The Commission describes its decision as a containment measure, designed to eradicate the disease, combined with market and other support measures. It considers that containment is universally recognised as a legitimate response to a problem such as that in the present case, in order to prevent the disease from spreading. The United Kingdom was identified as the relevant area of containment because, for various reasons, it was not sufficient to create local containment zones and 99.7% of all confirmed BSE cases had occurred in the United Kingdom. The Commission also submits that the directives relating to specific diseases provide that areas of containment are to be set having regard to natural barriers and administrative controls.
- 85 In the Commission's view, the contested decision is justified as regards live animals on account of the reassessment of the significance of existing doubts, particularly in relation to the presence of the BSE agent in young animals, the uncertainties associated with the system for tracing animals and identifying those that were at risk, the lack of certainty regarding the age at which the animal will be slaughtered and the risk of vertical or horizontal transmission.

- 86 In the case of semen, the ban was lifted after an opinion was delivered by the Scientific Veterinary Committee. However, that does not affect the validity of the contested decision, which was justified, as an emergency measure, by the risk of vertical transmission, by research which was still in progress to establish the incidence of transmission in the case of embryo transfer in cows inseminated with semen from bulls with confirmed BSE, and by the absence of a recent opinion of the Scientific Veterinary Committee on the subject.
- 87 A similar line of reasoning applies in respect of embryos, as does the observation of the Scientific Veterinary Committee that there is evidence of transmission of scrapie by embryo transfer.
- 88 The Commission refers to existing doubts in relation to meat, in particular as regards the operation of the system for the identification and tracing of animals in the United Kingdom and the effective implementation of the control measures to ensure removal of specified bovine offal. The Commission also points out that all meat contains small amounts of lymphatic tissue and that one of the members of the Scientific Veterinary Committee did not exclude the risk posed by muscle meat.
- 89 Similar considerations apply in the case of derived products, such as tallow and gelatin. Mammalian-derived meat meal and bone meal is considered to be the principal cause of the BSE epidemic.
- 90 The Commission also considers that the contested decision was justified in so far as it relates to exports to third countries. Those exports account for no more than about 5% of United Kingdom beef production; hence the extension of the ban to those countries was a relatively small price to pay in order to ensure the complete effectiveness of the containment measures. There was a risk of re-importation of the animals, the meat or derived products, possibly in another form and, in certain cases, with another origin. Furthermore, there was a real risk of fraud, bearing in

mind the available data on irregularities in relation to export refunds. According to the Commission, the effectiveness of the measures adopted would have been undermined had they not covered exports to third countries; in that sense, the prohibition on exports to third countries is an integral and necessary part of the contested decision and is therefore consistent with the principle of proportionality. Moreover, it is doubtful that failure to act in relation to exports to third countries would have been consistent with the obligations imposed on the Council and the Commission by the Treaty, in particular the obligation to take into account the position of Community agricultural produce on world markets, and with the Community's bilateral and multilateral international obligations.

91 Next, the Commission rejects the argument that the decision was discriminatory. It points out that 99.7% of BSE cases occurred in the United Kingdom and that the other Member States where cases have been recorded have adopted a policy of slaughtering the entire herd.

92 In the Commission's view, no alternative measures could have been taken. A Community-wide ban on specified bovine offal would not have contributed to the eradication of BSE; it would have been of very limited use given the negligible incidence of BSE in the other Member States. Moreover, a great deal of time would have been needed for the effective implementation of such a measure, which was inappropriate given the urgency of the situation. Improved control and certification of certain types of beef would have been an inadequate response, given the urgency of the matter and the doubts as to effectiveness of the control systems in the United Kingdom.

93 Finally, the Commission observes that, in order to assess the proportionality of the contested decision, it is necessary to examine it in the light of the package of measures adopted, costing some ECU 2.5 billion (including adjustment of the intervention thresholds, exceptional support measures in the United Kingdom and in other Member States, calf processing premiums, income support for beef and veal farmers, special measures for exporters, private storage aid for veal, export refunds, measures to promote and market quality beef and veal, and research).

- 94 In its reply, the United Kingdom submits that a containment measure which is appropriate for a highly contagious, airborne disease with a short incubation period, such as foot-and-mouth disease, is of no use in controlling a non-contagious disease caused by feed-borne infection and with a long incubation period. Moreover, containment is no more effective in eradicating BSE than the alternative solutions proposed by the United Kingdom.
- 95 In its rejoinder, the Commission emphasises that the contested decision constituted merely the first step in an overall strategy. It was a temporary (fifth recital in the preamble) and emergency (title) measure, subject to review (sixth and seventh recitals in the preamble, Articles 1 and 3), and to be followed by further measures aimed at controlling and eradicating the disease (Article 4).
- 96 It must be recalled that the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni* [1994] ECR I-4863, paragraph 41).
- 97 With regard to judicial review of compliance with the abovementioned conditions, in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 to 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (*Fedesa and Others*, cited above, paragraph 14, and *Crispoltoni*, cited above, paragraph 42).

- 98 At the time when the contested decision was adopted, there was great uncertainty as to the risks posed by live animals, bovine meat and derived products.
- 99 Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.
- 100 That approach is borne out by Article 130r(1) of the EC Treaty, according to which Community policy on the environment is to pursue the objective *inter alia* of protecting human health. Article 130r(2) provides that that policy is to aim at a high level of protection and is to be based in particular on the principles that preventive action should be taken and that environmental protection requirements must be integrated into the definition and implementation of other Community policies.
- 101 The contested decision was adopted as an 'emergency measure' 'temporarily' banning exports (fifth recital in the preamble). Moreover, the Commission acknowledges in the preamble to the decision the need for the significance of the new information and the measures to be taken to be subjected to detailed scientific study and, consequently, the need to review the contested decision following an overall examination of the situation (seventh recital).
- 102 As regards live animals, and in the light of the export ban already imposed by Decision 94/474, the export ban resulting from the contested decision relates only to cattle aged under six months born to cows not known or suspected to be affected by BSE. However, the scientific uncertainty concerning the manner in which BSE is transmitted, particularly as regards its transmissibility through the mother, coupled with the lack of a system for tagging animals and controlling their movements, has meant that there can be no certainty that the mother of a calf is completely free from BSE or, even if she is, that the calf itself is completely unaffected by the disease.

103 Consequently, the ban on the export of live bovine animals cannot be regarded as a manifestly inappropriate measure.

104 As regards bovine meat, it is sufficient to recall that, because the disease has a long incubation period, all animals aged six months or more had to be treated as potentially infected with BSE, even if they showed no signs of the disease. Special measures had been adopted in the United Kingdom, relating to the slaughtering of animals and the cutting of meat. However, it was only from May 1995 onwards that unannounced visits were made to United Kingdom undertakings to check compliance with those measures (*Bovine Spongiform Encephalopathy in Great Britain, A Progress Report*, November 1995, paragraph 16); those checks revealed that a significant proportion of slaughterhouses were failing to comply with the legislation.

105 Moreover, as is apparent from the report of the Scientific Veterinary Committee of 11 July 1994, meat invariably contains some residual nervous and lymphatic tissues. Similarly, according to the statement of one of the members of that committee annexed to the opinion of the Scientific Veterinary Committee of 22 March 1996, it was not possible, on the basis of the available scientific data, to exclude the risk of transmission of the infection through muscle meat (see paragraph 13 of this judgment).

106 It follows that the ban on exports of bovine meat likewise cannot be regarded as a manifestly inappropriate measure.

107 As regards semen and embryos, it is sufficient to recall that when the contested decision was adopted the risk of vertical transmission had not been definitively excluded.

- 108 In so far as other products, such as tallow and gelatin, are concerned, the Commission must be regarded as having displayed appropriate caution by banning the export of those products pending completion of an overall examination of the situation.
- 109 The ban on exports to third countries was appropriate since it ensured the effectiveness of the measure by containing within the territory of the United Kingdom all animals and products likely to be infected with BSE. It would not have been possible, by limiting the number of third countries from which imports were authorised and by imposing import controls, wholly to exclude the possible re-importation of meat in another form or to prevent deflections of trade.
- 110 The United Kingdom has suggested possible alternative measures. However, in view of the seriousness of the risk and the urgency of the situation, the Commission did not react in a manifestly inappropriate manner by imposing, on a temporary basis and pending the production of more detailed scientific information, a general ban on exports of bovine animals, bovine meat and derived products.
- 111 Consequently, the plea alleging breach of the principle of proportionality is unfounded.

*The sixth plea, alleging infringement of Articles 6 and 40(3) of the Treaty*

- 112 According to the United Kingdom, the Commission infringed Articles 6 and 40(3) of the Treaty because it discriminated between United Kingdom producers and those in other Member States, and also between consumers in the United Kingdom and those in other Member States, despite the fact that there was no objective reason for that difference in treatment.



- 113 The Commission contends that the measures adopted have nothing to do with nationality, being based on geographical location. Furthermore, the contested decision has affected individuals and operators from and in other Member States. In any event, having regard to the situation, it is clear that, even if there had been any difference of treatment, it would have been objectively justified by the circumstances.
- 114 According to settled case-law, the principle of non-discrimination between producers or consumers in the Community laid down in the second subparagraph of Article 40(3) of the Treaty means that comparable situations are not to be treated differently and that different situations are not to be treated alike unless such treatment is objectively justified (see, in particular, Case 203/86 *Spain v Council* [1988] ECR 4563, paragraph 25).
- 115 In the present case, it has at no time been denied that almost all the cases of BSE in Europe were recorded in the United Kingdom.
- 116 In the light of that fact, the situation in the United Kingdom must be regarded, in accordance with the objective criterion of the incidence of BSE, as not comparable with that in the other Member States. Accordingly, in adopting a decision containing the animals and products within the territory of the United Kingdom, the Commission has not infringed the second subparagraph of Article 40(3) of the Treaty.
- 117 Consequently, the plea alleging breach of the principle of non-discrimination is unfounded.

*The seventh plea, alleging infringement of Article 39(1) of the Treaty*

- 118 In the United Kingdom's view, the contested decision is not justified by any of the objectives of the common agricultural policy set out in Article 39(1). Far from increasing agricultural productivity and ensuring a fair standard of living for the agricultural community, the decision has harmed operators in the beef and associated sectors in the United Kingdom, has destabilised the market in the Community and, since the products referred to cannot be supplied to other Member States, has prevented supplies from reaching consumers at reasonable prices.
- 119 The Commission points out that the protection of animal and public health forms an integral part of the common agricultural policy and that public health is a matter of overriding importance. In fact, none of the objectives set out in Article 39(1) is achievable without the necessary degree of consumer confidence and without the necessary public health controls.
- 120 It must be recalled in that regard that, according to the third subparagraph of Article 129(1) of the EC Treaty, health protection requirements are to form a constituent part of the Community's other policies and that, as the Court has consistently held, efforts to achieve objectives of the common agricultural policy cannot disregard requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals, requirements which the Community institutions must take into account in exercising their powers (Case 68/86 *United Kingdom v Council* [1988] ECR 855, paragraph 12).
- 121 Moreover, the protection of health contributes to the achievement of the objectives of the common agricultural policy laid down in Article 39(1) of the Treaty, particularly where agricultural production is directly dependent on demand amongst consumers who are increasingly concerned to protect their health.

122 It follows that, in adopting the contested decision, the Commission has not infringed Article 39(1) of the Treaty

*The eighth plea, alleging that the third indent of Article 1 of the contested decision is defective, in particular because it fails to respect the principle of legal certainty*

123 According to the United Kingdom, the contested decision fails to respect the principle of legal certainty because the scope of the ban is not defined with sufficient clarity. The limits to the scope of the third indent of Article 1 of the decision (which prohibits exports of 'products obtained from bovine animals slaughtered in the United Kingdom which are liable to enter the animal feed or human food chain, and materials destined for use in medicinal products, cosmetics or pharmaceutical products') cannot be identified otherwise than by reference to the products covered by Directives 90/425 and 89/662. Article 1 of each of those directives refers to Annexes A and B, which were amended, following their adoption, by Directive 92/118. Moreover, Article 10(4) of Directive 90/425 and Article 9(4) of Directive 89/662 also cover, 'if the situation so requires', 'the products derived' from the animals in question and 'the originating products or products derived from those products' respectively. The scope of those two directives must be further defined by reference to Article 43 of the Treaty, which means that the agricultural products to be taken into consideration are limited to those listed in Annex II to the Treaty.

124 Similarly, the lack of clarity concerning the scope of the third indent of Article 1 of the contested decision makes it virtually impossible for the Court to review the legality of that decision, because owing to the failure to comply with the obligation to provide an adequate statement of reasons no link can be established between the third indent and the reasoning set out in the preamble.

- 125 Lastly, the United Kingdom states that the Commission was not competent to impose a ban on the export of certain products which are not covered by Annex II to the Treaty and which therefore fall outside the scope of Directives 90/425 and 89/662, such as gelatin, amino acids, di-calcium phosphate, peptides, which are derived from peptones, glycerol, stearic acid and its salts.
- 126 The Commission considers that, having regard to the urgency of the matter and the need to ensure effective and complete control of the situation, the third indent of Article 1 of the contested decision respects the principle of legal certainty. In the light of the seriousness of the threat to human health and the nature of the BSE agent, as well as the objectives of the contested decision, it clearly covers products such as tallow and gelatin, which are products derived from cattle. Moreover, the contested decision is correctly reasoned, since it is directed against the BSE agent and thus against all products in which there is a risk that the BSE agent may be present, that is to say, all derived products. Finally, Directives 90/425 and 89/662 expressly refer to all of the products covered by the contested decision.
- 127 In referring to 'products obtained from bovine animals slaughtered in the United Kingdom which are liable to enter the animal feed or human food chain, and materials destined for use in medicinal products, cosmetics or pharmaceutical products', the third indent of Article 1 of the contested decision does not appear to be unclear as to its scope.
- 128 As regards compliance with the obligation to state reasons, it is necessary, as the Advocate General points out in point 38 of his Opinion, to take account of the fact that the United Kingdom, to which the contested decision is addressed, had detailed knowledge of the situation and could not have been unaware of the products covered by the decision.

- 129 Lastly, Directives 90/425 and 89/662 provide that the safeguard measures adopted by the Commission may cover 'products of animal origin', 'products derived from those products' and 'products derived' from the animals in question. Consequently, in adopting the contested decision, which refers to 'products obtained from bovine animals', the Commission has not infringed those directives.
- 130 It follows that the plea alleging that the third indent of Article 1 of the contested decision is defective must be rejected.

*The ninth plea, alleging the illegality of Directives 90/425 and 89/662*

- 131 If and to the extent that the Court decides that Directive 90/425 or Directive 89/662 applies or purports to apply to products falling outside Annex II to the Treaty, the United Kingdom maintains that Article 43 of the EC Treaty did not empower the Council to adopt those directives to that extent. Consequently, they are *pro tanto* inapplicable and do not provide a basis in law for the contested decision.
- 132 The Commission and the Council contend that Article 43 of the Treaty constitutes the correct legal basis for Directives 90/425 and 89/662, since those directives were intended to achieve the objectives laid down in Article 39 and the derived products to which they refer fall at least within the catch-all provision in Annex II covering 'animal products not elsewhere specified or included'. In any event, the fact that they also cover incidentally other products not included within Annex II does not affect their validity.
- 133 It is settled case-law that Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products

listed in Annex II to the Treaty which contributes to the achievement of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty (Case 68/86 *United Kingdom v Council*, cited above, paragraph 14, Case 131/86 *United Kingdom v Council* [1988] ECR 905, paragraph 19, Case C-131/87 *Commission v Council* [1989] ECR 3743, paragraph 28, and *Fedesa and Others*, cited above, paragraph 23).

<sup>134</sup> The Court has also held that, where a directive constitutes an essential means of increasing agricultural productivity (an objective laid down in Article 39(1)(a) of the Treaty), it must be adopted on the basis of Article 43 of the Treaty even though, in addition to applying essentially to products falling within Annex II, it also covers incidentally other products not included in that annex (Case C-11/88 *Commission v Council* [1989] ECR 3799, paragraph 15, summary publication).

<sup>135</sup> Having regard to the importance of the role played by the free movement of animals, animal products and products of animal origin in achieving the objectives laid down in Article 39(1) of the Treaty, Article 43 of the Treaty must be regarded as constituting the appropriate legal basis for the adoption of Directives 90/425 and 89/662, even though those directives authorise the Commission incidentally to adopt safeguard measures covering 'products of animal origin', 'products derived from those products' and 'products derived' from animals which are not included in Annex II to the Treaty.

<sup>136</sup> Consequently, the plea alleging that Directives 90/425 and 89/662 are illegal must be rejected.

<sup>137</sup> In the light of the foregoing, the action must be dismissed in its entirety.

**Costs**

138 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom has been unsuccessful and the Commission has applied for costs, the United Kingdom must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, the Member States and institutions which intervene in the proceedings must bear their own costs. The Council must therefore bear its own costs.

On those grounds,

**THE COURT**

hereby:

1. Declares the action brought by the United Kingdom of Great Britain and Northern Ireland inadmissible in so far as it seeks annulment of the Commission's statements of position of 10 April, 13 April and 8 May 1996;
2. Dismisses the action brought by the United Kingdom of Great Britain and Northern Ireland in so far as it seeks annulment of Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy;

**3. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;**

**4. Orders the Council of the European Union to bear its own costs.**

Rodríguez Iglesias

Gulmann

Ragnemalm

Wathelet

Schintgen

Mancini

Moitinho de Almeida

Murray

Edward

Puissochet

Hirsch

Jann

Sevón

Delivered in open court in Luxembourg on 5 May 1998.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President