JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
21 October 2003 *

In Case T-392/02,

Solvay Pharmaceuticals BV, established in Weesp (Netherlands), represented by C. Meijer, F. Herbert and M.L. Struys, lawyers, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by M. Balta and M. Ruggeri Laderchi, acting as Agents,

defendant,

supported by

Commission of the European Communities, represented by A. Bordes, acting as Agent, with an address for service in Luxembourg,

APPLICATION for the annulment of Council Regulation (EC) No 1756/2002 of 23 September 2002 amending Council Directive 70/524/EEC concerning additives in feedingstuffs as regards withdrawal of the authorisation of an additive and amending Commission Regulation (EC) No 2430/1999 (OJ 2002 L 265, p. 1),

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: N.J. Forwood, President, J. Pirrung and A.W.H. Meij, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 July 2003

gives the following

Judgment

Legal background

The Community rules on additives in feedingstuffs

General description

1 Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs (OJ, English Special Edition 1970 (III), p. 840) lays down the

Community rules applying to the authorisation, and withdrawal of authorisation, of additives for incorporation in feedingstuffs.

2 The seventh recital in the preamble to that directive provides that, 'certain purely medicinal substances such as coccidiostats should, during a first stage, be regarded in relation to feedingstuffs as additives, since most Member States have been using them for collective prophylaxis, principally in poultry-farming;... however, they will be examined further if a directive on medicinal feedingstuffs is drawn up'.

3 Directive 70/524 has been amended and supplemented on several occasions. In particular, it was substantially amended by Council Directive 84/587/EEC of 29 November 1984 (OJ 1984 L 319, p. 13) and by Council Directive 96/51/EC of 23 July 1996 (OJ 1996 L 235, p. 39). It was supplemented by the decisions cited in paragraphs 22 and 23 below.

4 Directive 96/51 entered into force on 7 October 1996, in accordance with Article 254(2) EC. It introduced new rules for authorisation, and withdrawal of authorisation, of additives in feedingstuffs ('the new rules' or 'the Directive 96/51 rules') in place of the rules which had applied until then ('the original rules'). Those new rules took effect on 1 October 1999, following a transitional period provided for by that directive with regard to certain additives.

The original rules

5 Article 3(1) of Directive 70/524, which was repealed by Directive 96/51, provided that 'Member States shall provide that, as regards feedingstuffs, only those

additives which are listed in Annex I which comply with this Directive may be marketed and that they may be incorporated in feedingstuffs only subject to the requirements set out in that Annex...'.

6 In order that the dossiers which must accompany every request for the inclusion of an additive are compiled in accordance with the common guidelines defining, in particular, the studies necessary in order to evaluate their efficacy and their safety for humans, animals and the environment, the Council adopted on 16 February 1987 Directive 87/153/EEC fixing guidelines for the assessment of additives in animal nutrition (OJ 1987 L 64, p. 19), last amended by Commission Directive 2001/79/EC of 17 September 2001 (OJ 2001 L 267, p. 1; 'Directive 87/153').

7 Under the original rules, the substance Nifursol, a coccidiostat belonging to the nitrofuran group, was authorised, provisionally, as an additive in feedingstuffs by Commission Directive 82/822/EEC of 19 November 1982 amending the annexes to Directive 70/524 (OJ 1982 L 347, p. 16). Commission Directive 89/23/EEC of 21 December 1988 amending the annexes to Directive 70/524 (OJ 1989 L 11, p. 34) definitively included Nifursol in the original Annex I to Directive 70/524. That annex was deleted with effect from 1 April 1998, pursuant to Article 1(19) of Directive 96/51.

The rules introduced by Directive 96/51

— Community authorisation for additives

8 Under the new rules, defined by Directive 70/524 as amended by Directive 96/51 ('Directive 70/524'), Article 3 of Directive 70/524 provides that only additives

which have a Community authorisation granted under a Commission regulation may be put into circulation.

9 According to Article 4(1) of Directive 70/524, in order to obtain such authorisation, the applicant must select a Member State to act as rapporteur during the scrutiny procedure on the dossier he has compiled in accordance with the provisions of Directive 87/153.

10 Article 3a of Directive 70/524 lays down the conditions for granting Community authorisation for an additive.

11 According to recital 3 in the preamble to Directive 96/51, it was considered necessary to draw a distinction under the new rules between 'additives which are widely used and present no particular dangers for the manufacture of feedingstuffs' and 'high technology additives with a very specific composition for which the person responsible for putting them into circulation must receive authorisation, in order to avoid copies which might not be in conformity and might therefore be unsafe'.

12 Effect was given to that distinction by Article 2 of Directive 70/524, which states that the additives which are subject to authorisation linked to the person responsible for putting them into circulation are mentioned in Part I of Annex C. According to that annex, all additives belonging to the group of antibiotics, the group of coccidiostats and other medicinal substances, and to the group of growth promoters are subject to such authorisation.

13 Article 2(l) of Directive 70/524 defines the 'person responsible for putting into circulation' as 'the natural or legal person who has responsibility for the conformity of the additive which has been granted Community authorisation and for putting it into circulation'.

— Transitional rules

14 For additives authorised under the original rules and whose authorisation Directive 96/51 thereafter linked to the person responsible for putting them into circulation, Articles 9g, 9h and 9i of Directive 70/524, introduced by Directive 96/51, establish transitional procedures.

15 Article 9h(1) of Directive 70/524 provides for the provisional authorisation, from 1 April 1998, and the transfer to Chapter II of Annex B, inserted by Article 1(20) of Directive 96/51, of additives, such as Nifursol which, under the original rules, were included in Annex I to the directive after 31 December 1987 (see paragraph 7 above). An application for authorisation, in accordance with the procedure provided for in Article 9h(2) and (3), must have been made in respect of those additives by 1 October 1998 at the latest.

16 Under Article 9h(2) of Directive 70/524, the new application for authorisation must be accompanied by a 'monograph' and 'identification notes' — drawn up according to the guidelines laid down in the annex to Directive 87/153 — in accordance with the dossier on the basis of which the authorisation was granted under the original rules.

17 Article 9h(3) of Directive 70/524 provides for the withdrawal or the replacement of the provisional authorisation by a regulation to be adopted in accordance with the procedure of the regulatory committee under Article 23 of that directive (cited in paragraph 21 below). According to Article 9h(3)(a), authorisation is to be withdrawn 'if the documents prescribed in paragraph 2 are not submitted within the time allowed or if, after scrutiny of the documents, it is established that the monographs or the identification notes are not in accordance with the data in the dossier on the basis of which the original authorisation was given'. If neither of those two bases for withdrawal applies, Article 9h(3)(b) of Directive 70/524 provides for replacement of the provisional authorisations mentioned in paragraph 1 'by authorisations linked to the person responsible for putting them into circulation, which shall be given for a period of 10 years through the adoption of a regulation taking effect no later than 1 October 1999' and the consequent inclusion of the additives concerned in Chapter I of the list of authorised additives published each year in the *Official Journal of the European Communities*, in accordance with Article 9t(b) of Directive 70/524.

18 Pursuant to Article 9h of Directive 70/524, Article 1 of Commission Regulation (EC) No 2430/1999 of 16 November 1999 linking the authorisation of certain additives belonging to the group of coccidiostats and other medicinal substances in feedingstuffs to persons responsible for putting them into circulation (OJ 1999 L 296, p. 3) replaces the provisional authorisations for the additives listed in Annex I thereto, including additive E 769 Nifursol, by authorisations granted to the person responsible for putting the additive into circulation until 30 September 2009.

— Withdrawal of authorisation of additives

19 Under the new rules, Article 9m of Directive 70/524 fixes the conditions for the withdrawal of the authorisation of an additive.

20 Under Article 9r of Directive 70/524, the withdrawal of the authorisation of an additive is subject to the procedure before the regulatory committee governed by Article 23 of that directive.

21 Article 23 of Directive 70/524, as amended by Directive 84/587 and, most recently, by Annex I to the Act concerning the Conditions of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21), as adapted by Decision 95/1/EC, Euratom, ECSC of the Council of the European Union of 1 January 1995 adjusting the instruments concerning the accession of new Member States to the European Union (OJ 1995 L 1, p. 1), provides:

'...

2. The representative of the Commission shall submit to the [Standing Committee for feedingstuffs] a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time-limit which the chairman may lay down according to the urgency of the matter...

3. The Commission shall adopt the measures and implement them forthwith where they are in accordance with the opinion of the Committee. Where they are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall without delay propose to the Council the measures to be adopted. The Council shall adopt the measures by a qualified majority.

...'

— The Standing Committee for Feedingstuffs and the Scientific Committee for Animal Nutrition

22 The Standing Committee for Feedingstuffs ('the Standing Committee'), referred to in Article 23 of Directive 70/524, was established by Council Decision 70/372/EEC of 20 July 1970 (OJ, English Special Edition 1970 (II), p. 534).

23 By Decision 76/791/EEC of 24 September 1976 establishing a Scientific Committee for Animal Nutrition (OJ 1976 L 279, p. 35), replaced by Commission Decision 97/579/EC of 23 July 1997 setting up Scientific Committees in the field of consumer health and food safety (OJ 1997 L 237, p. 18), the Commission appointed a Scientific Committee for Animal Nutrition ('SCAN').

24 Article 8(1) of Directive 70/524 provides that SCAN 'shall be responsible for assisting the Commission, at the latter's request, on all scientific questions relating to the use of additives in animal nutrition'. Under Article 8(2), at the request of the Commission, the Member State acting as rapporteur shall ensure that all or part of the dossier referred to in Article 4 is officially forwarded to the members of SCAN.

Community rules on veterinary medicinal products

25 According to Article 5 of Council Regulation (EEC) No 2377/90 of 26 June 1990 laying down a Community procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of animal origin (OJ 1990

L 224, p. 1), where it appears that a maximum residue limit cannot be established in respect of a pharmacologically active substance used in veterinary medicinal products because residues of the substances concerned, at whatever limit, in foodstuffs of animal origin constitute a hazard to the health of the consumer, that substance is to be included in a list in Annex IV.

26 Under Council Regulation (EEC) No 2901/93 of 18 October 1993 amending Annexes I, II, III and IV of Regulation No 2377/90 (OJ 1993 L 264, p. 1), nitrofurans (not including furazolidone) were included in Annex IV to Regulation No 2377/90. The result of that inclusion is that it is prohibited to administer those nitrofurans as veterinary medicinal products to food-producing animals. That prohibition was extended to furazolidone by Commission Regulation (EC) No 1442/95 of 26 June 1995 amending Annexes I, II, III and IV of Regulation No 2377/90 (OJ 1995 L 143, p. 26).

Facts and procedure

Background to the dispute

Status of Nifursol as an additive

27 Nifursol is an additive used in feedingstuffs, manufactured by Solvay Pharmaceuticals BV (hereinafter 'Solvay' or 'the applicant'). It is used to prevent the occurrence of histomoniasis (blackhead), a parasitic disease in turkeys.

28 Nifursol belongs to the group of nitrofurans, which are medicinal substances belonging to the class of coccidiostats which are regarded in relation to feedingstuffs as additives in Directive 70/524, pending the drawing-up of a directive on medicinal feedingstuffs, according to the seventh recital in the preamble to Directive 70/524 (see paragraph 2 above). As the Council points out, the Community legislature considered it appropriate, provisionally, to regard those substances as additives, because legislation relating to feedingstuffs was more harmonised than that relating to medicinal products.

29 The parties agree that Nifursol has never been the subject of an application for authorisation as a veterinary medicinal product within the Community.

Original authorisation of Nifursol as an additive

30 In 1982, Nifursol was provisionally authorised as an additive in animal feedingstuffs. In 1988, following an assessment of that substance on the basis of a dossier compiled in accordance with Directive 87/153, Nifursol was definitively authorised and included in the original Annex I to Directive 70/524 (see paragraphs 6 and 7 above).

Ban on nitrofurans as veterinary medicinal products

31 In 1995, the administration of all nitrofurans as veterinary medicinal products was banned (see paragraph 26 above).

32 According to the preamble to the SCAN opinion of 11 October 2001 (see paragraph 46 below) that ban was decided following the examination by the 'Committee for Veterinary Medicinal Products' of the European Agency for the Evaluation of Medicinal Products of four substances ('nitrofurazone', 'nitrofurantoine', 'furaltadone' and 'furazolidone') belonging to the nitrofurans group, during the period from 1990 to 1995. That committee considered that two of those substances ('furazolidone' and 'nitrofurazone') presented a risk of genotoxicity and carcinogenicity and that it was not possible to determine the safety of the other two substances because of the lack of toxicological data available. Nifursol was not examined by the Committee for Veterinary Medicinal Products.

New authorisation for Nifursol as an additive, pursuant to the transitional provisions of Directive 96/51, and withdrawal of that authorisation by the contested regulation

33 According to the case-file, the re-evaluation of Nifursol, which resulted in the withdrawal of authorisation for that substance by the contested regulation, was undertaken during the procedure for granting a new authorisation for that substance pursuant to the transitional rules introduced by Directive 96/51 (see paragraphs 15 to 18 above).

34 In its letter of 20 July 1998 to the applicant, the United Kingdom Veterinary Medicines Directorate ('the VMD') refers, as the authority designated by the rapporteur Member State, to the new application for authorisation for Nifursol which had been sent to it by the applicant in May 1998, for the purpose of forwarding it to the Commission before 1 October 1998, as provided for in Article 9h(2) of Directive 70/524. In that letter, the VMD, after pointing out that Nifursol would not be subject to a re-evaluation procedure for the purpose of retaining its authorisation under the new provisions introduced by Directive 96/51, informed the applicant of the decision of the Commission to re-evaluate the section of the Nifursol dossier relating to safety, without requesting additional studies. In answer to questions put during a meeting of the Standing

Committee (see paragraph 22 above) by the VMD and Germany which harboured doubts about the legal basis for such a re-evaluation, the Commission pointed out that Nifursol belonged to the nitrofuran group of chemicals and referred essentially to the need for consistency between the rules on medicinal products and those on additives following the ban on nitrofurans as veterinary medicinal products intended for food-producing animals. Moreover, it indicated, at that meeting, that it wished to obtain from Solvay a summary of the part of the dossier relating to safety, and expert opinions on the differences in toxicity between Nifursol and the other nitrofurans, in particular furazolidone. In that regard, the VMD refers to the need to examine the report of the Committee for Veterinary Medicinal Products on those substances (see paragraph 32 above) in order to check whether it could be of use in that review.

35 Following a letter from the applicant of 10 September 1998 in which, referring to various reports and data already available, Solvay had asked whether they were sufficient to allow the Commission to determine whether Nifursol was safe, the VMD pointed out to the applicant, by letter of 23 September 1998, that, according to the Commission, 'the aspects relating to genotoxicity and mutagenicity had been adequately dealt with', but that it was necessary to 're-examine the safety of Nifursol concentrating on the aspects concerning carcinogenicity and on the differences in toxicity between Nifursol and the other nitrofurans, particularly furazolidone'.

36 On 24 December 1998, the applicant sent the VMD an additional dossier containing inter alia a report re-examining the matter of carcinogenicity.

37 By letter of 28 January 1999, the VMD informed the applicant that the Commission was satisfied with the additional dossier concerning the safety of Nifursol and asked the applicant to send copies of it to the members of SCAN and the Standing Committee.

38 The VMD informed the applicant, by letter of 3 August 1999, that a SCAN working party had just been set up to examine the dossier.

39 On 16 November 1999, pursuant to Article 9h of Directive 70/524, Regulation No 2430/1999 replaced the provisional authorisation for Nifursol with an authorisation linked to the person responsible for placing that substance on the market, namely the applicant, valid until 30 September 2009 (see paragraphs 15 and 18 above).

40 In response to questions raised by Sweden, Spain and Finland, the VMD pointed out to the applicant, in a letter of 9 February 2000 enclosing Sweden's observations, that the Commission suggested that the applicant should offer, after receiving SCAN's opinion, a programme of additional tests on the safety of Nifursol to determine the matter.

41 By letter of 22 May 2000, the VMD forwarded to the applicant the evaluation report drawn up by that authority at the request of the Commission on the basis of information provided by the applicant. That report, written by an expert who subsequently became a member of the abovementioned SCAN working party, was not sent to the Commission by the VMD because the VMD thought it desirable to avoid distributing it to the other SCAN experts responsible for the re-evaluation of Nifursol so as not to influence their assessment. According to the findings of that report (pp. 11 and 12), it is proven that certain nitrofurans are genotoxic and that that risk is thought to be associated with the presence in the molecule of a 'group 5-nitro'. ('This property is thought to be associated with the presence in the molecule of a furan ring with a nitrogen atom at the 5-position'.) Since Nifursol has the same molecular structure, it is, according to the VMD, also likely to present a risk of genotoxicity.

42 In that report, the VMD takes the view that the available toxicological data concerning Nifursol are incomplete. There are no studies of developmental

toxicity, and the pharmacokinetic data are incomplete. As regards the risk of mutagenicity, the VMD points out that the results of *in vitro* tests were not clear but raised concerns about the existence of such a risk. The negative results from *in vivo* tests on bone-marrow (micronucleus and cytogenetics tests) and liver (UDS test unscheduled DNA synthesis) gave rise to the view that Nifursol was not genotoxic after travelling through the liver. However, the positive result of the UDS test on the intestine and the DNA binding study suggested that Nifursol is genotoxic. It was suggested that the positive result of the UDS test on the intestine could be caused by irritancy but, according to the VMD, it cannot be ruled out that Nifursol is both irritant and genotoxic. The results of the mutagenicity tests support the hypothesis that Nifursol is a direct-action genotoxic agent which is subject to rapid and extensive metabolism. Further tests are needed to confirm or invalidate that hypothesis. In the meantime it would be sensible to consider that Nifursol is potentially genotoxic and carcinogenic.

43 Furthermore, the VMD points out that it is possible to demonstrate that the risk to consumers is minimal by showing the absence of measurable residues of Nifursol and its metabolites of the nitrofuran group in food derived from animals treated with that substance. It proposes, in that connection, that the applicant furnish, in accordance with Chapter IV, paragraph 1.3, of Directive 87/153, specific data and tests.

44 The VMD concludes that, on the basis of the available data, the administration of Nifursol to animals should be banned. It sets out the additional information required:

— full reports on all existing studies;

— studies on developmental toxicity;

— pharmacokinetic data on the rate and extent of metabolism;

— high-quality studies on carcinogenicity by oral administration;

— further mutagenicity studies;

— information on the residues detected in food by the method of analysis used in the study of the elimination of residues (are all potentially genotoxic residues detected?).

45 In response to that report, which identified a number of points on which additional or new data were necessary, on 27 June 2000 the applicant sent the VMD several studies, copies of which were sent to SCAN on 28 September 2000.

46 On 11 October 2001, SCAN adopted an opinion on Nifursol. As regards, first, mutagenicity and genotoxicity, SCAN concluded: 'The results of *in vivo* mutagenicity studies that used bone marrow as the target tissue (cytogenetics and micronucleus assays) were clearly negative. None of the *in vivo* studies that used other target tissues gave convincingly negative results, even if the negative result from a limited carcinogenicity bioassay gives some reassurance. Only the provision of reassuring results from further *in vivo* mutagenicity studies using two different target tissues could allay concerns arising from structural alerts and positive results in some *in vitro* assays. Normally, an *in vivo* liver UDS assay using a maximum dose of at least 2 000 mg/kg bw would be considered as a useful additional study but, in view of the negative result of the *in vitro* hepatocyte UDS study, the value of such a study is dubious. One of the newer multi-tissue assays such as the *in vivo* comet assay, looking at several tissues

including the stomach, intestines and liver, might give more relevant results' (point 4.2.6 of the opinion). Secondly, as regards tumorigenicity, SCAN concluded that the available data do not give a clear indication of any carcinogenicity from Nifursol. However, there are shortcomings in the design of the study and in the absence of details of histopathology, including tumour data from individual animals, the conclusions should be regarded as provisional (point 5 of the opinion). Thirdly, considering the safety of Nifursol for the consumer (point 6 of the opinion), SCAN noted, first, as regards metabolism and Nifursol residues in turkeys, that the studies provided made it possible to identify two separate 'metabolic routes', but that no identification of tissue residues was performed and no investigation of the absorption, distribution and excretion of Nifursol was conducted (point 6.1). It concludes that, on the basis of the mutagenicity, genotoxicity and carcinogenicity studies provided by the applicant and in particular because of the lack of data on developmental toxicity and the fact that only one metabolic route is common to the turkey and the rat, it is not possible to fix an acceptable daily intake for consumers (that is, a level of absorption by the human body of residues of that substance in foodstuffs, which can be considered safe, 'the ADI') (point 6.3 of the opinion). SCAN concludes from this that as both the ADI and the human exposure to Nifursol residues (including metabolites) cannot be established, the safety of Nifursol cannot be ensured (point 7 of the opinion).

47 On 22 November 2001, the Commission, at a meeting with the applicant's representatives, informed the applicant that it intended, in the light of the SCAN opinion, to withdraw the authorisation to place Nifursol on the market.

48 By letters of 3 December 2001 and 15 January 2002 to the Commission, the applicant confirmed that it had commenced further tests which were to be completed before 1 January 2003, in order to fill the gaps in its dossier. It pointed out that, at the meeting on 22 November 2001 referred to above, it had submitted

to the Commission a protocol drawn up in August 2001 by TNO Pharma (the pharmaceutical division of the Netherlands' organisation for applied scientific research) for measuring the residues of Nifursol present in turkey meat. It also sent certain documents on the toxicological profile and the risk of carcinogenicity from Nifursol. Lastly, it stressed that the withdrawal of authorisation for Nifursol would deprive turkey producers of the last means of controlling histomoniasis as the veterinary products intended to control that disease had long since been withdrawn from the market.

49 At the same time the Commission consulted the administrations of the Member States and the undertakings concerned to assess the health and socio-economic effects of a potential withdrawal of Nifursol from the market. In an open consultation letter of 20 December 2001, the Commission stated that SCAN had adopted an unfavourable opinion on Nifursol. It stated that that opinion 'clearly stated that Nifursol carries a risk of mutagenicity and is suspected of carcinogenicity, like other nitrofurans. Furthermore, it has not been possible to fix an ADI for the consumer, so that the safety [of Nifursol] cannot be guaranteed'. That consultation concerned the probable consequences of withdrawing Nifursol, in the light of the ban on dimetridazole with effect from 1 July 2002, and the possible alternatives, such as the 'good hygiene practice' currently applied in Sweden.

50 On 8 January 2002, the applicant was informed by the SCAN secretariat that, in order to obtain an amendment of the opinion adopted by that committee, it would need to produce detailed additional scientific data filling the gaps identified by SCAN.

51 At its meetings of 5 and 6 February 2002, the minutes of which were approved at the meetings of 17 and 18 April 2002, SCAN concluded that the additional data provided by the applicant confirmed the lack of evidence of the risk of carcinogenicity. Nevertheless given that doubts persisted as to the potential

genotoxicity of Nifursol, and as there were no kinetic studies on the residues of that substance in turkey-meat, SCAN considered that it had to adhere to the conclusion that Nifursol had not been shown to be safe.

52 By letter of 8 March 2002 to the SCAN secretariat, the applicant pointed out that it had informed the Commission that further tests on Nifursol residues and its metabolites in turkey tissue had already been commenced by TNO Pharma and that it intended to carry out further mutagenicity tests *in vivo*. The applicant expressed the desire to contact a member of the SCAN working group to discuss the protocol and the timing of those tests. By letter of 8 April 2002, the SCAN secretariat replied that it was not the job of that group to advise undertakings. Under the procedure established by Directive 70/524 it is the rapporteur Member State which acts as intermediary between undertakings and the Commission for the purposes of presenting dossiers for authorisation. The same applies in respect of SCAN. Moreover, SCAN's involvement in the drawing up of protocols for tests would jeopardise its independence.

53 At the meetings of 17 and 18 April 2002, the minutes of which were approved at the meetings of 18 and 19 June 2002, SCAN examined a kinetic study submitted by the applicant and found it only partly satisfactory. Furthermore, as regards the evidence that Nifursol was not genotoxic, it considered the applicant's proposal to carry out a classic test for genetic mutation *in vitro*. Although SCAN admitted that there was no *in vivo* mutagenicity test validated other than the tests on bone marrow and the UDS tests on liver, it considered that further *in vitro* tests would not alleviate the concerns raised by the positive results of some of the tests already notified. In order to confirm that Nifursol is not mutagenic *in vivo*, as already demonstrated in bone marrow, SCAN repeated the need for a further adequate *in vivo* test (namely a different UDS study) on a tissue other than bone marrow.

54 In accordance with the procedure laid down in Article 23 of Directive 70/524, the Commission submitted to the Standing Committee, for its opinion, a proposal for a regulation concerning withdrawal of the authorisation of the additive Nifursol.

55 Since that proposal did not obtain a qualified majority of the votes of the Standing Committee at its meeting on 23 May 2002, the Commission submitted to the Council on 8 July 2002 a proposal for a regulation withdrawing the authorisation for Nifursol [COM (2002) 367 final].

56 By letter of 23 July 2002 to the Commission, the applicant pointed out inter alia that its letters, informing the Commission that the results of the necessary tests would be available at the end of the year, had gone unanswered. It stated that the following day it would send the Commission a full summary of those tests with supporting documentation — which it did, as the Commission confirmed at the hearing — and asked for a reasonable period within which to provide the results of those tests. By letter of 30 July 2002, the Commission replied essentially that, since the safety of Nifursol could not be guaranteed because of the inadequacy of the scientific data provided, it was obliged to propose that authorisation of that substance be withdrawn. When the gaps in the dossier were filled, it would be open to the applicant to apply for a new authorisation in accordance with the usual procedure. The Commission added that the applicant had been fully informed of the policy followed, at its meetings with the Commission's technical services, in particular at the meeting of 22 November 2001.

57 On 23 September 2002, the Council adopted Regulation (EC) No 1756/2002 amending Directive 70/524 as regards withdrawal of the authorisation of an additive and amending Regulation No 2430/1999 (OJ 2002 L 265, p. 1; 'the contested regulation').

The contested regulation

58 The contested regulation is based on Directive 70/524 and in particular Article 9m thereof. In recital 3 in the preamble, the Council refers to the opinions of the

'Joint FAO/WHO Expert Committee on Food Additives' and the 'European Agency for the Evaluation of Medicinal Products' 'Committee for Veterinary Medicinal Products', which were issued between 1990 and 1995 and related to the 'use of veterinary medicinal products in food-producing animals of the group of substances known as nitrofurans'. It points out that, according to those opinions, it is not possible to determine an ADI because of the genotoxicity and carcinogenicity of those substances. That is why all nitrofurans were listed in Annex IV to Regulation No 2377/90, resulting in a Community-wide ban on using those substances as veterinary medicinal products in food-producing animals. According to recitals 4 and 5 in the preamble to the contested regulation, the Commission therefore requested that SCAN re-examine the risks presented by Nifursol. As that committee concluded in its opinion of 11 October 2001, which was confirmed on 18 April 2002, that it was impossible — on the basis of the studies provided by the applicant and given the lack of data available on developmental toxicity — to determine an ADI for Nifursol, the Council concluded, in recital 6, that 'it cannot be guaranteed that Nifursol does not present a risk for human health'. In recitals 7 and 8 it states that the conditions laid down in Article 3a(b) of Directive 70/524 are no longer met and that the use of Nifursol as an additive in feedingstuffs should therefore no longer be permitted.

59 Accordingly, Article 1 of the contested regulation deletes the reference to Nifursol in Annex I to Regulation No 2430/1999 and in Chapter II of Annex B to Directive 70/524. Article 2 of the contested regulation provides that the deletion is to apply from 31 March 2003.

Procedure before the Court of First Instance

60 By document lodged at the Court Registry on 26 December 2002, the applicant brought an action before the Court under the fourth paragraph of Article 230 EC for the annulment of the contested regulation and for an order for costs against the Council.

61 By separate document lodged at the Court Registry on the same day, the applicant applied for its application for annulment to be decided under an expedited procedure, in accordance with Article 76a of the Rules of Procedure of the Court of First Instance. In its observations on that application, lodged on 21 January 2003, the Council claimed that the Court should dismiss it.

62 By application lodged at the Court Registry on 22 January 2003, the Commission submitted an application to intervene in support of the form of order sought by the Council.

63 The Second Chamber of the Court of First Instance, to which the case was assigned by decision of 22 January 2003, dismissed the application for an expedited procedure by decision of 4 February 2003, of which the parties were notified on the following day.

64 By document lodged at the Court Registry on 5 March 2003, the applicant submitted an application for suspension of the operation of Articles 1 and 2 of the contested regulation and an application for urgent suspension under Article 105(2) of the Rules of Procedure.

65 By order of 17 March 2003 of the President of the Second Chamber of the Court, the Commission was granted leave to intervene in the main proceedings in support of the form of order sought by the Council. It lodged its statement in intervention on 14 May 2003.

66 By order of 11 April 2003 in Case T-392/02 R *Solvay Pharmaceuticals* v *Council* [2003] ECR II-1825, the President of the Court of First Instance dismissed the application for interim measures on the basis of the balance of interests involved.

67 By letter lodged at the Court Registry on 21 May 2003, the applicant elected not to lodge a reply. It lodged its observations on the statement in intervention on 11 June 2003.

68 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber) opened the oral procedure. The Commission was requested to produce a document by way of a measure of organisation of procedure. It complied with that request.

69 The parties presented oral argument and replied to the Court's questions at the hearing on 17 July 2003. At that hearing, the experts for the applicant and the Commission at the request of the Court replied to the Court's questions.

Forms of order sought

70 The applicant claims that the Court should:

— annul the contested regulation;

— order the Council to pay the costs;

— in the alternative, should the application be dismissed as unfounded, order the Council to pay the costs in full, in view of the alleged lack of cooperation and transparency on the part of the Commission in the handling of its file.

71 The Council, supported by the Commission, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Admissibility

Arguments of the parties

72 The applicant submits that its action is admissible. It submits that the contested regulation is not a measure of general application but a disguised decision against it since the sole purpose of that regulation is to withdraw authorisation to place Nifursol on the market and the applicant is the only holder of such authorisation.

73 Moreover, the applicant claims that even if the contested regulation is of general application it is in the nature of a decision addressed to it in that it concerns the applicant directly and individually within the meaning of the fourth paragraph of Article 230 EC (Case T-13/99 *Pfizer Animal Health* v *Council* [2002] ECR II-3305 and Case T-70/99 *Alpharma* v *Council* [2002] ECR II-3495).

74 The Council does not formally raise a plea of inadmissibility. However, it submits, first of all, that the contested regulation is of general application.

75 Second, the Council accepts that the applicant's situation has certain similarities to that of the applicants in the cases giving rise to the judgments in *Pfizer Animal Health* v *Council* and *Alpharma* v *Council*. It nevertheless points out that in those judgments the Court found, on the basis of the individual rights which they enjoyed under the re-evaluation procedures laid down by the transitional provisions introduced by Directive 96/51, that the producers of additives in question did have standing to bring an action. However, those transitional rules do not apply in the present case.

Findings of the Court

76 The fact that a regulation is of general application does not preclude it from being of direct and individual concern to certain natural and legal persons, which therefore have standing to challenge it under the fourth paragraph of Article 230 EC (Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 19; *Pfizer Animal Health* v *Council*, paragraph 84, and *Alpharma* v *Council*, paragraph 76).

77 In the present case, the applicant is directly concerned by the contested regulation in so far as that measure, which applies directly to the traders concerned without any need for intermediate rules to be adopted, removes the applicant's authorisation to market that substance (see, to that effect, *Pfizer Animal Health* v *Council*, paragraph 87, and *Alpharma* v *Council*, paragraph 79).

78 As to whether the applicant is individually concerned by the contested regulation, it should be noted that natural or legal persons may claim that a measure of general application is of individual concern to them only if they are affected by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 107, *Pfizer Animal Health* v *Council*, paragraph 88, and *Alpharma* v *Council*, paragraph 80).

79 In the present case, the applicant rightly submits that, in its capacity as the person responsible for putting Nifursol into circulation following the adoption of Regulation No 2430/1999, it is in a situation peculiar to it which differentiates it from all other persons. First, under Article 2(1) of Directive 70/524, as 'the person responsible for putting Nifursol into circulation', the applicant had the responsibility for the conformity of the additive in question and for putting it into circulation (see paragraph 13 above). In that capacity it enjoyed certain procedural rights under the re-evaluation procedure for Nifursol, since the Commission was required to notify it of the main gaps in the dossier, as held in paragraph 186 below.

80 It follows that the applicant was affected by the withdrawal of authorisation for Nifursol by reason of an attribute peculiar to it which differentiated it from all other persons.

81 That differentiation is further confirmed by the fact that Article 1 of the contested regulation deletes the reference to Nifursol in Annex I to Regulation No 2430/1999 and in Chapter II of Annex B to Directive 70/524. Those annexes contain an express reference, in respect of each additive registered, to the name of the person responsible for putting the additive into circulation, in this case the name of the applicant in respect of Nifursol.

82 In those circumstances, the action is admissible.

The merits

83 The applicant raises three groups of pleas in support of its application, alleging, first, infringement of Article 9m, second indent, and Article 3a(b) of Directive 70/524 and, in the alternative, of the 'precautionary principle', second, infringement of Article 9m, fifth indent, of that directive and of the principles of equal treatment and sound administration and, third, infringement of the principles of legal certainty, sound administration and good faith in the procedure which led to the adoption of the contested regulation.

84 The Court considers it appropriate to examine first the first group of pleas referred to above and then the two other groups of pleas raised by the applicant together.

The first group of pleas, alleging infringement of Article 9m, second indent, and Article 3a(b) of Directive 70/524 and the precautionary principle

— Arguments of the parties

85 The applicant claims that, by justifying the withdrawal of the authorisation for Nifursol by the fact that 'it cannot be guaranteed that Nifursol does not present a risk for human health' (recital 6 in the preamble to the contested regulation), the Council significantly altered the test defined in Article 9m of Directive 70/524 in relation to Article 3a(b) of that directive. Under the latter provision, an authorisation can be withdrawn only where it appears that the additive in question has an adverse effect on human health. However, in the present case, the contested regulation is based on a purely hypothetical risk.

86 The applicant further points out that the withdrawal of the authorisation for Nifursol is not based on the precautionary principle, as evidenced by the absence of any reference to that principle in the contested regulation. Moreover, reliance on the precautionary principle — which, according to the case-law, implies the existence of an unacceptable level of risk for human health (*Pfizer Animal Health* v *Council*, paragraphs 149 to 151) — cannot be reconciled with the operative part of the contested regulation, which provides for the withdrawal of the authorisation for Nifursol only after 31 March 2003, that is six months after it was adopted, so as to enable the feeding conditions of animals to be adapted and to take account of their well-being. That indeed confirms the hypothetical nature of the alleged risk to human health. Recourse to the precautionary principle is also difficult to reconcile with the fact that SCAN took more than a year to give its opinion and the Commission took almost four years to propose the withdrawal of the authorisation for Nifursol.

87 In the alternative, by admitting even that the contested regulation is based on the precautionary principle, that regulation errs in its application of that principle by relying on a purely hypothetical risk to human health (*Pfizer Animal Health* v *Council*, paragraph 145).

88 The applicant submits that the opinions to which the contested regulation refers do not establish the presence of a serious risk. It asserts first of all that the opinions of the Joint FAO/WHO Expert Committee on Food Additives and of the Committee for Veterinary Medicinal Products, referred to in recital 3 of the contested regulation, did not relate to Nifursol but to two other substances belonging to the nitrofurans group. The various substances forming that group are not the same in terms of their effects as those two substances, as is shown by the use of several substances from the nitrofurans group as active molecules in medicinal products for human use. Furthermore, it is because of the lack of available studies on the substances in question, since no undertaking has been inclined to make the necessary investment, that the administration of nitrofurans as veterinary medicinal products to food-producing animals was prohibited.

89 The SCAN opinion of 11 October 2001, confirmed on 18 April 2002, on which the contested regulation is based (recital 5), was not unfavourable to the authorisation of Nifursol, as the Commission submits, and was incompletely cited in that regulation. As regards the risks of genotoxicity and mutagenicity from Nifursol, SCAN considered that *in vitro* experiments in 1985 had shown that Nifursol has mutagenic potential in certain circumstances (point 4.1.4 of the opinion). However those tests preceded the inclusion of Nifursol in the original Annex I to Directive 70/524 and were considered at the time of that inclusion. The *in vivo* experiments carried out on rats were negative or inconclusive. SCAN concluded that further *in vivo* tests were needed to allay the concerns arising from certain results of *in vitro* experiments (point 4.2.6 of the opinion). Therefore SCAN was not able to establish the ADI for the consumer because it considered that it had insufficient data.

90 Solvay stresses in that regard that the lack of scientific data cannot be imputed to it. In its letter of 23 September 1998, the VMD informed it that the Commission unit responsible took the view that the questions of genotoxicity and mutagenicity had been sufficiently considered (in the documents already submitted pursuant to the 1988 authorisation procedure) and that the re-evaluation of the safety of Nifursol should concentrate on carcinogenicity and the differences in toxicity between Nifursol and the other nitrofurans, in particular furazolidone.

91 On the question of carcinogenicity, the lack of risk was confirmed in the minutes of the SCAN meetings of 5 and 6 February 2002. The contested regulation (recital 5) therefore highlights the risk of carcinogenicity in a wholly unjustified manner.

92 The Commission proceeded in the re-evaluation of Nifursol by grouping together that substance and certain other substances from the nitrofurans group, as is shown in particular by the letter from the VMD of 20 July 1998. Contrary to the Commission's suggestion in its observations, the choice of the status of additive for Nifursol is not intended to escape a ban.

93 Moreover, the Council and the Commission's reasoning are contradictory. According to the applicant, either it was possible in 1995 to establish a clear link between Nifursol and certain nitrofurans the use of which as veterinary medicinal products had been prohibited, in which case the authorisation of Nifursol in 1999 was significant (order in *Solvay Pharmaceuticals* v *Council*, paragraph 75), or as the Commission points out in its observations, the risk to human health from Nifursol was still 'insufficiently defined' in 1995, so that only fresh evidence could have justified the withdrawal of the authorisation for that substance in 2002.

94 In that regard, the mention that authorisations for additives may be withdrawn at any time, in recital 5 to Regulation No 2430/1999, does not preclude the establishment of a legitimate expectation on the part of the recipients of authorisations as regards the compliance of the substances authorised with the conditions set out in Article 3a of Directive 70/524, still less since that recital refers to Article 9g of Directive 70/524, which is not relevant in the present case.

95 The Council rejects that line of argument. It submits that Directive 70/524 is based on a 'positive list' system, according to which additives are prohibited unless the manufacturer provides evidence of compliance with the conditions listed in Article 3a of that directive. That directive provides for 'zero tolerance with regard to potential risks for which the manufacturer has not adduced proof that they are acceptable'. The contested regulation is based on the precautionary principle, in relation to the rules of evidence (Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others* v *Commission* [2002] ECR I-4945).

96 Contrary to the applicant's assertion, in recital 6 to the contested regulation, the Council merely applied the rule that it is for the manufacturer of an additive to prove that the additive is not harmful to health once a potential risk has been identified.

97 It is permissible for the Community legislature to have a 'zero tolerance' policy with regard to certain risk factors for which the manufacturer cannot adduce proof that they are acceptable (Case C-121/00 *Hahn* [2002] ECR I-9193, and the Opinion delivered by Advocate General Geelhoed in that case, point 29).

98 The Council claims that the risk to human health presented by Nifursol is far from being hypothetical. The *in vitro* tests in respect of that substance confirmed that the risks related to certain characteristics of the molecular structure of

nitrofurans are also present in Nifursol. The *in vivo* tests were incomplete and inconclusive and therefore did not show that the results of the *in vitro* tests cannot be reproduced in conditions in which Nifursol is actually used.

99 Lastly, contrary to the applicant's submission, the duration of the reassessment procedure for Nifursol and the fact that the entry into force of the prohibition of that substance was fixed at six months after the adoption of the contested regulation do not show the absence of serious risk to health. The best strategy for managing the risk was not an immediate ban on Nifursol. Given the marginal risk of exposure to that substance, it was acceptable and proportionate to take the time necessary to consult the manufacturer of Nifursol and SCAN and to take account of certain competing interests by reducing the consequences for human health and the well-being of animals of withdrawing the contested authorisation.

100 The Commission adopts the Council's arguments. It states that in 1995 Nifursol escaped the general ban on nitrofurans as veterinary medicinal products only because of its previous administrative classification as an additive in feedingstuffs. With effect from that time, the risk of genotoxicity, linked to the presence of a 'group 5-nitro' in the molecular structure of Nifursol, was however regarded as 'serious' even if it was still 'insufficiently defined'.

101 There was however no need for 'urgent management' of that risk because of the limited use of Nifursol in the rearing of turkeys and of the necessary adjustments in the economic sector concerned. The Commission therefore sought the reassessment of that substance only in July 1998 in order to address the question in the context of the new provisions of Directive 70/524, the proposal for amendment of which was lodged in 1993. Furthermore, it was because the experiments submitted by the applicant were incomplete, as emphasised in the SCAN opinions of 11 October 2001 and April 2002, that the SCAN working group was able to examine the file for the reassessment of Nifursol only as from 28 September 2000.

102 In those circumstances, the Community institutions did not commit a manifest error of assessment in their choice of risk management.

— Findings of the Court

103 The applicant's principal submission is, first, that in the light of the studies available, the withdrawal of the authorisation for Nifursol is based on a purely hypothetical risk for human health. The institutions concerned wrongly found there to be a link between Nifursol and other substances in the nitrofurans group, the assessment of which by the veterinary medicinal products committee between 1990 and 1995 led, in 1995, to the ban on administering any substance from that group as a veterinary medicinal product in the Community.

104 Second, the applicant alleges that the purely hypothetical nature of the risk taken into account in the present case is also confirmed by the fact that Nifursol was the subject of a new authorisation in 1999, on the basis of Article 9h of Directive 70/524. The applicant suggests in that respect (see paragraph 96 above) that, if a link could be shown in 1995 between, on the one hand, the presence of a molecular structure containing a 'group 5-nitro', which is characteristic of nitrofurans — including Nifursol — and the risks of genotoxicity and carcinogenicity, on the other, the new authorisation for Nifursol in 1999 shows that those risks were excluded in respect of Nifursol. In support of that argument the applicant maintained at the hearing, in reply to a question from the Court, that, for the purposes of the grant of that new authorisation under Article 9h of Directive 70/524, the competent authorities were required to verify in advance that Nifursol fulfilled the condition of safety for human health set out in Article 3a of that directive. Article 9h of Directive 70/524 does not derogate from the conditions defined by Article 3a thereof. In the cases giving rise to the judgments in *Pfizer* v *Commission* and *Alpharma* v *Commission*, the authorisations for the substances considered were thus withdrawn notwithstanding the fact that the

procedure laid down by Article 9h was ongoing. The applicant concludes from this that, in the present case, only new evidence could therefore justify the withdrawal of the authorisation for Nifursol in 2002. In fact, all of the scientific evidence taken into consideration in 2002 was already available in 1995.

— The scope of the authorisation of Nifursol granted in 1999

105 It is therefore necessary, first, to assess the scope of the authorisation of Nifursol as an additive, which was granted in 1999 after the total ban on the use of nitrofurans as veterinary medicinal products.

106 It should be noted in that connection that that new authorisation was granted in November 1999 for a period of 10 years, whilst the procedure for the re-evaluation of the safety of Nifursol had already been set in train in July 1998 and the Commission had the unfavourable opinions, issued between 1990 and 1995, concerning certain nitrofurans as veterinary medicinal products.

107 On this point the present dispute is distinguishable from the facts at issue in the cases giving rise to the judgments in *Pfizer Animal Health* v *Council* and *Alpharma* v *Council*, relied on by the applicant, in which the withdrawal of the authorisation for some of the additives in question (antibiotics) had occurred — as a safeguard measure under Article 11 of Directive 70/524 — before the replacement of their provisional authorisation by an authorisation linked to the person responsible for placing them on the market under the procedure laid down by the transitional rules introduced by Directive 96/51.

108 In the present case, the inconsistency between, on the one hand, the grant of a new authorisation in 1999 and, on the other, the simultaneous pursuit of the procedure for withdrawing that same authorisation, which had been opened in 1998 on the basis of Article 9m of Directive 70/524, results exclusively from a strict application of the transitional rules. The application of the transitional rules did not however have a bearing on the procedure for re-evaluating Nifursol or on the content of the contested regulation and was not a source of legal uncertainty for the applicant, contrary to its submission (see paragraph 116 below).

109 Under those transitional rules, Article 9h of Directive 70/524, applicable in the present case, provided for the replacement, at the request of the holder, of the provisional authorisation for the additive in question by an authorisation linked to the person responsible for putting it into circulation once the following two conditions were fulfilled: first, the monographs and the identification notes in respect of that additive were submitted within the time allowed and, second, those two documents were in accordance with the data in the dossier on the basis of which the original authorisation had been given. It follows in particular from Article 9h(3)(b) of Directive 70/524 that, where those two requirements were met, the new authorisation had to be granted for a period of 10 years through the adoption of a regulation taking effect no later than 1 October 1999.

110 It is thus clear from those provisions that Article 9h of Directive 70/524 established a purely administrative procedure which derogates from the ordinary rules relied on by the applicant. Those transitional provisions in effect exclude any scientific re-evaluation of the safety of the additive in question and, therefore, any discretion in that regard on the part of the institutions concerned. Contrary to the applicant's assertion, the grant of an authorisation on the basis of that article was not therefore subject to prior control of respect for the requirement set out in Article 3a(b) of Directive 70/524, that the substance in question is safe for human health.

111 That interpretation of Article 9h of Directive 70/524 is corroborated by the general structure and purpose of the transitional regime established by Directive 96/51. In order to ensure the requirements of the protection of public health and

in the interests of economy of procedure, those transitional rules provided solely for the re-evaluation of substances the original authorisation for which had been granted before the expiry of the time-limit for the implementation of Directive 87/153, in accordance with the explanations provided by the Council and the Commission at the hearing. The procedure introduced by Article 9h of Directive 70/524, applicable to the additives listed in Annex I to Directive 70/524 after 31 December 1997, was based on the idea that, as a general rule, those substances — initially evaluated on the basis of a dossier which complied with the provisions of Directive 87/153 — did not require re-evaluation, unlike the additives listed in Annex I before that date the new authorisation for which was subject to a prior re-evaluation under Article 9g of Directive 70/524.

112 In that context, it should be stressed that, in the scheme of Directive 70/524, the transitional provisions of Article 9h did not preclude the implementation, in parallel with the purely administrative procedure for replacing the provisional authorisation of an additive by a definitive authorisation, of a safeguard measure under Article 11 of that directive as in the cases giving rise to the judgments in *Pfizer Animal Health* v *Commission* and *Alpharma* v *Commission*, or of a procedure for withdrawing the additive based on Article 9m of that directive, as in the present case.

113 In particular, given the formal nature of the check carried out for the purposes of granting a new authorisation on the basis of Article 9h of Directive 70/524, the grant of an authorisation on the basis of that provision is not such as to give rise to a presumption that the substance in question is safe or, therefore, to have any bearing on the totally autonomous assessment of that substance carried out under the re-evaluation procedure.

114 In the present case it is not in dispute that the purely formal conditions for the grant of a new authorisation on the basis of Article 9h of Directive 70/524 were met in the case of Nifursol.

115 It follows that only the adoption of a safeguard measure or the withdrawal of the provisional authorisation for Nifursol on the basis of Article 9m of Directive 70/524, before 1 October 1999, could stand in the way of the grant of a new authorisation with effect from that date. At the hearing, the Council and the Commission stated in that regard that, in the present case, a safeguard measure had not been considered appropriate and that the length of the procedure for the re-evaluation of Nifursol under Article 9m could be explained by the importance of the procedural requirements and, in particular, by the need to obtain a scientific opinion for the purposes of applying the precautionary principle.

116 Moreover, contrary to the applicant's submission (see paragraph 97 above), the new authorisation of Nifursol by Regulation No 2430/1999 did not give rise to any legitimate expectation that that substance was safe. The applicant can never have had any doubt about the purely administrative nature of that authorisation which could be withdrawn at any time on the basis of Articles 9m or 11 of Directive 70/524, as recital 5 to Regulation 2430/1999 moreover expressly stated. In particular, the reference in that recital to Article 9g of Directive 70/524, which is irrelevant to the present case, was not such as to give rise to doubts in the mind of the applicant that the new authorisation for Nifursol might be withdrawn as a result of the ongoing re-evaluation of that substance. The applicant had been notified immediately of the Commission's decision to carry out that re-evaluation, by the letter from the VMD of 20 July 1998, and was thereafter regularly informed of the various stages of that procedure throughout its duration.

117 It follows that, prior to the adoption of the contested regulation, Nifursol had only been the subject of an evaluation on the basis of a dossier in accordance with the provisions of Directive 87/153, as part of its original authorisation in 1988 (see paragraphs 6 and 7 above). Contrary to the applicant's submission, the opinions issued between 1990 and 1995 in respect of veterinary medicinal products had not therefore been taken into account for the purposes of assessing the safety of that substance.

118 The new authorisation for Nifursol in 1999 cannot therefore be taken into consideration in assessing the complaints relating to the alleged risk to human health.

— The allegedly hypothetical nature of the risk to human health

119 In this legal context, it is necessary to examine, second, the applicant's primary argument that the contested regulation is based on a purely hypothetical risk to human health. The applicant primarily alleges in that respect an infringement of Articles 9m and 3a(b) of Directive 79/524 and, in the alternative, infringement of the precautionary principle (see paragraph 83 above).

120 It should be noted in the present case that, in the light of the applicant's argument, and contrary to its presentation of the abovementioned pleas in law, the infringement of the precautionary principle cannot be pleaded in isolation in the alternative. In the present case, the pleas alleging, first, infringement of Articles 9m and 3a(b) of Directive 70/524 and, second, and alternatively, infringement of the precautionary principle must be read as meaning that the applicant alleges an infringement of Article 9m in conjunction with Article 3a(b) of Directive 70/524, in relation to the precautionary principle.

121 The precautionary principle constitutes a general principle of Community law requiring the authorities in question, in the particular context of the exercise of the powers conferred on them by the relevant rules, to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests

over economic interests. Since the Community institutions are responsible, in all their spheres of activity, for the protection of public health, safety and the environment, the precautionary principle can be regarded as an autonomous principle stemming from the Treaty provisions, in particular Articles 3(p) EC, 6 EC, 152(1) EC, 153(1) and (2) EC and 174(1) and (2) EC (*Artegodan and Others* v *Commission*, paragraphs 182 to 184; see also to that effect *Pfizer Animal Health* v *Council*, paragraphs 114 and 115, and *Alpharma* v *Council*, paragraphs 135 and 136).

122 It is settled case-law that, in the field of public health, the precautionary principle implies that, where there is uncertainty as to the existence or extent of risks to human health, the institutions may take precautionary measures without having to wait until the reality and seriousness of those risks become fully apparent (Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 99; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 63; Case T-199/96 *Bergaderm and Goupil* v *Commission* [1998] ECR II-2805, paragraph 66; *Pfizer Animal Health* v *Council*, paragraph 139; *Alpharma* v *Council*, paragraph 152, and *Artegodan and Others* v *Commission*, paragraph 185).

123 In the present case the precautionary principle therefore applies in relation to Article 9m in conjunction with Article 3a(b) of Directive 70/524.

124 As the Council submits (see paragraph 95 above), the lack of express reference to the precautionary principle in the contested regulation does not mean that that institution did not rely on that principle, for the purposes of assessing the measures to be adopted under the second indent of Article 9m of Directive 70/524 in order to prevent the alleged risks. On the contrary that regulation expressly states that it is based on the fact that it was impossible in the case of Nifursol to determine an ADI particularly given the lack of available scientific data in relation to developmental toxicity. By thus finding that there was a potential risk, the contested regulation implicitly but clearly applies the precautionary principle without prejudice to the limited review by the courts of that application.

125 As regards the scope of the discretion of the relevant institution it should be noted that, where scientific evaluation does not make it possible to determine the existence of a risk with sufficient certainty, whether to have recourse to the precautionary principle depends on the level of protection chosen by the competent authority in the exercise of its discretion, taking account of the priorities that it defines in the light of the objectives it pursues in accordance with the relevant rules of the Treaty and of secondary law. That choice must, however, comply with the principle that the protection of public health, safety and the environment is to take precedence over economic interests, as well as with the principles of proportionality and non-discrimination (*Artegodan and Others* v *Commission*, paragraph 186).

126 In that context, as regards the extent of the review by the courts of the implementation of the precautionary principle, it should be noted that it is settled case-law that where a Community institution is called upon to make complex assessments, it enjoys a wide measure of discretion the exercise of which is subject to a judicial review restricted to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers and that the competent authority did not clearly exceed the bounds of its discretion (*United Kingdom* v *Commission*, paragraph 97, and *Artegodan and Others* v *Commission*, paragraph 201).

127 In the present case it is necessary in accordance with the rules referred to in the preceding paragraph to verify whether the institutions concerned validly applied Article 9m in conjunction with Article 3a(b) of Directive 70/524 in relation to the precautionary principle.

128 Under Article 3a of Directive 70/524, Community authorisation of an additive is to be given if:

'...

(b) taking account of the conditions of use, it does not adversely affect human or animal health or the environment, nor harm the consumer by impairing the characteristics of animal products;

...'

129 It follows from that provision, interpreted in combination with the abovementioned principles (paragraphs 121 and 125), that, in the domain of additives for feedingstuffs, the existence of solid evidence which, while not resolving the scientific uncertainty, may reasonably raise doubts as to the safety of a substance, justifies the withdrawal of the authorisation for that substance. The precautionary principle is designed to prevent potential risks. By contrast, purely hypothetical risks — based on mere hypotheses that have not been scientifically confirmed — cannot be accepted (see, to that effect, *Pfizer Animal Health* v *Council*, paragraph 146; *Alpharma* v *Council*, paragraph 159, and *Artegodan and Others* v *Commission*, paragraph 192).

130 To make the maintenance of the authorisation of a substance subject to proof of the lack of any risk, even a purely hypothetical one, would be both unrealistic — in so far as such proof is generally impossible to give in scientific terms since 'zero risk' does not exist in practice (see, to that effect, *Pfizer Animal Health* v *Council*, paragraph 145, and *Alpharma* v *Council*, paragraph 158) — and contrary to the principle of proportionality.

131 In the present case, in order to show that the contested regulation is based on the existence of a purely hypothetical risk to human health, the applicant essentially relies, first, on the wording of recital 6 to the contested regulation and the lack of urgency (see paragraphs 85 and 86 above) and, second, on the irrelevance of the abovementioned scientific opinions issued between 1990 and 1995 in the domain of veterinary medicinal products (see paragraph 88 above) and the contents of the SCAN opinion on which the contested regulation is based (see paragraphs 89 to 91 above).

132 First, as regards the wording of recital 6 to the contested regulation, it must be conceded that it is equivocal in that, in concluding that 'it cannot be guaranteed that Nifursol does not present a risk for human health', the Council appears to refer to a purely hypothetical risk.

133 The conclusion set out in recital 6 must, however, be read in context. It must, in particular, be interpreted in the light of the reasons, set out in recital 5 to the contested regulation, on which it is based, since the risks taken into consideration cannot be determined merely from its wording. In the present case it is made clear and explicit in recital 5 that the contested regulation is based on the SCAN opinion of 11 October 2001, confirmed on 18 April 2002 and moreover communicated to the applicant, which stated that it was not possible to determine an ADI on the basis of the available scientific data. Interpreted in that context, recital 6 to the contested regulation does not support the finding that the Council relied in this case on a purely hypothetical risk, as is confirmed hereinafter (paragraphs 135 to 166 below).

134 Furthermore, the length of the re-evaluation procedure and the period of six months allowed by the contested regulation for the entry into force of the ban on Nifursol do not constitute evidence that there was no serious risk from that substance for human health.

135 Recourse to the precautionary principle does not necessarily imply urgency. The adoption of a precautionary measure in order to prevent a risk which cannot be demonstrated in the state of scientific knowledge at the date of that adoption, but which is supported by sufficiently serious evidence, may in certain cases be deferred on the basis of the nature, the seriousness and the scope of that risk on the basis of a balancing of the various interests involved. During that balancing exercise the competent authority enjoys a wide discretion (see paragraph 125 above).

136 In the present case, it follows that, contrary to the applicant's contention, the absence of a re-evaluation decision on the safety of Nifursol prior to July 1998, even though the use of all nitrofurans as veterinary medicinal products had been prohibited since 1995, the recourse to the withdrawal procedure under Article 9m

of Directive 70/524, rather than a safeguard measure under Article 11 of that directive, and the length of the re-evaluation procedure and the deferral in the contested regulation of the entry into force of the ban on Nifursol do not support the presumption that the risks referred to were purely hypothetical.

137 Second, having regard to the applicant's argument, it is necessary to verify, in the light of the scientific opinions referred to in the contested regulation, whether that regulation is vitiated by a manifest error of assessment in respect of the potential risks alleged (see paragraph 129 above).

138 In that regard the applicant, first of all, complains that the institutions in question based their decisions on risks of carcinogenicity and mutagenicity allegedly associated with the molecular structure of Nifursol.

139 At the hearing the applicant's experts accepted that the nitrofurans group was 'concerned' by those two risks, although it has been never been proven that the presence of a 'group 5-nitro' in the molecular structure, characteristic of nitrofurans, is the cause of such risks. They nevertheless insisted on the fact that the substances belonging to the nitrofurans group and consequently containing a 'group-5 nitro' in their molecular structure moreover had annex structures very different from each other and therefore had different effects. Those differences were confirmed in particular by the SCAN's conclusion that Nifursol was not carcinogenic (see paragraph 51 above) and by the fact that it was demonstrated that other nitrofurans, authorised as medicinal products for human use (such as ercefuryl) were not mutagenic.

140 It should be noted at the outset that the contested regulation (recital 5) does not rely on the molecular structure of Nifursol in order to conclude that it has not been established that that substance is safe, but on the SCAN opinions based on

the entirety of the scientific dossier in respect of Nifursol, as it was communicated by the applicant and supplemented by it during the administrative procedure. The opinions issued in respect of veterinary medicinal products as regards certain nitrofurans other than Nifursol are referred to solely to justify the Commission's decision to carry out a fresh scientific evaluation of the risks posed by Nifursol as an additive, as is expressly stated in the contested regulation (recitals 3 and 4) and the letter from the VMD of 20 July 1998 (cited in paragraph 34 above) informing the applicant of that decision.

141 In particular, it is not disputed by the Council or the Commission that the mere fact that Nifursol belongs to the nitrofurans group was not sufficient, in the absence of a specific assessment of the safety of that substance, to conclude that it posed the same risks as those cited by the veterinary medicinal products committee in respect of furazolidone and nitrofurazone. In its opinion of 11 October 2001 (see paragraph 32 above), SCAN moreover emphasises that the veterinary medicinal products committee had not examined Nifursol in its opinions issued between 1990 and 1995, which resulted in the ban in 1995 on the use of all nitrofurans as veterinary medicinal products.

142 Nevertheless it is also not in dispute that the principle that the presence of certain active groups in a molecule prima facie implies a given effect is generally accepted by the scientific community and applied by the pharmaceutical industry, as the Commission's experts pointed out at the hearing without being contradicted by the applicant's experts.

143 In the present case, it should also be noted that the VMD stressed — in its report of 22 May 2000, drawn up at the request of the Commission following its decision to re-evaluate Nifursol (see paragraph 41 above) — that it may be supposed that the risk of genotoxicity, established in the case of certain nitrofurans, is associated with the presence of a group 5-nitro in the molecular structure of those substances. The VMD inferred from this that Nifursol was also suspected of posing such a risk.

144 In those circumstances, even though the VMD's report of 22 May 2000 was not sent to the Commission, it follows from the foregoing considerations that that institution did not commit a manifest error of assessment in considering that the demonstration between 1990 and 1995 of risks of genotoxicity and carcinogenicity as regards certain nitrofurans gave rise to doubts as to the safety of Nifursol — the molecule of which contains the same active ingredient (namely group 5-nitro) — which were sufficiently serious to justify a re-evaluation of that substance. That analysis cannot be undermined by the fact, referred to by the applicant, that the administration of all nitrofurans as veterinary medicinal products was prohibited because there were no studies available of the various substances considered, apart from furazolidone and nitrofurazone (see paragraph 91 above). It does not follow from the foregoing considerations that the Commission exceeded the limits of its discretion in finding that it sufficed that the risks considered were proven in respect of two substances of the nitrofurans group, for it to suspect other substances in that group of posing the same risks and to decide, in the present case, to carry out a re-evaluation of Nifursol in order to be satisfied that those risks could be discounted in respect of that substance on the basis of the scientific evidence peculiar to it.

145 It should be noted in this connection that Nifursol, which had been authorised solely as an additive, was not covered by the ban on nitrofurans as veterinary medicinal products (see paragraph 29 above). Its authorisation therefore remained valid for as along as it was not the subject of a re-evaluation in accordance with the procedures laid down in respect of additives in feedingstuffs by Directive 70/524. The applicant rightly stresses in that context that its decision as long ago as 1982 to market Nifursol as an additive rather than a veterinary medicinal product was in full compliance with the relevant rules (see paragraph 28 above) and did not in any way seek to escape a ban.

146 However, in the present case, in so far as the Commission had found there to be reasonable doubts as to the safety of Nifursol which justified the re-evaluation of that substance, as has already been held (see paragraph 144 above), it was for the applicant to prove that those doubts were not well founded on the basis of the

dossier which it had presented at the last evaluation of Nifursol in 1998 (see paragraph 117 above), supplemented where necessary by subsequent studies or scientific reports.

147 In the absence of such proof, it cannot be found that the Council and the Commission committed a manifest error of assessment in finding that the abovementioned doubts could be considered to be sufficiently serious to justify the withdrawal of the authorisation of the substance in question pursuant to the precautionary principle.

148 In this connection, the applicant's argument that certain nitrofurans are authorised as medicinal products for human use (see paragraphs 88 and 139 above) is wholly irrelevant in the present case. As the Council submits, the relevant rules make the grant or withdrawal of authorisation for a medicinal product for human use subject to a benefit/risk assessment (see, to that effect, *Artegodan and Others* v *Commission*, paragraph 178).

149 By contrast, in the domain of additives in feedingstuffs, Directive 70/524 makes the grant or maintenance of authorisation for a substance subject to proof that there are no risks to human health. In accordance with the principle that the protection of human health must prevail, that directive does not provide for the balancing of such risks against the economic benefits or the benefits in terms of animal welfare arising from the use of the substance in question, without prejudice to the discretion reserved to the institutions concerned in respect of the management of risk where there is scientific uncertainty (see paragraphs 125 and 135 above).

150 In those circumstances, the Council rightly asserts that, in the domain of additives, the competent institutions legitimately adopted a policy of 'zero tolerance' with regard to the potential risks to human health posed by the substances in question. That concept of 'zero tolerance' does not refer to purely

hypothetical risks and cannot therefore be compared to the concept of 'zero risk' referred to above (paragraph 133; see to that effect *Hahn*, cited above in paragraph 97). In *Hahn* it was found that on the basis of scientific knowledge at the relevant time, the presence of the micro-organism in question (Listeria monocytogenes) in foodstuffs could constitute a genuine danger to human health. The uncertainty related to the acceptable limits for contamination by that micro-organism in the most vulnerable groups of people. Advocate General Geelhoed stressed that, 'in view of this uncertainty..., strict zero tolerance [could] be justified, in considering proportionality, under the precautionary principle' (points 40, 43, 50 and 51 of the Opinion in *Hahn*). In the present case, it may be found by analogy that, if the concept of 'zero tolerance' may result, through the application of the precautionary principle, in the total ban of an additive even in the case of uncertainty as to the extent of the potential risk in question, the existence of that potential risk must nevertheless be supported by scientific data.

151 It is in that context that the applicant's argument — that SCAN did not find in its opinion of 11 October 2001 that there were serious risks to human health — should be considered. In the applicant's view the Council's reading of that opinion was partial.

152 In the contested regulation, the Council found that the requirement that Nifursol be safe was not fulfilled in the present case essentially because it was not possible to determine an ADI (see paragraph 58 above). It relies, in recital 5 to that regulation, on SCAN's conclusion in its opinion of 11 October 2001 that 'on the basis of the mutagenicity, genotoxicity and carcinogenicity studies provided by [the applicant] and because of the lack of data on developmental toxicity [teratogericity], it was not possible to derive an [ADI] for the consumers'.

153 First as regards the risk of carcinogenicity posed by Nifursol, the applicant infers from recital 5 of the contested regulation that that regulation takes account of

such a risk, whilst the existence of that risk was formally discounted by SCAN in the minutes of its sessions of 5 and 6 February 2002, approved on 17 and 18 April 2002 (see paragraph 51 above).

154 That argument cannot be upheld. It is true that the contested regulation does not expressly refer to the risks which in the present case are said to prevent the fixing of an ADI, but refers to the SCAN opinion the conclusions of which it adopts. Recital 5 of that regulation does not, however, lead to the conclusion that the Council found there to be a risk of carcinogenicity merely because it mentions all of the studies provided by the applicant, including as regards that risk, for the purposes of SCAN's assessment of the safety of Nifursol. Moreover, the interpretation of the contested regulation proposed by the applicant is clearly contradicted by the express reference in recital 5 of the contested regulation to the minutes of the SCAN sessions of 5 and 6 February 2002, referred to above, in which that committee discounted the existence of a risk of carcinogenicity, whilst maintaining the unfavourable conclusion reached in its opinion of 11 October 2001. In those minutes SCAN referred to the potential genotoxicity of Nifursol and the lack of kinetic studies on the residues of that substance. Lastly, the Council and the Commission did not deny before the Court that the risk of carcinogenicity had been discounted by SCAN.

155 Next, as regards the risks of genotoxicity, mutagenicity and developmental toxicity (teratogenicity), considered in the SCAN opinion, it is clear from the converging explanations given by the parties' experts at the hearing that those three risks arise from a common phenomenon in that the substance in question gives rise to genetic mutations within the cell. Depending upon whether those mutations occur in the cells of an embryo, reproductive cells or somatic cells, they are described as teratogenic, genotoxic or mutagenic respectively. In particular the terms mutagenic and genotoxic are often used interchangeably by scientists to describe that phenomenon.

156 Furthermore, it is not in dispute between the parties that an ADI — that is to say the level of absorption by humans of residues in foodstuffs which can be regarded as safe — can be fixed only if the substance does not pose the abovementioned

risks, as those may be triggered by a single molecule, according to the explanations given by the Commission's experts at the hearing.

157 The applicant objects, however, that in the present case, the alleged impossibility of fixing an ADI does not arise from the presentation of risks to public health, but from the fact that SCAN considered that it did not have sufficient scientific data. Far from finding that there was a risk of genotoxicity/mutagenicity, SCAN concluded in its opinion that supplementary studies on other tissues were necessary in order to confirm the negative results (namely the lack of evidence of a risk to human health) of the *in vivo* studies already carried out on bone marrow. However, that alleged lack of data is not the applicant's fault, but the Commission's (see paragraphs 89 and 90 above).

158 However, that argument put forward by the applicant does not undermine the interpretation of SCAN's opinion adopted by the institutions in question, that that committee found that there were serious potential risks for human health.

159 In particular, as regards the *in vitro* studies, the fact put forward by the applicant, that those studies were already available at the time of the original evaluation of Nifursol in 1998, did not preclude their being taken into consideration as part of the re-evaluation of that substance because of the doubts as to its safety raised by the ban on nitrofurans as veterinary medicinal products (see paragraph 146 above).

160 Furthermore, the applicant has not denied the need for *in vivo* studies in the present case. It submits by contrast that the available results of *in vivo* studies on bone marrow were negative or inconclusive.

161 However, in its opinion of 11 October 2001 (point 4.2.6), SCAN concluded as regards the risks of mutagenicity and genotoxicity that only the provision of reassuring results from further *in vivo* mutagenicity studies using two different target tissues could allay concerns arising from structural alerts and positive results in some *in vitro* assays. In the minutes of its sessions of 17 and 18 April 2002, SCAN confirmed the need for a further appropriate *in vivo* study (that is, not UDS) on a tissue other than bone marrow to confirm the absence of *in vivo* mutagenicity already demonstrated on bone marrow. At the hearing the Commission experts stressed, in reply to a question from the Court, that in its opinion of 11 October 2001 SCAN had merely suggested a multi-tissue assay such as the Comet test. As for the risk of developmental toxicity, SCAN stresses in that opinion the lack of available data (point 6.3).

162 In that context, it is necessary to point out that the inconsistency alleged by the applicant between the need for further *in vivo* mutagenicity studies on two tissues other than bone marrow, in the SCAN opinion of 11 October 2001, on the one hand, and the need for a further mutagenicity study on a tissue other than bone marrow in the minutes of the sessions of that committee of 17 and 18 June 2002, on the other, is not such as to undermine, in the light of the reasons given in the opinion, the consistency and comprehensiveness having regard to SCAN's finding that the available studies on bone marrow are insufficient to discount the doubts about the risks of mutagenicity and genotoxicity.

163 In that regard, the applicant advances no other argument to challenge the internal consistency and reasoning of the SCAN opinion in respect of the abovementioned finding. Furthermore, although, during the oral procedure, it submitted that it had filed toxicity studies carried out on three generations of rats, it does not dispute the lack of a developmental toxicity study, required by Directive 87/153. There is therefore no challenge to the validity of the SCAN opinion (see, to that effect, *Artegodan and Others* v *Commission*, paragraphs 199 and 200).

164 It must be found in those circumstances that, in adopting the contested regulation, the Council did not commit any manifest error of assessment in finding that the safety of Nifursol was not sufficiently certain, in the light of SCAN's very clear conclusions that, because of the need for further mutagenicity and genotoxicity studies and the lack of data on developmental toxicity (teratogenicity), it was not possible to fix an ADI.

165 Lastly, the applicant's argument that the lack of scientific data cannot be attributed to it relates to the second group of pleas in law, alleging an infringement of the fifth indent of Article 9m of Directive 70/524 and the principles of equal treatment, legal certainty, sound administration and good faith. It will therefore be addressed when those pleas are considered.

166 It suffices at this stage to note that, since it was admitted that certain factors (the results of the *in vitro* assays; the fact that Nifursol belongs to a group of substances whose molecular structure prima facie gives rise to a presumption of serious risks to human health) gave rise to serious doubts as to the safety of Nifursol, it was for the applicant to provide the data necessary to eliminate those doubts, as has already been held (see paragraphs 146 and 147 above). Whilst SCAN confirmed the absence of risk of carcinogenicity it considered that the data provided by the applicant did not allow the serious doubts concerning the risks of mutagenicity, genotoxicity and developmental toxicity posed by Nifursol to be discounted.

167 It follows that the pleas in law alleging infringement of Articles 9m, second indent, and 3a(b) of Directive 70/524 and of the precautionary principle are unfounded.

The second and third groups of pleas, alleging infringement of the fifth indent of Article 9m of Directive 70/524 and the principles of equal treatment, legal certainty, sound administration and good faith

— Arguments of the parties

168 The applicant submits, first, that the fifth indent of Article 9m of Directive 70/524 empowers the Commission to require the person responsible for putting an additive on the market to provide it with information within a given period of time, or risk having the marketing authorisation withdrawn. Since the Commission omitted in the present case to require the applicant to provide the precise data necessary for the evaluation of Nifursol, the Council cannot rely in the contested regulation on the lack of available data. That regulation is therefore flawed because of an infringement of the procedural guarantees laid down by the fifth indent of Article 9m of Directive 70/524. Furthermore, since the Commission failed without any objective reason to exercise its power to request information, the contested regulation is also contrary to the principles of equal treatment and sound administration (see, by analogy, Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, and Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781).

169 Second, the applicant points out that the relevant rules do not specify the nature of the studies to be carried out and the type of protocol (that is to say the methodology) to be used by the person responsible for putting the substance on the market in the case of a re-evaluation of its safety by the Commission. The authorities responsible for the re-evaluation are therefore required to provide 'guidance' in that regard in order to avoid giving rise to serious legal uncertainty for the holder of the authorisation, since that person is unable to undertake the studies, often long and costly, which are necessary to provide the information which those authorities consider to be probative.

170 Directive 87/153, which fixes guidelines for the assessment of additives in animal nutrition, does not specify the nature of the studies required or the procedures to be followed, in particular as regards mutagenicity assays. As regards balance studies and identification of metabolites, nor does that directive specify what would constitute an appropriate marking of molecules or define the 'appropriate' exposure period. In order to avoid any misunderstanding as to the interpretation of the concepts referred to by that directive, the co-operation of the authorities responsible for re-evaluation is therefore indispensable.

171 In the present case, by failing to provide the necessary clarification, the Council and the Commission infringed the principle of legal certainty. Moreover, the Commission infringed the principles of sound administration and good faith by failing to respond to the applicant's requests (Joined Cases 43/59, 45/59 and 48/59 *Von Lachmüller and Others* v *Commission* [1960] ECR 463 and Case 179/82 *Lucchini* v *Commission* [1983] ECR 3083).

172 The applicant's letters, particularly those of 3 December 2001 and 15 January 2002 (see paragraph 48 above), show that the applicant has on numerous occasions sought in vain the Commission's assistance as regards the nature of the studies to be carried out and the protocols to be applied. Moreover, by letter of 8 April 2002, the SCAN secretariat refused to provide the information sought by the applicant on the ground that SCAN's involvement in the drawing up of protocols for studies would undermine its independence where it has to take cognisance of the results of those studies. In that regard the applicant submits that, in the field of medicinal products for human use, notwithstanding the existence of detailed guidelines, the Committee for Proprietary Medicinal Products does not hesitate to reply to requests for guidance which are addressed to it by the holder or the applicant for authorisation to put a medicinal product on the market.

173 Furthermore, at no time did the Commission question whether the questions put to it by the applicant during the administrative procedure were appropriate. Contrary to its assertion, the Commission nevertheless did not at the meeting of

22 November 2001 provide the information sought as regards the studies to be provided and the type of protocol to be applied, following the SCAN opinion of 11 October 2001 (see paragraph 46 above). The applicant expressed in vain the desire in its letter of 15 January 2002 'to be able to discuss the most appropriate way of satisfying the Commission's requirements'. In its opinion of 11 October 2001, SCAN considered that further studies on *in vivo* mutagenicity on two tissues other than bone marrow were necessary. However, as SCAN recognised at the hearings on 17 and 18 April 2002, there were no approved *in vivo* mutagenicity studies other than those on bone marrow and the UDS studies on the liver. It was following the applicant's alternative proposition to carry out an *in vitro* study that SCAN, at the abovementioned sessions, restricted its request to an appropriate *in vivo* mutagenicity study on one tissue other than bone marrow (see paragraph 53 above).

174 Lastly, the applicant dismisses the Commission's complaints that it demonstrated bad faith or a lack of diligence during the re-evaluation procedure for Nifursol. By contrast, the consultations which the Commission carried out distorted the SCAN opinion with the objective of convincing the users of Nifursol and the Member States that that substance was allegedly dangerous.

175 The Council, supported by the Commission, objects, first, that the fifth indent of Article 9m of Directive 70/524 confers no power on the Commission to issue directions.

176 Second, the Council submits that the applicant received all information necessary for it to provide the scientific data required for it to demonstrate that Nifursol is harmless.

177 It stresses that the applicant does not clearly state whether it challenges the contested regulation or rather the allegedly incomplete nature of Directives 70/524 and 87/153. Moreover, although the applicant's arguments seem to relate to maladministration on the part of the Commission, the applicant does not allege a breach of the non-contractual liability of that institution. In that respect the Council stated at the hearing that the procedural shortcomings alleged are the Commission's responsibility and cannot therefore affect the lawfulness of the contested regulation adopted by the Council which is not bound by the SCAN opinion, since that opinion has no legal force.

178 In the alternative, the Council rejects the applicant's argument on the ground that it is for the manufacturer of a substance to plan and carry out tests which, in the light of the characteristics of the substance in question which by definition is known to the producer alone, are likely to demonstrate that that substance has no particular adverse effect on human or animal health or the environment. Directive 70/524 and its implementing measures, in particular the guidelines set out in Directive 87/153, are restricted to defining certain criteria of general application in respect of the dossiers submitted in support of an application for authorisation for an additive. It is for the manufacturers to develop appropriate experimental methodologies.

179 Furthermore, in the present case, the Commission went out of its way carefully to assist the applicant with numerous direct contacts or through the VMD.

180 The Commission adopts the arguments of the Council. The further data required could be defined only in the following very general terms: the applicant had to provide 'sufficiently probative negative results of relevant studies in the light of the identified risks of genotoxicity and in terms of the assessment of metabolites and their residues having regard to the metabolic pathways identified'.

181 The applicant was duly informed of the further studies necessary in order to show that Nifursol was harmless thanks to the requests made by the Commission in particular at the meeting of 22 November 2001, the letter from the VMD of 9 February 2000 and the SCAN opinion of 11 October 2001.

182 Furthermore, numerous technical rules or guidelines concerning the nature and methodology of the studies to be provided were defined at various levels by specialised institutions or public authorities. In particular, Directive 87/153, whilst demonstrating some flexibility, provided appropriate information as to the various studies to be carried out by the manufacturer of an additive.

— Findings of the Court

183 First, as regards the plea alleging an infringement of the fifth indent of Article 9m of Directive 70/524, it should be noted that that article provides that the authorisation of an additive is to be withdrawn by means of a regulation, inter alia:

— 'if any of the conditions for the authorisation... referred to in Article 3a are no longer met' (second indent) and

— 'if the person responsible for putting the additive into circulation does not provide, within a given period of time, the information requested by a person responsible at the Commission' (fifth indent).

184 As the Commission submits, it is clear from the broad logic of that article that it sets out alternative grounds for withdrawal. By contrast, the fifth indent of Article 9m of Directive 70/524 does not confer on the Commission a power to issue directions. It covers merely 'the information requested by a person responsible at the Commission' and not by the Commission itself. It confers on

that institution the power to ban an additive where the manufacturer does not provide that information. Similarly, it suffices that one of the conditions set out in Article 3a of Directive 70/524 be no longer satisfied to justify the withdrawal of the authorisation.

185 In that legal context, the lack of a formal decision on the part of the Commission in the present case compelling the applicant to provide the specific data regarded as sufficiently probative can constitute neither a breach of essential procedural requirements nor a breach of the principles of equal treatment or sound administration.

186 Nevertheless, it should be noted that, in so far as the fifth indent of Article 9m of Directive 70/524 refers to requests for information addressed to the person responsible for putting an additive into circulation for the purposes of re-evaluating that substance, it must be interpreted, in relation to the principles of legal certainty and sound administration, as meaning that it constitutes the legal basis of a right on the part of the person responsible for putting an additive into circulation to be informed of the main gaps in its dossier. Apart from urgent cases, the Commission cannot withdraw the authorisation for an additive without allowing its holder to provide the information which the Commission considers appropriate in order to fill those gaps.

187 It follows that, whilst there can be no requirement for the Commission to give formal notice to the person responsible for putting an additive into circulation, in the absence of any express procedural provision to that effect, that person must however be closely associated with the procedure for the re-evaluation of that additive and may invoke the right to be informed of the main gaps in its dossier which stand in the way of the authorisation being maintained.

188 Contrary to the Council's assertion, compliance with those procedural safeguards is subject to judicial review by means of an action against the contested regulation which brings the re-evaluation procedure to an end.

189 In the present case, it is therefore, second, necessary to verify in the light of the exchanges of correspondence between the Commission or the VMD, on the one hand, and the applicant, on the other, and the information contained in the VMD evaluation report on Nifursol and, above all, in the SCAN opinion of 11 October 2001, whether the applicant was sufficiently informed of the gaps in its dossier to be able where appropriate to provide the necessary scientific evidence, or even to carry out the appropriate studies to fill those gaps.

190 The applicant essentially criticises the Commission for failing to provide it with sufficient 'guidance' as to the *in vivo* studies to be carried out in order to dispel the doubts about, in particular, the risks of mutagenicity posed by Nifursol. It relies, in particular, on the fact that Directive 87/153, which fixes guidelines for the assessment of additives in feedingstuffs, does not specify the nature of the studies required in relation to mutagenicity or the procedures to be followed.

191 The doubts voiced by the Council in that respect concerning the purpose of the applicant's challenge are unfounded. The applicant does not claim that the applicable rules are unlawful. Referring to what it calls the very imprecise nature of the guidelines fixed by Directive 87/153, it infers from this that there is a duty on the Commission to give 'guidance' so that that institution is required where necessary to provide it with the guidelines necessary for it to carry out further appropriate studies.

192 It is necessary to consider the specific evidence put forward by the applicant to show that it did not receive the information necessary for it to carry out the appropriate studies.

193 The applicant complains in particular that the Commission informed it, in the letter from the VMD of 23 September 1998 (cited in paragraph 35 above), that the issues of the genotoxicity and mutagenicity of Nifursol had been adequately examined in 1988.

194 It must be found in that regard that such an assertion, made at the beginning of the re-evaluation procedure, was necessarily provisional. Moreover, the scope of that assertion was clearly delineated in the VMD letter of 23 September 1996, which clearly stressed the need, in the Commission's view, to concentrate in particular on the differences in toxicity between Nifursol and the other nitrofurans, in particular furazolidone.

195 Moreover, it should be noted that the applicant was warned throughout the re-evaluation procedure of the gaps in the dossier as and when they came to light. Further to questions raised by some Member States, the Commission therefore suggested to the applicant in February 2000 that it offer a programme of further studies on the safety of Nifursol in order to address that question after having received the SCAN opinion (see paragraph 40 above).

196 Furthermore, the Nifursol evaluation report, which was drawn up by the VMD as the competent authority of the rapporteur Member State and notified solely to the applicant in May 2000, emphasised in a clear and detailed way the need for further studies relating in particular to the mutagenicity, developmental toxicity and residues of Nifursol detected in turkey meat (see paragraphs 41 to 44 and 155 above).

197 Moreover, the applicant essentially submits that, following the SCAN opinion of 11 October 2001, it was unable to determine the type of study to carry out because of the requirement in that opinion for further appropriate *in vivo*

mutagenicity studies on two tissues other than bone marrow, whereas only studies of that type on bone marrow and the liver had been validated. However, the Commission did not reply to the request for assistance which the applicant made in particular in its letters of 3 December 2001 and 15 January 2002.

198 As the applicant itself acknowledges in this regard (see paragraph 173 above), it is clear from the minutes of the SCAN sessions of 17 and 18 April 2002 (see paragraph 53 above) that that committee acknowledged that it was impossible to provide studies on two tissues other than bone tissue, recommended in its opinion of 11 October 2001, and adjusted accordingly the requirements which had been formulated in that opinion. That shows that not only were the applicant's observations taken into consideration, but also that they caused SCAN to alter its assessment of the gaps in the dossier as regards the risks of mutagenicity posed by Nifursol.

199 The applicant's participation in the re-evaluation procedure is further corroborated by the fact that, at its sessions of 5 and 6 February 2002, SCAN confirmed the provisional finding as to the absence of risk of carcinogenicity from Nifursol which it had set out in its opinion of 11 October 2001, following the submission of supplementary data by the applicant (see paragraph 51 above).

200 Furthermore, contrary to the applicant's assertion, neither the dossier nor the explanations provided by the parties in reply to questions from the Court at the hearing demonstrate that during the re-evaluation procedure the applicant sought clarification of specific issues relating to the requirement for an appropriate in vivo mutagenicity study. It is apparent from the applicant's letters to the Commission of 3 December 2001 and 15 January 2002, and to SCAN of 8 March 2002 (see paragraphs 48 and 52 above), that the study protocol drawn up by

TNO Pharma, submitted to the Commission at the meeting of 22 November 2001, did not relate to a mutagenicity study, but was designed to determine detectable residues. At the hearing the Commission confirmed, without being contradicted by the applicant, that the 'TNO' study did not relate to the risk of mutagenicity. However, in the absence of scientific data sufficient to discount that risk, an ADI could not in any event be fixed (see paragraph 156 above).

201 It follows that the applicant's argument, that the Commission did not reply to its requests in respect of the *in vivo* studies suggested in the SCAN opinion, is unfounded.

202 In those circumstances, in the absence of the applicant filing any specific proposal for an appropriate *in vivo* study relating in particular to the mutagenicity of Nifursol, the Commission lawfully submitted to the standing Committee a proposal for the withdrawal of the authorisation for Nifursol. As that proposal did not obtain a qualified majority in that committee, the Commission immediately submitted to the Council a proposal for a regulation for the withdrawal of that authorisation, pursuant to Article 23 of Directive 70/524. It was only after that proposal that the applicant sent to the Commission at the end of July 2002 a full summary of the ongoing studies, with supporting documents.

203 Lastly, contrary to the applicant's assertion, it is not evident from the open consultation letter addressed by the Commission to the administrations of the Member States and to the undertakings in question on 20 December 2001 that the Commission distorted the SCAN opinion of 11 October 2001 (see paragraph 49 above).

204 For all of the foregoing reasons, the pleas alleging an infringement of the fifth indent of Article 9m of Directive 70/524 and of the principles of equal treatment, legal certainty, sound administration and good faith cannot be upheld.

205 It follows that the action must be dismissed as unfounded.

Costs

206 Under Article 87(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 applicant has been wholly unsuccessful, it must be ordered to pay the costs of these proceedings and of the proceedings for interim measures. In that regard, its alternative claims seeking an order that the Council pay the costs because of an alleged lack of cooperation and transparency in the management of the file by the Commission must also be rejected, since none of those complaints can be upheld, as is apparent from the assessment of the second group of pleas (see paragraph 189 et seq. above).

207 Under Article 87(4) of the Rules of Procedure, the Community institutions which intervene in the proceedings must be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber),

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to bear its own costs and to pay the Council's costs, including the costs incurred in the proceedings for interim measures;**

3. **Orders the Commission to bear its own costs, including those incurred in the proceedings for interim measures.**

Forwood Pirrung Meij

Delivered in open court in Luxembourg on 21 October 2003.

H. Jung N.J. Forwood

Registrar President

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