1. Directive 70/524 concerning additives in feedingstuffs, as amended up to the adoption of Directive 84/587, provided for harmonization which precluded Member States from relying on Article 36 of the Treaty in order to impose, on the importation from other Member States of feedingstuffs containing additives, national measures intended to ensure the identification and the purity of the additives in question. It did not, on the other hand, provide for harmonization of such a nature as to deprive Member States of recourse to Article 36 of the Treaty as regards measures of health control applicable to the traders concerned.

2. Article 30 of the Treaty must be interpreted as meaning that a national measure which subjects the importation of feedingstuffs containing additives to prior authorization constitutes a measure having an effect equivalent to quantitative restrictions on imports within the meaning of Article 30 of the Treaty.

3. An annual levy charged by a Member State in like manner on importers and national producers of feedingstuffs containing additives and intended to cover the costs incurred by the State in checking samples taken pursuant to Directive 70/524 is compatible with Articles 9 and 95 of the Treaty and the provisions of that directive.

REPORT FOR THE HEARING
delivered in Case 29/87 *

I — Facts and written procedure

1. The Council has adopted several directives concerning feedingstuffs, in particular Directives 70/524 of 23 November 1970 concerning additives to feedingstuffs (Official Journal, English Special Edition 1970 (III), p. 840), 74/63 of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs (Official Journal 1974, L 38, p. 31) and 79/373 of 2 April 1979 on the marketing of compound feedingstuffs (Official Journal 1979, L 86, p. 30). The common aim of the directives is to increase agricultural production while improving the quality of animal production by the use of 'suitable, good quality feedingstuffs' (see the first and second recitals in their preambles).

With that in view the object of Directive 70/524 (hereinafter referred to as 'the directive'), as amended by Council Directive 73/103 of 28 April 1973 (Official Journal

* Language of the Case: Danish.

1973, L 124, p. 17) and Council Directive 75/296 of 28 April 1975 (Official Journal 1975, L 124, p. 29) is to define the matters requiring special monitoring by reason in particular of their impact on animal health (see first to fifth recitals of the preamble to the directive). Council Directive 84/587 of 29 November 1984 amending for the third time Directive 70/524 (Official Journal 1984, L 319, p. 13) entered into force (with the exception of the new Article 13 (3) of Directive 70/524) on 3 December 1986.

The directive defines feedingstuffs as organic or inorganic substances, used singly or in mixtures, whether or not containing additives, for oral animal feeding; additives 'as substances which, when incorporated in feedingstuffs, are likely to affect their characteristics or livestock production'.

The basic principle of the directive set out in the eighth recital thereto and in Article 3, is that only those additives which are listed in Annex I may be incorporated in feedingstuffs and only subject to the requirements set out therein. Annex I, as amended on several occasions, contains an extensive list of additives sometimes with minimum and maximum contents and sometimes only with maximum. The annex, for example, lists virginiamycin under the heading 'antibiotics' within a scale range of a minimum of five and maximum of 20 mg per kg of complete feedingstuff.

The directive provides for two decision-making mechanisms:

(a) Article 6 (1) provides that the Council, acting on a proposal from the Commission, should adopt any amendments to be made to Annex I. Article 6 (1) (a), inserted by Directive 73/103, allows amendments to the annexes 'on account of the growth of scientific and technical knowledge' and Article 6 (3), inserted by Directive 75/296, allows the criteria of both composition and purity and the physico-chemical and biological properties to be fixed in accordance with the procedure laid down in Article 16 (a), inserted by Directive 73/103, that is after an opinion from the 'Standing Committee for Feedingstuffs' set up by Council Decision 70/372 of 20 July 1970 (Official Journal, English Special Edition 1970 (II) p. 535).

(b) Article 7, as also amended by Directive 73/103, allows Member States temporarily to suspend the maximum level should there be a risk to animal or human health provided that it informs the other Member States and the Commission. If that is done an emergency procedure is brought into operation which also involves the Management Committee.

Article 10 of the directive sets out the requirements in relation to the particulars, *inter alia* in relation to antibiotics, which have to be included on the packaging or label. It follows from Article 12 that the particulars have to be in Danish for feedingstuffs intended for Denmark. Article 10 (4) provides that 'any reference to additives other than in the form provided for in this directive shall be prohibited'. Article 13 of the directive provides that feedingstuffs which conform to the directive are to be subject to no marketing restrictions other than those provided for in the directive. Article 15 requires the Member States to take all necessary measures to ensure that

feedingstuffs put on the market are officially controlled, at least by check sampling, to verify whether the conditions laid down in the directive are satisfied.

2. The relevant provisions of Danish law in the present case are as follows:

(a) Pursuant to Order No 222 of 11 May 1981 of the Ministry of Agriculture, as amended *inter alia* by Order No 38 of 9 February 1982, no antibiotics, coccidiostats and other medicinal substances or growth promoters may be added to feedingstuffs and no feedingstuffs containing such additives may be imported unless the additives in question are registered with the Ministry of Agriculture's Committee on Additives to Feedingstuffs. The registration requirement in the case of compound feedingstuffs manufactured in Denmark is set out in Article 4 (1) whilst the corresponding requirement in the case of imported compound feedingstuffs is to be found in Article 4 (2).

(b) Pursuant to Article 17 (2) of the same order, in conjunction with the conditions laid down by the Ministry of Agriculture's Committee on Additives to Feedingstuffs in regard to registration, the sale in Denmark of imported feedingstuffs containing additives as mentioned under paragraph (i) is made conditional on there being a statement on the packaging that the additive in question is approved by the aforementioned committee, under the registration number assigned, for commercial use as an additive incorporated in feedingstuffs. In the case of feedingstuffs manufactured in Denmark rules on registration numbers for additives to feedingstuffs and on the related controls are to be found in Article 4 of the order.

(c) It is provided in Articles 14 and 17 of the same order that feedingstuffs containing the additives mentioned may not be manufactured or imported without prior authorization by the Ministry of Agriculture. According to the law and the terms of the authorization the latter may be withdrawn at any time by the Ministry of Agriculture in the event, *inter alia*, of failure to observe the conditions to which its grant was subject.

(d) Pursuant to Article 19 of Order No 529 of the Ministry of Agriculture of 12 October 1977 holders of authorizations must pay an annual levy. The authorization levy was abolished with effect from 1 April 1981 when the 1977 Order was replaced by Order No 222 of 11 May 1981.

3. The company Dansk Denkavit ApS (hereinafter referred to as 'Denkavit') is part of the same group as a Netherlands undertaking which manufactures compound feedingstuffs containing additives and in particular an antibiotic known as 'virginiamycin'. Since 1981 Denkavit has been importing into Denmark compound feedingstuffs from the Netherlands undertaking and for that purpose complies with the

aforesaid requirements laid down by the Danish authorities.

Denkavit considered however that those requirements were contrary to Community law, at least as it stood before 3 December 1986 (when the third amending Directive 84/587 entered into force), and brought an action before the Østre Landsret (Eastern Division of the High Court) in September 1981 in which it sought a declaration that the Danish Ministry of Agriculture had no right under Community law to impose the aforementioned requirements. During the proceedings it also claimed a refund of the sums which it had paid by way of the annual authorization levy between 1 January and 31 March 1981 and which amounted to DKR 6 084.63.

By order of 30 January 1987 the Østre Landsret stayed the proceedings pursuant to Article 177 of the EEC Treaty until the Court of Justice had given a preliminary ruling on the following questions:

'(1) Did Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs, as amended before Council Directive 84/587/EEC of 29 November 1984, lay down such a degree of harmonization that the Member States were precluded, as regards the importation from other Member Staes of feedingstuffs containing additives, from relying on Article 36 of the EEC Treaty in connection with national measures for ensuring the identification of the additives used and the purity of those additives?

(2) If Question 1 is answered in the negative it is asked whether, again prior to the said Directive 84/587/EEC, such a degree of harmonization of the requirements on packaging and labelling of feedingstuffs containing additives had been achieved that Article 36 could not be relied on in connection with a national requirement that there must be a statement on the packaging that the additive in question had been approved by a national authority under the registration number assigned.

(3) Must Article 30 of the EEC Treaty be construed as meaning that it forbids a national measure whereby a Member State requires that the importation from other Member States of feedingstuffs containing additives mentioned in Directive 70/524/EEC shall only take place on the basis of a document, known as an 'authorization', issued to the undertaking on a 'once and for all' basis, *where* a wholly analogous authorization is required of domestic products, *where* the authorities are not informed in any other way in which undertakings the control must be carried out pursuant to the said directive, *where* the legislation does not lay down specific conditions for issuing or revoking authorizations and it must be assumed that according to principles

of national law a request may be revoked only where the activity is pursued in such a way that considerations of human or animal health make this imperative, *where* according to administrative practice the authorization is issued within a few weeks on the basis of a request which need only contain the importer's name and address and *where* in administrative practice an authorization has hitherto never been refused to or withdrawn from an importer?

(4) Did Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs, as amended before Council Directive 84/587/EEC of 29 November 1984, lay down such a degree of harmonization that the Member States were wholly precluded from relying on Article 36 of the EEC Treaty in connection with a national measure such as that described in Question 3?

(5) Was it compatible with Community law, in particular Articles 9 and 95 of the EEC Treaty in conjunction with Directive 70/524/EEC, for a Member State to collect an annual levy from undertakings which obtained the authorization mentioned in Question 3, *where* the levy was collected in the same amount from domestic producers and importers and *where* the total amount of the levy corresponded to the expenditure occasioned by the checks by random sampling carried out in accordance with Directive 70/524/EEC?'

4. The order of the Østre Landsret was received at the Court Registry on 2 February 1987.

5. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by Dansk Denkavit ApS, the plaintiff in the main proceedings, represented by Karen Dyekjaer-Hansen, of the Copenhagen Bar, the Danish Government and more particularly by the Ministry of Agriculture, the defendant in the main proceedings, represented by Jørgen Molde, Legal Adviser to the Danish Government, and Gregers Larsen, of the Copenhagen Bar and by the Commission of the European Communities, represented by its Legal Adviser, Richard Wainwright and by Jens Christophersen, a member of its Legal Department.

6. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations before the Court

A — *Observations lodged by Dansk Denkavit ApS*

1. The plaintiff in the main proceedings claims that it is apparent from the wording of Article 13 of Directive 70/524 that it is a 'maximum' directive which is intended fully to achieve the objective of harmonizing additives used in feedingstuffs. The harmon-

ization also extends to the special Community procedure for the purpose of fixing the requirements of purity and identifying substances as set out in Article 6 (3) of the directive as amended by the second amending Directive 75/296. In addition it points out that in that respect the Court has many times stated that the harmonization has been fully achieved (see judgment of 5 October 1977 in Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555; judgments of 3 October 1985 in Case 28/84 *Commission* v *Germany* [1985] ECR 3097 and Case 195/84 *Denkavit Futtermittel GmbH* v *Land Nordrhein-Westfalen* [1985] ECR 3181).

A requirement to register products such as that at issue in the main action constitutes a measure having an effect equivalent to quantitative restrictions on imports. Since no such requirement is set out in the directive and it cannot be regarded as being implied under Article 15 of the directive, the Member States may not rely on Article 36 in order to justify it. Any problems of public health with which the contested measure purports to deal should have been resolved solely by the procedure referred to in Article 6 (3) of the directive.

That interpretation is also supported by Section B of Annex V referred to in Article 107 of the Act of Accession of the Kingdom of Denmark, Ireland and the United Kingdom. Denmark has never availed itself of the emergency procedure of Article 7 of the directive in order to justify maintaining special national requirements upon the expiry of the transitional period.

It would be quite illogical to regard harmonization as complete by reason of the implementation of Directive 84/587, which involves no basic change in the directive, but previously incomplete. Directive 84/587 replaces the *ad hoc* optional procedure provided for by Article 6 (3) of the directive by a systematic procedure of approval for certain additives and provides that the procedure of approval, the application of which no longer depends on the Commission or the Member States, is to be mandatory. It was not intended to achieve a harmonization which until then was incomplete.

The plaintiff in the main action therefore proposes that the first question should be answered in the affirmative.

2. The requirement of labelling is in itself an independent measure which falls under Article 30 of the Treaty. The requirement of labelling is incompatible with the directive by reason of the general provision of Article 13 and the special provision of Article 10 (4). The requirement that the additive should be registered under a particular registration number is not mentioned either in Article 10 or referred to the directive in general.

Since the plaintiff in the main action proposes that the first question should be answered in the affirmative, the second question does not call for an answer. Alternatively, it should be answered in the affirmative.

3. The requirement of authorization such as that referred to in the third question constitutes a measure having an effect equivalent to quantitative restrictions on imports and therefore falls under the prohibition laid down in Article 30 of the Treaty.

4. The complete harmonization prescribed by Directive 70/524 means that Member States have no power under Article 36 of the Treaty to require that an undertaking should obtain an 'authorization, as described in the third question. Even if there is no specific mention of the concerns which prompted the requirement of authorization, the harmonization on the basis of Directive 70/524 extends to all concerns which national legislation is deemed to have to take into account.

The plaintiff in the main action accordingly proposes that the fourth question should be answered in the affirmative.

5. A charge whose objective is to finance a measure contrary to Community law or which is levied in connection with such a measure is unlawful (see the judgments of 13 December 1983 in Case 222/82 *Apple and Pear Development Council* v *K J Lewis Ltd and Others* [1983] ECR 4083; 12 June 1986 in Case 50/85 *Schloh* v *Auto controle technique* [1986] ECR 1855 and 25 November 1986 in Case 218/85 *Association comité économique agricole régional fruits et légumes de Bretagne* v *A. le Campion* [1986] ECR 3513.

The plaintiff in the main action also relies on an analysis based on the system of control set up by the directive (see Articles 15 and 16). It argues that the imported goods are already subject to the system of control under the directive in the exporting Member State so that in Denmark they are submitted to control for the second time and at a later stage. On the other hand, Danish products are checked for the first time in Denmark. After completion of harmonization the importation and manufacturing stages cannot be regarded as comparable for the purposes of imposing a domestic tax in accordance with Article 9 of the Treaty. Thus a tax such as referred to in the fifth question would be contrary to Article 9.

In the second place it submits that the tax is a greater burden to foreign production than to domestic production in so far as the tax affects any importer as such whereas domestically the tax is borne by the producer.

Alternatively it considers that should the tax be regarded as internal taxation it would be incompatible with Article 95 of the Treaty for it is imposed on imported products at a different marketing stage and at a higher rate (see the judgment of 16 November 1986 in Case 200/85 *Commission* v *Italian Republic* [1986] ECR 3953).

B — *Observations submitted by the Danish Government*

1. Prior to the amending Directive 84/587 there was no complete harmonization of all the measures to be adopted with regard to feedingstuffs containing additives. The Danish Government submits that Article 6 (3) of the directive, as amended by Directive 75/296, shows that it is not exhaustive by providing that it is only subsequently that criteria on the composition and purity of the substances authorized are to be fixed. Further it submits that it is clear from the judgment of the Court of 27 March 1985 (Case 73/84 *Denkavit Futtermittel* v *Land*

Nordrhein-Westfalen [1985] ECR 1019, paragraphs 12 and 13 of the judgment) that the measures needed to protect health have not been harmonized in relation to additives in feedingstuffs but that it is for the Member States to carry out the necessary inspections in accordance with Article 36 of the Treaty. The Member States may thus rely on Article 36 of the Treaty in relation to national measures intended to ensure identification and purity of the products used as additives.

The Danish Government maintains that the system introduced at a Community level by Directive 84/587 is based on the same principles as the Danish system in the main action. In those circumstances the Council cannot have considered that complete harmonization had been achieved before Directive 84/587. It follows that the requirement in Denmark that products containing additives be registered and that the registration number be stated on the packaging may be maintained, as may the undertaking's authorization, provided that they satisfy the criteria of Article 36 of the EEC Treaty. In that respect it points out that the plaintiff in the main action has never denied that the Danish requirements answer a need for the purposes of achieving the objectives of Article 36.

The Danish Government accordingly proposes that a general answer be given to questions 1 to 4 be answered together as follows:

'At the material time, before the adoption of Council Directive 84/587/EEC of 29 November 1984 amending Directive 70/524/EEC concerning additives in feedingstuffs, Member States were not wholly precluded from relying on Article 36 of the EEC Treaty as regards national measures intended to ensure identification of products used as additives and the purity of such substances. The national measures described in the order of the Østre Landsret requesting a preliminary ruling may thus be maintained provided that they satisfy the criteria set out in Article 36 of the EEC Treaty, which is not contested'.

2. In the event of an affirmative answer to the first question, the Danish Government maintains that the directive contains no special harmonization of the requirements relating to the statement of the registration number on the packaging. It would be impossible to check observance of the health requirements solely on the basis of the samples specially provided for in Article 15. The requirement of particulars on the packaging other than those referred to in Article 10 is thus necessary and justified. Moreover, the statement of the registration number is not a 'reference to additives' within the meaning of Article 10 (4); on the other hand, Article 10 is solely concerned with mention of those of the substances listed in Annex I which have been used and not with the problems concerning impurities.

3. Rules concerning 'authorization', such as those referred to in the third question, which require undertakings to inform the administrative authorities of their name and address before they engage in production or importation cannot be regarded as measures falling under Article 30 of the Treaty.

4. In any event, rules concerning 'authorization' such as those referred to in the third

question, are justified under Article 36 of the Treaty in conjunction with Article 15 of the directive. Article 15 requires the Member States to adopt all the necessary measures of control to ensure the protection of health while leaving the Member States responsible for the details of such measures.

5. The Danish Government considers that the lawfulness of the imposition of an annual levy such as that referred to by the national court depends on an interpretation of Article 95 of the Treaty and cannot be regarded as a charge having an effect equivalent to a customs duty. The levy is imposed according to uniform and objectively justified criteria; it is accordingly lawful to charge such a levy, of a uniform amount, on each trader; it matters not whether a domestic undertaking or an importer is concerned or even whether some undertakings have a larger turnover than others (see the judgment of 28 January 1981 in Case 32/80 *Officier van Justitie* v *Kortmann* [1981] ECR 251, paragraphs 27 and 28 of the judgment).

Lastly the Danish Government observes that the directive does not deal with the question of what charges Member States may impose within the limits of Article 95 of the Treaty for the measures of control which have to be applied. In that respect it refers to the judgments of the Court of 30 November 1978 in Case 31/78 (*Bussone* v *Italian Ministry for Agriculture and Forestry*, [1978] ECR 2429) and 15 September 1982 in Case 233/81 (*Denkavit Futtermittel* v *Federal Republic of Germany* [1982] ECR 2933).

The Danish Government accordingly suggests that the fifth question should be answered as follows:

'An annual levy collected in the same amount from importers and domestic producers of feedingstuffs containing additives constitutes internal taxation which is compatible with Article 95 of the EEC Treaty. The collection of such a levy to cover the costs of the measures of control is not contrary to Council Directive 70/524/EEC of 23 November 1970, as subsequently amended'.

C — *Observations submitted by the Commission*

1. In the Commission's view it is clear from Article 3 of and Annex I to Directive 70/524, and also from Article 13, that the directive is intended to set up a complete system for checking the authorization of additives, their quality and use, which precludes Member States from applying for the purposes of the protection of health measures other than those which it provided. The third amending directive, Directive 84/587, in no way affects that interpretation.

2. The provisions of Article 3 of and Annex I to Directive 70/524 and those of Article 10 thereof, are intended to constitute an exhaustive enumeration of the 'marking obligations' with which additives intended for feedingstuffs must comply. That interpretation is confirmed by Article 10 (4) and Article 13 of the directive.

The Commission accordingly proposes that the first two questions should be answered in the affirmative.

3. The obligation to obtain an authorization imposed on the importing undertaking falls under the prohibition laid down in Article 30. It is obvious that that obligation is 'capable of hindering ... trade' (judgment of 11 July 1974 in Case 8/74 *Procureur du roi* v *Dassonville* [1974] ECR 837, at p. 852).

4. Directive 70/524/EEC does not purport to adopt provisions on the authorization to be obtained by undertakings which market feedingstuffs containing additives. Before the third amending directive entered into force responsibility for adopting rules on the powers and capacity of undertakings concerned with the manufacture of additives and their incorporation in feedingstuffs was left to the Member States, which could therefore rely on Article 36 in order to justify the adoption of national provisions in that respect. In addition the Commission considers that 'authorization' in the circumstances set out by the national court is justified and in reasonable proportion to the objective pursued by the protection of health.

It accordingly proposes that the fourth question should be answered in the negative.

5. The Commission observes first of all that the lawfulness of the levy referred to in the fifth question depends on an interpretation of the Treaty and not Directive 70/524/EEC. Since such a levy is part of a system of internal taxation applied according to the same criteria to importers and national producers it is not incompatible with Article 9 of the Treaty (see, in particular, the judgment of 28 January 1981 in Case 32/80 *Officier van Justitie* v *Kortmann* [1981] ECR 251).

With regard to Article 95, the Commission states that an annual levy on producers and importers according to the same criteria so that importers do not have to bear a heavier burden than national producers does not constitute taxation of products within the meaning of Article 95.

The Commission accordingly proposes that the fifth question should be answered in the affirmative.

T. F. O'Higgins
Judge-Rapporteur