# JUDGMENT OF THE COURT
23 February 1988 *

In Case 68/86

**United Kingdom of Great Britain and Northern Ireland**, represented by H. R. L. Purse, of the Treasury Solicitor's Department, acting as Agent, and by Richard Plender, Barrister, with an address for service in Luxembourg at the Embassy of the United Kingdom, 28 boulevard Royal,

applicant,

supported by

**Kingdom of Denmark**, represented by Laurids Mikaelsen, Legal Adviser to the Danish Government, with an address for service in Luxembourg at the Danish Embassy, 11b boulevard Joseph II,

intervener,

v

**Council of the European Communities**, represented by Antonio Sacchettini, Director in the Council's Legal Department, assisted by Moyra Sims, Administrator in that department, with an address for service in Luxembourg at the office of Jörg Käser, Director of the Legal Department of the European Investment Bank, 100 boulevard Konrad Adenauer,

defendant,

supported by

* Language of the Case: English.

**Commission of the European Communities**, represented by D. Grant Lawrence, a member of its Legal Department, and Dierk Booss, Legal Adviser, both acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

intervener,

APPLICATION for a declaration that Council Directive 85/649/EEC of 31 December 1985 prohibiting the use in livestock farming of certain substances having a hormonal action (Official Journal 1985, L 382, p. 228) is void,

THE COURT

composed of: G. Bosco, President of Chamber, acting as President, G. C. Rodríguez Iglesias (President of Chamber), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 24 June 1987, at which the applicant was respresented by Sir Patrick Mayhew QC and Richard Plender, Barrister,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 October 1987,

gives the following

## Judgment

1 By application lodged at the Court Registry on 10 March 1986 the United Kingdom brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Council Directive 85/649/EEC of 31 December 1985 prohibiting the use in livestock farming of certain substances having a hormonal action (Official Journal 1985, L 382, p. 228) is void.

2 The applicant bases its action on the following submissions: insufficient legal basis, insufficient reasons, breach of the principle of legitimate expectations, infringement of the Council's Rules of Procedure, failure to consult the European Parliament and the Economic and Social Committee, and lack of material justification for the directive.

3 Reference is made to the Report for the Hearing for the facts of the case, the course of the procedure and the arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

**Legal basis**

4 The applicant, supported in all essential respects by the Danish Government, claims that the contested directive, which was adopted by a qualified majority on the basis of Article 43 of the Treaty, should have been based not only on that article, but also on Article 100, which requires unanimity on the part of the Council. It considers that it was necessary to base the directive at issue on those two articles since, in addition to having agricultural policy objectives, it was designed *inter alia* for the purpose of approximating the provisions laid down by law, regulation or administrative action in the Member States to safeguard the interests and health of consumers. In the applicant's view, that aim is not covered by Article 43 of the Treaty but comes under Article 100. Previous practice on the part of the Council bears out the need for that dual legal basis.

5 The Council, the defendant, and the Commission, intervening, do not deny that one aspect of the directive at issue deals with the harmonization of national laws with a view to the protection of consumers and public health, but consider that that does not cause it to fall outside the sphere of the common agricultural policy and that it is therefore covered by Article 43 of the Treaty.

6 It should be pointed out first of all that in this case the argument with regard to the correct legal basis is not a purely formal one, inasmuch as Articles 43 and 100 of the Treaty entail different rules regarding the manner in which the Council may arrive at its decision. The choice of the legal basis could thus affect the determination of the content of the contested directive.

7 Consequently, in order to determine whether the submission based on the alleged insufficiency of the legal basis of the directive at issue is well founded it is necessary to consider whether the Council had the power to adopt it on the basis of Article 43 alone.

8 By virtue of Article 38 of the Treaty, the provisions of Articles 30 to 46 apply to the products listed in Annex II to the Treaty.

9 Article 43, moreover, must be interpreted in the light of Article 39, which sets out the objectives of the common agricultural policy, and Article 40, which governs its implementation, providing *inter alia* that in order to attain the objectives set out in Article 39 a common organization of agricultural markets is to be established and that that organization may include all measures required to attain those objectives (judgment of 21 February 1979 in Case 138/78 *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713).

10 The agricultural policy objectives set out in Article 39 of the Treaty include in particular the increasing of productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production. Moreover, Article 39 (2) (b) and (c) provides that in working out the common agricultural policy account must be taken of the need to effect the appropriate adjustments by degrees and the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole. It follows that agricultural policy objectives must be conceived in such a manner as to enable the Community institutions to carry out their duties in the light of developments in agriculture and in the economy as a whole.

11 Measures adopted on the basis of Article 43 of the Treaty with a view to achieving those objectives under a common organization of the market as provided for in Article 40 (2) may include rules governing conditions and methods of production, quality and marketing of agricultural products. The common organizations of the markets contain many rules in that regard.

12 Efforts to achieve objectives of the common agricultural policy, in particular under common organizations of the markets, cannot disregard requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals, requirements which the Community institutions must take into account in exercising their powers.

13 Finally, it must be observed that according to Article 42 of the Treaty the rules on competition are to apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of provisions adopted pursuant to Article 43. Consequently, in adopting such provisions the Council must also take into consideration the requirements of competition policy.

14 It follows from the provisions discussed above, taken as a whole, that Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex II to the Treaty which contributes to the achievement of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty. There is no need to have recourse to Article 100 of the Treaty where such legislation involves the harmonization of provisions of national law in that field.

15 As the Court has pointed out, in particular in its judgments of 29 November 1978 in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347 and 26 June 1979 in Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161, Article 38 (2) of the Treaty gives precedence to specific provisions in the agricultural field over general provisions relating to the establishment of the common market.

16 Consequently, even where the legislation in question is directed both to objectives of agricultural policy and to other objectives which, in the absence of specific provisions, are pursued on the basis of Article 100 of the Treaty, that article, a general one under which directives may be adopted for the approximation of the laws of the Member States, cannot be relied on as a ground for restricting the field of application of Article 43 of the Treaty.

17 It is on the basis of the foregoing considerations that it must be determined whether or not the contested directive falls within the scope of Article 43 of the Treaty as described above.

18 In that regard, it must first be observed that there are common organizations of the markets in the sectors of beef and veal (Regulation No 805/68 of the Council of 27 June 1968, Official Journal, English Special Edition 1968 (I), p. 187), pigmeat (Regulation No 2759/75 of the Council of 29 October 1975, Official Journal 1975, L 282, p. 1) and sheepmeat and goatmeat (Council Regulation No 1837/80 of 27 June 1980, Official Journal 1980, L 183, p. 1), and that Article 2 of each of those regulations provides for the adoption of Community measures designed to promote better organization of production, processing and marketing, and to improve quality.

19 The directive at issue essentially contains, on the one hand, rules on the administration of certain substances having a hormonal action to farm animals whose meat is covered by the aforementioned common organizations of the markets and, on the other hand, rules concerning the requisite control measures. Those measures relate in particular to trade between Member States in live animals and meat and to imports of those products into the Community.

20 The aim of the directive, according to the recitals in its preamble, is to protect human health and consumer interests with a view to eliminating the distortion of conditions of competition and bringing about an increase in 'consumption of the product in question'.

21 In view of the content and objectives of the directive, it must be found that, in regulating conditions for the production and marketing of meat with a view to improving its quality, it comes into the category of measures provided for by the aforementioned common organizations of the markets in meat and thus contributes to the achievement of the objectives of the common agricultural policy which are set out in Article 39 of the Treaty.

22 It follows from the foregoing that the directive at issue falls within the sphere of the common agricultural policy and that the Council had the power to adopt it on the basis of Article 43 alone.

23 That finding cannot be affected by the fact, on which the applicant places some reliance, that the Council departed from its practice of basing measures in the field in question on Articles 43 and 100 of the Treaty.

24 On that point, it should be borne in mind that, as the Court held in its judgment of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1493, in the context of the organization of the powers of the Community the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. A mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty. Such a practice cannot therefore create a precedent binding on Community institutions with regard to the correct legal basis.

25 The applicant's first submission must therefore be rejected.

**Statement of reasons**

26 The applicant maintains that the statement of the reasons for the directive at issue is inadequate.

27 The applicant's first complaint with regard to the statement of reasons relates to the failure to mention the true purpose of the directive, that is to say the approximation of national laws in the interests of consumers, particularly by safeguarding their health.

28 It should be pointed out, first, that it is clear from the considerations set out above as regards the legal basis that the recitals in the preamble to the directive give a sufficiently clear statement of the objectives pursued and, secondly, that human health and the protection of consumers' interests are expressly mentioned in the first and second recitals respectively. That complaint must therefore be rejected.

29 The applicant's second complaint with regard to the statement of reasons is that no reference is made to Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action (Official Journal 1981, L 222, p. 32), to

which the directive at issue is complementary. Article 8 of Directive 81/602 in fact provides that the Commission shall submit to the Council a report on the experience acquired and scientific developments, accompanied, if necessary, by proposals which take those developments into account.

30 That complaint cannot be upheld. Although Directive 81/602 is not mentioned in the recitals in the preamble to the directive at issue, Articles 1, 2, 5, 6 and 7 thereof refer to Directive 81/602 expressly. The link between the two directives therefore emerges with sufficient clarity from the text of the directive at issue.

31 The applicant's third complaint with regard to the statement of reasons is that the directive fails to identify the Commission's proposal.

32 It must be observed in that connection that the directive in question does not in fact contain a precise reference enabling the Commission's proposal to be identified. However, that omission cannot be regarded as constituting an infringement of an essential procedural requirement, inasmuch as it is not denied that the directive was in fact adopted pursuant to a proposal from the Commission.

33 The complaint relating to the failure to identify the Commission's proposal must therefore be rejected.

34 Lastly, the applicant's fourth complaint with regard to the statement of reasons is that the directive at issue does not make it clear that it was adopted following the submission of the scientific report provided for in Article 8 of Directive 81/602 and does not advance any reason for not taking into account the findings in that report, which the Council was under a duty to consider in order to verify whether the proposed legislation was not manifestly inadequate in relation to its objectives.

35 On that point it is sufficient to state that, as the Council has correctly pointed out, Article 8 of Directive 81/602 imposed an obligation on the Commission only, which was under a duty to have the report drawn up and, if appropriate, to take account of it in its proposals. Consequently, the Council was not under an obligation to refer to those antecedents. That complaint must therefore be rejected.

36 It follows from the foregoing that the reasons for the directive are sufficiently stated. The second submission must therefore be rejected.

**The principle of legitimate expectations**

37 The applicant considers that it is contrary to the principle of legitimate expectations that the contested directive was adopted by a majority decision whereas Article 5 of Directive 81/602 (cited above) and Article 14 of Council Directive 85/358/EEC of 16 July 1985 supplementing Directive 81/602 (Official Journal 1985, L 191, p. 46) provide for a unanimous decision on the part of the Council with regard to administering to animals the five hormones referred to in the directive at issue. Accordingly, the Council committed itself to deciding by a unanimous vote.

38 So far as that claim is concerned, it must be pointed out that the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves.

39 That submission must therefore also be rejected.

**Infringement of the Council's Rules of Procedure**

40 The applicant considers that the application of the written procedure for the adoption of the contested directive, when two Member States had expressly opposed it, constitutes an infringement of an essential procedural requirement, since Article 6 (1) of the Council's Rules of Procedure (Official Journal 1979, L 268, p. 1) makes recourse to the written procedure subject to the agreement of all the members.

41 In order to determine whether that submission is well founded it is necessary to give a brief account of the main events leading to the adoption of the directive.

42 In November 1985 the Commission submitted to the Council an amendment of its previous proposal, which — like the directive which was adopted and is the subject of these proceedings — provided for the banning of natural hormones, except for therapeutic purposes, and the banning of synthetic hormones altogether. The Council discussed that draft on 19 November 1985.

43 A further amended proposal, which was submitted on 18 December 1985, was considered by the Council on 19 December, solely on the basis of a version drawn up in French. At that session the Commission proposed its final amendments. The Council decided, contrary to the votes of the United Kingdom and Denmark, to adopt the directive by means of the written procedure before 31 December 1985.

44 On 23 December 1985 the Secretary-General of the Council sent a telex message to the British Minister for Agriculture asking for the United Kingdom's vote, before 30 December 1985, 16.00 hrs, on the directive at issue in accordance with the written procedure. In a letter dated 31 December 1985, the United Kingdom stated that it opposed the use of the written procedure as well as the directive itself.

45 On the same day, 31 December 1985, the directive at issue was notified to the United Kingdom as having been adopted by way of the written procedure.

46 In view of those circumstances, it must first be pointed out that Article 6 (1) of the Council's Rules of Procedure provides as follows:

'Acts of the Council on an urgent matter may be adopted by a written vote where all the members of the Council agree to that procedure in respect of the matter in question.'

47 It is clear from the wording of that provision that all the members of the Council must agree before recourse can be had to the written procedure. That requirement of unanimity is independent of the question whether the measure in point has, by virtue of the Treaty, to be adopted by unanimity or a majority vote.

48 The Council is therefore under a duty to comply with the procedural rule which it itself laid down in Article 6 (1) of its Rules of Procedure. It cannot depart from that rule, even on the basis of a larger majority than is laid down for the adoption or amendment of the Rules of Procedure, unless it formally amends those rules, which constitute a measure adopted pursuant to Article 5 of the Treaty establishing a Single Council and a Single Commission.

49 It follows that in this case the failure to comply with Article 6 (1) of the Council's Rules of Procedure must be regarded as an infringement of an essential procedural requirement within the meaning of the first paragraph of Article 173 of the Treaty, and that therefore the submission to that effect contained in the application is well founded. Council Directive 85/649 of 31 December 1985 prohibiting the use in lifestock farming of certain substances having a hormonal action must therefore be declared void and there is no need to consider the applicant's other submissions.

## Costs

50 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, according to the first subparagraph of Article 69 (3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the parties bear their own costs in whole or in part.

51 In this case, although the applicant has succeeded in its submission alleging an infringement of an essential procedural requirement, it has failed in other submissions, including that relating to the essential institutional problem involved in the case, namely the choice of legal basis for the contested directive.

52 In those circumstances the parties, including the interveners, must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

**(1) Declares void Council Directive 85/649/EEC of 31 December 1985 prohibiting the use in livestock farming of certain substances having a hormonal action;**

**(2) Orders the parties, including the interveners, to bear their own costs.**

Bosco Rodríguez Iglesias Koopmans Everling

Bahlmann Galmot Kakouris Joliet O'Higgins

Delivered in open court in Luxembourg on 23 February 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President