REPORT FOR THE HEARING
delivered in Case 68/86 *

I — Summary of the facts

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), was adopted on the basis of the EEC Treaty 'and in particular Articles 43 and 100 thereof'. The Commission's proposal mentioned only Article 43. Article 3 of the Directive prohibits without exception the placing on the market of certain hormonal substances for administering to animals of all species. 'Subject to Articles 4 and 5', Article 2 of the directive requires the Member States to prohibit the administering of certain substances to farm animals. According to Article 4, Member States may authorize the administering of certain substances for therapeutic purposes.

Article 5 provides that:

'The Council, acting unanimously on a proposal from the Commission shall take a decision as soon as possible on the administering to farm animals of oestradiol 17/ß, progesterone, testosterone, trenbolone and zeranol for fattening purposes.

Pending adoption of this decision, the national regulations in force and the arrangements made by Member States concerning these substances shall continue to apply while complying with the general provisions of the Treaty and without prejudice to measures adopted in accordance with a Community procedure designed for their approximation.

Member States may not authorize the use of new substances during this transitional period.'

Article 7 of the directive states that the detailed rules for carrying out and financing controls concerning the application of the directive 'shall be laid down by the Council acting unanimously on a proposal from the Commission'.

On 16 July 1985 the Council, referring to Articles 43 and 100 of the EEC Treaty, adopted Directive 85/358/EEC supplementing Directive 81/602/EEC (Official Journal 1985, L 191, p. 46). Directive 85/358/EEC deals with the questions referred to in Article 7 of Directive 81/602/EEC. The second paragraph of Article 14 of the directive provides that the unanimous decision of the Council provided for in Article 5 of Directive 81/602/EEC shall be adopted before 31 December 1985.

Article 8 of Directive 81/602/EEC provides that:

'Not later than 1 July 1984, the Commission shall submit to the Council a report on the experience acquired and scientific developments, accompanied, if necessary, by proposals which take these developments into account'.

In pursuance of that article the Commission set up a scientific group on anabolic agents in animal production whose terms of reference were to determine whether the use for fattening purposes in animals of the five hormonal substances mentioned in Article 5 of Directive 81/602/EEC present any

* Language of the Case: English.

harmful effect to health. In 1982 the scientific group reported that the use of the first three of the substances mentioned (the 'natural' hormones) presented no harmful effects to the health of the consumer when used under appropriate conditions. In the case of the remaining two substances (the 'synthetic' hormones), the scientific group reported that some data were missing and further inquiries were necessary.

On 13 June 1984 the Commission submitted to the Council a proposal for a directive based on Article 43 of the EEC Treaty amending Directive 81/602/EEC (Official Journal 1984, C 170, p. 4). On the basis of the scientific group's report, which had been studied by various committees, the proposal envisaged in Article 1 that Article 5 of Directive 81/602/EEC would be amended so as to permit the use of the natural hormones for fattening purposes subject to specific conditions. According to the new Article 5 (5), the possible authorization of use of synthetic hormones would be referred to a subsequent decision of the Council acting by qualified majority on a proposal from the Commission.

On 13 December 1984 the Economic and Social Committee delivered an opinion on that proposal (Official Journal 1985, C 44, p. 14). The Committee's opinion was that the proposal should be rejected and the provisions of Directive 81/602/EEC retained pending further consideration of scientific evidence (paragraph 1), since the scientific group's additional report on synthetic hormones was to be completed by the end of the year (paragraph 3). The opinion also states that, pending the adoption of uniform Community-wide rules, Community measures should be adopted enabling products obtained with or without the aid of anabolic agents to be identified (paragraph 13).

On 3 April 1985 the Commission submitted to the Council an amendment of its proposal (Official Journal 1985, C 106, p. 7), envisaging in substance the addition of an article designed to facilitate the identification of products obtained with or without the addition of anabolic agents.

On 11 October 1985 the European Parliament adopted a resolution on the proposal from the Commission (Official Journal 1985, C 288, p. 158). It considered that, in order to protect the consumer, uniform standards should be laid down by means of a regulation (paragraph 2). It welcomed the proposed ban on the synthetic hormones in view of the fact that their safety had not been conclusively proven (paragraph 6), but it did not approve the proposed authorization of the three natural hormones except for therapeutic purposes (paragraph 7).

Following receipt of that resolution, the Commission cancelled a meeting of the scientific group which had been scheduled to take place on 30 October 1985. The applicant deduces from a letter sent by the chairman of the scientific group to the Commission on 23 September 1985 and from the draft report appended to that letter that the meeting on 30 October 1985 would probably have resulted in a report that the safety of the synthetic hormones had been proven.

On 31 October 1985 the British Minister for Agriculture, Fisheries and Food, Mr Jopling, wrote to the Vice-President of the Commission, Mr Andriessen, expressing his 'surprise' and 'concern' at the cancellation of the meeting of the scientific group and his hope that the Commission would reconsider its decision.

Without reconvening a meeting of the scientific group (as it explained in its written answer to a question asked by the Court, the Commission considered that another meeting of that group was superfluous once the decision had been taken to accept the changes suggested by the Parliament), the Commission submitted to the Council in November 1985 (on the 19th according to the applicant, on the 8th according to the Council), as an 'amendment of the proposal for a directive', 'pursuant to the second paragraph of Article 149 of the EEC Treaty', a proposal for a Council regulation concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action (Official Journal 1985, C 313, p. 4). Without expressly mentioning it, that draft regulation purported to be based on Article 43 of the EEC Treaty, to the exclusion of Article 100, which mentions only directives. The draft regulation envisaged the banning of the natural hormones, except for therapeutic purposes, and the banning of the synthetic hormones altogether. The Council discussed the draft regulation on 19 November 1985. The Parliament and the Economic and Social Committee have not been specifically consulted about the draft regulation.

On 18 December 1985 the Commission submitted to the Council 'pursuant to the second paragraph of Article 149 of the EEC Treaty' an amended proposal for a directive prohibiting the use in livestock farming of certain substances having a hormonal action (Official Journal 1985, C 351, p. 13). That proposal, based solely on Article 43 of the EEC Treaty, provides for a total ban on hormones (Article 2) but provides in Article 3 for a special procedure for establishing a list of the hormones that may be used for therapeutic purposes. The inclusion of the synthetic hormones in that list was to be done only on the basis of authorization by the Council acting by a qualified majority in response to a proposal from the Commission.

On 19 December 1985 the members of the Council were asked to consider, on the basis of a French text only, the Commission's proposal. At that session the Commission proposed its final amendments (Doc. COM(85) 832 final). The Council decided, contrary to the United Kingdom's and Denmark's vote, to adopt the directive in accordance with the written procedure before 31 December 1985.

That procedure is governed by Article 6 (1) of the Rules of Procedure of the Council (Official Journal 1979, L 268, p. 1):

'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'.

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 contested directive in accordance with the written procedure. In a letter dated 31 December 1985 sent to the Secretary-General of the Council the United Kingdom Permanent Representative pointed out on behalf of the Minister for Agriculture that the United Kingdom opposed the use of the written procedure as well as the directive itself. Its main reasons were that it regarded the legal basis as incomplete and inconsistent with Directives 81/602/EEC and 85/358/EEC and that there was no scientific evidence justifying a ban on the use of the hormones concerned.

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

That Council directive, No 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 based on the EEC Treaty 'and in particular Article 43 thereof' and refers to 'the proposal from the Commission' without giving further details. Article 2 provides for a ban on the natural hormones save for therapeutic purposes and for an absolute ban on the synthetic hormones.

II — Written procedure and conclusions of the parties

The United Kingdom's application was registered at the Court on 10 March 1986.

By orders of 3 October 1986 the Court granted leave to the Commission to intervene in support of the Council's conclusions and to the Kingdom of Denmark to intervene in support of the applicant's conclusions.

The written procedure followed the normal course.

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. The parties were requested to reply in writing to certain questions and the Council was also asked to make certain documents available to the Court. Those requests were complied with within the time allowed.

The applicant claims that the Court should:

(i) annul the Council directive of 31 December 1985 prohibiting the use in livestock farming of certain substances having a hormonal action; and

(ii) order the Council to pay the costs of this action.

The Government of the Kingdom of Denmark, intervener, supports the United Kingdom's conclusions.

The Council and the Commission, as interveners, contend that the Court should dismiss the application as unfounded and order the applicant to pay the costs.

III — Submissions and arguments of the parties

The applicant bases its application on a number of submissions: insufficient legal basis, insufficient reasons, procedural irregularities and lack of material justification.

1. *Legal basis*

The applicant submits that Directive 85/649/EEC should have been based not only on Article 43 (common agricultural policy) but also on Article 100 (approximation of laws) of the EEC Treaty so that the unanimity provided for by Article 100 was required, Article 43 allowing a vote by a qualified majority.

The directive clearly has agricultural purposes but its aim above all is to approximate the provisions laid down by law, regulation or administrative action in the Member States to safeguard the interests and health of consumers. That aim is also clear from the directive itself (first recital) and from the antecedent legislation dealing with the same subject-matter as well as from the working documents preceding the directive. The first recital of the preamble to

Directive 81/602/EEC, based on Articles 43 and 100 of the Treaty, deals with dangers for the health of the consumer and Article 5 provides for a subsequent unanimous decision on certain hormones (first paragraph) and approximation of laws (second paragraph), thus going beyond the ambit of Article 43 of the Treaty. Directive 85/358/EEC, also adopted unanimously on the basis of the two articles and requiring in Article 14 unanimity for the subsequent decision, also makes clear the aspect regarding the approximation of laws.

As regards the preparatory documents relating to Directive 85/649/EEC, the applicant refers to the Commission's proposal of 13 June 1984 (whose preamble refers repeatedly to the protection of human health and the approximation of laws), the opinion of the Economic and Social Committee and the resolution of the Parliament, both of which also emphasize the aspects of protecting human health and the interests of the consumer.

However, those matters are not covered by Article 43 of the Treaty. They come under Article 100 (see the judgment of the Court of 18 March 1980 in Case 91/79 *Commission* v *Italy* [1980] ECR 1099).

According to the applicant, the two separate aims (agricultural aims on the one hand and, on the other, the approximation of laws on human health and on the protection of consumers) are essential to the directive, which should therefore be based on Articles 43 and 100. That assertion is confirmed by the Council's practice of using both articles as a basis for directives on agricultural matters involving the approximation of laws. The applicant quotes a number of examples from the years 1964 to 1982.

The situation is different from that in Case 138/78 *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713. Where a measure is adopted on the basis of an article in the Treaty which has only a marginal effect on a policy governed by another article, it is not necessary to refer also to the latter article.

The applicant also rejects the contention that it is appropriate to seek to identify the article representing the 'primary purpose' of a measure and to base the measure on that article alone. That test is impractical because it is not always possible to distinguish between the primary and secondary purposes and dangerous because special procedures laid down in the article relating to the secondary purpose might easily be circumvented.

The Council admits that the directive is both a measure of agricultural policy and a measure of approximation of laws but it considers that Article 43 of the Treaty is sufficient as the single legal basis. According to the *lex specialis* principle, Article 100 is only relevant in the absence of a specific provision allowing for the adoption of directives. Article 43 is such a provision because it excludes no means of action and allows the adoption of all measures necessary to put the common agricultural policy into effect. By contrast, Article 100 is a general residual provision.

Where the Treaty empowers the Council to act in a particular manner for the realization of a common policy, it is incumbent upon it so to act. That requirement results from Article 4 (1) of the EEC Treaty.

Therefore, according to the Council, where an instrument is adopted to pursue an agri-

cultural objective or has such an objective as its principal purpose, it must obligatorily and exclusively be based upon Article 43, even where the means employed to achieve this objective is by way of approximation. Directive 85/649/EEC is an approximating measure which is essentially economic in nature, adopted in the context of the common agricultural policy. It is distinguishable from an approximating measure whose adoption is necessitated by the effect of provisions of national law on a common policy.

As is clear from the title, preamble and legal text of the directive at issue, it seeks to pursue objectives enumerated in Article 39 of the Treaty and in particular the rational development of agricultural production (Article 39 (1) (a)), the stabilization of markets (Article 39 (1) (c)) by guaranteeing the quality of products and adjusting supply to demand and the availability of supplies (Article 39 (1) (d)), which specifically means that the products are sound. The safeguarding of the interests and health of consumers merely arises as a corollary to the principle objectives.

Public health is not as such an objective of either Article 100 or of Article 43 nor is it exclusively reserved to the competence of the Member States. The judgment in Case 91/79 *Commission* v *Italy* cited by the applicant, is not relevant in this context. Rather, the competence of the Community in this domain must be considered on a case-by-case basis. As is clear from the judgment of the Court of 3 July 1974 in Case 9/74 *Casagrande* v *Landeshauptstadt München* [1974] ECR 773, the exercise of powers transferred to the Community is not limited if it affects a field which as such is not covered by the Community's powers.

The question of ascertaining the primary purpose of a measure is to be resolved by the discretionary power which, in its judgment in *Stölting*, the Court held was vested in the Council when acting by virtue of Articles 40 and 43 of the Treaty. Furthermore, according to the judgment of 30 September 1982 in Case 108/81 *Amylum* v *Council* [1982] ECR 3107, the Council may take all the necessary measures to attain the objectives defined in Article 39.

The Council admits that a certain practice has developed of basing directives comparable to the directive at issue on both Article 43 and Article 100. That practice arose on account of a political compromise reached in 1964 in order to prevent further delay in the adoption of certain directives. However, this was without prejudice to future action; delegations retained their complete freedom as regards the legal basis for future directives. Thus that practice was not followed systematically and there are examples of directives with similar aims based only on Article 43. Moreover, a mere practice cannot override the legal provision normally applicable. Such a practice is not unalterable. Each directive must be considered in the light of the circumstances of the case.

The applicant states in its reply that, if the Council were correct in submitting that directives pursuing mainly or exclusively agricultural purposes must 'obligatorily and exclusively' be based on Article 43, all directives of that kind based on both Article 43 and Article 100 would be defective. The Court has often had cause to apply such directives without ever expressing any doubt as to their validity (see, for example, the judgment of 25 January 1977 in Case 46/76 *Bauhuis* v *Netherlands* [1977] ECR 5).

The applicant also questions the Council's submissions concerning its discretionary power in respect of measures adopted by virtue of Articles 40 and 43 and questions

the relevance of the judgments cited by the Council. Its argument amounts in effect to suggesting that the decision on the legal basis of a measure is left to its discretion. That proposition is incompatible with Article 4 of the Treaty.

As regards the Council's argument that the safeguarding of the interests and health of consumers is merely a corollary of the principal objectives, the applicant points out that the Council has not taken into consideration the contrary evidence, in particular the observation made by the Economic and Social Committee in its opinion on the Commission's proposal that the Commission's initiative 'seems mainly motivated by its desire to safeguard health and consumer interests'.

The Council replies that it did take that opinion into account but that the substantive appreciation of that opinion is a matter for the political appreciation of the Council, taking into account the purely advisory role of the committee.

The Danish Government states that it is opposed to the use of the written procedure and the adoption of the directive because, like the applicant, it considers that the legal basis was incorrect. It submits that the guaranteeing of a certain degree of quality of agricultural products is not one of the express aims of the agricultural policy listed in Article 39 of the Treaty and that it is not therefore part of the agricultural policy *sensu strictu*.

The provisions applicable to agricultural products are not only to be found in the chapter on agricultural policy but also amongst the rules laid down for the establishment of the common market (Article 38 (2) of the Treaty). It was thus natural for the Council to decide to use, besides Article 43, Article 100 as the legal basis of directives having as their aim the free movement of agricultural products whilst taking into account the protection of human health. The Danish Government cites several directives in this field which were based on both Article 43 and Article 100. Directive 85/649/EEC falls into the same category. It is intended to create uniform conditions of production, to facilitate trade between Member States and to avoid distortion of the conditions of competition whilst having regard to the need to protect human health. Those aims are not covered by Article 43.

The Commission takes the view that the directive, whilst seeking *inter alia* to protect consumers and public health, does not go beyond Article 39 of the Treaty. As the Court held in its judgment of 2 June 1976 in Joined Cases 56 to 60/74 *Kurt Kampffmeyer Mühlenvereinigung KG and Others* v *Commission and Council* [1976] ECR 711, the aims set out in Article 39 are to be applied in a harmonious manner. To increase productivity (Article 39 (1) (a)) without jeopardizing the stability of markets (Article 39 (1) (c)) does not imply, in a period of agricultural surpluses, the increase of production but its improvement. The stabilization of markets requires optimum productivity, not the maximum. It is therefore necessary to avoid creating production for which there is no demand. If the interests of consumers were not taken into consideration, the stabilization of markets would not be achieved. The sound quality of agricultural produce is also inherent in the objective of ensuring the availability of supplies (Article 39 (1) (d)). It follows that the protection of consumers and of public health, although not Community objectives themselves, should be taken into account in the pursuit of the aims of Article 39.

Moreover, the Court held in its judgment of 20 April 1978 in Joined Cases 80 and 81/77

Commissionnaires réunis v *Receveur des douanes* [1978] ECR 927 (paragraphs 35 and 36, at pp. 946 and 947) that, in addition to the objectives of Article 39, the general aims of Article 2 of the Treaty are applicable to the common agricultural policy. For 'a harmonious development of economic activities' cannot be promoted regardless of consumer interests; nor can an 'accelerated raising of the standard of living' disregard public health.

Contrary to what is stated by the applicant, the Court did not state in its judgment in Case 91/97 *Commission* v *Italy* [1980] ECR 1099 that health as such was an objective of Article 100. Although that article may also be used to ensure the free movement of goods, it is not the only appropriate provision. The Commission refers in this context to the Court's judgment of 29 November 1978 in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347 (paragraph 55, at p. 2371):

'... the provisions of the Treaty relating to the abolition of tariff and commercial barriers to intra-Community trade ... are to be regarded as an integral part of the common organization of the market'.

Similarly, the observance of the rules of competition is more than a mere aim of the common agricultural policy of which it is an integral part. The Council may, under Article 42, make the rules of competition applicable to agriculture, and Article 40 (2) (a) provides as one of the possible forms of market organization 'common rules on competition'.

According to the Commission, it is contrary to the very wide field of application of Article 43 to base Directive 85/649/EEC on another legal basis. It gives several examples of other agricultural directives and regulations which are based only on Article 43 although they also pursue aims other than those expressly mentioned in Article 39. Such a broad interpretation of Article 43 does not deprive Article 100 of all effect: it remains applicable to any measure which, though concerning agricultural products covered by Annex II to the EEC Treaty, does not pursue objectives of the agricultural policy.

2. *Statement of reasons*

The applicant claims that the Council failed in several respects to state proper reasons.

The directive gives the impression that it was adopted for the purpose of achieving certain objectives of the common agricultural policy but the title, recitals and preamble give no indication of the directive's true purpose, namely to promote the approximation of national laws in the interests of consumers, particularly by safeguarding their health. Moreover, Directive 85/649/EEC makes no reference at all to Directive 81/602/EEC and does not identify the Commission's proposal. Those omissions serve to conceal the fact that the contested directive is complementary to Directive 81/602/EEC and, like that directive, is designed to fulfil the objectives of Article 100 of the EEC Treaty as well as those of Article 43.

Furthermore, Directive 85/649/EEC 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/EEC and does not advance any reason for disregarding the findings made in that report. Legislation manifestly inappropriate to the achievement of its objective may be invalid (see the judgment in Case

138/78 *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713, paragraph 7, at p. 722). The Council ought therefore to have considered the report to ascertain whether the proposed legislation was patently unsuited to its objectives and to mention this in the preamble to the directive in question. Otherwise the Court cannot exercise appropriate judicial review (Joined Cases 8 to 11/66 *Cimenteries* v *Commission* [1967] ECR 75, at p. 94). The duty to take account of the report also arises from the fact that the Council and the Commission must cooperate in the achievement of the objectives of the Treaty, whether in the context of Article 152 thereof or in the context of Article 8 of Council Directive 81/602/EEC.

The Council considers that Directive 85/649/EEC is sufficiently reasoned in view of the case-law of the Court on Article 190 of the EEC Treaty, in particular its judgment in Case 166/78 *Italy* v *Council* [1979] ECR 2575 and in Case 110/81 *Roquette frères* v *Council* [1982] ECR 3159.

As far as concerns the alleged absence of references to the protection of consumers, in particular their health, the Council points out that the first recital of the preamble to the directive states that:

'... assessments of their effect on human health vary and this is reflected in the regulations governing their use ...'.

Antecedent legislation is referred to in the fifth recital which refers to Council Directive 72/462/EEC of 12 December 1972 on health and veterinary inspection problems on importation of bovine animals and swine and fresh meat from third countries (Official Journal, English Special Edition 1972, 31 December 1972) and to Directive 85/358/EEC.

The Council admits that it departed from established practice by omitting to make a specific reference to the Commission's proposal. However, this was impractical and impossible in view of the fact that a whole series of proposals were concerned encompassing both provisions of the original series of proposals for Directive 81/602/EEC as well as new proposals and amendments thereto. Moreover, the absence of a specific reference to Directive 81/602 reinforces the autonomous nature of the directive in question.

As far as the scientific report is concerned, the Council submits first of all that Article 8 of Directive 81/602/EEC imposes no obligation upon the Council but only on the Commission. Article 152 of the Treaty is not relevant either. If the Council requests a study from the Commission under that article, such a request does not in itself produce any obligatory effects; the Commission is solely responsible for the action which it judges appropriate. In any case, the report mentioned in Article 8 of Directive 81/602/EEC and the studies mentioned in Article 152 of the EEC Treaty should be considered as elements preliminary to the drafting of a proposal by the Commission which enjoys a wide margin of discretion. Any regard which the Council would have to such a scientific report would be totally at its discretion and subject to its political appreciation. A reference to the report in the statement of reasons was not therefore necessary.

As to the question whether the directive is patently unsuited to its objectives, the Council considers it a *non sequitur* to state that a report to which it was not obliged to have regard should determine whether the proposed legislation was patently unsuited to its objectives. Furthermore, the applicant has failed to demonstrate in which specific ways the directive must be regarded as patently unsuited to its objectives.

As regards the judgment in Case 110/81 *Roquette Frères* v *Council* relied on by the Council, the applicant contends that it is irrelevant. That case concerns the sufficiency of the reasoning, not its truth or tendency to mislead. The Council does not accept that distinction.

The Commission takes the view on the basis of the judgment in Case 37/83 *Rewe-Zentrale AG* v *Landwirtschaftskammer Rheinland* [1984] ECR 1229 that the statement of reasons for Directive 85/649 is sufficient and correct. The recitals refer not only to the agricultural considerations but also to human health. The statement of reasons would have become unnecessarily detailed if not only the scientific report but other reports as well were to have been cited. As to the precise references to the Commission's proposals, the Commission mentions other cases in which proposals, having been amended several times and not published, are not identified in the act adopted by the Council.

The Commission points out a consideration of a general nature which it deduces from the judgment in Case 106/81 *Julius Kind KG* v *EEC* [1982] ECR 2885 and in Case 22/70 *Commission* v *Council* [1971] ECR 263. The requirements concerning the reasoning of an act are less stringent *vis-à-vis* a Member State than *vis-à-vis* an individual affected by a Community act. This is particularly true where the Member State, as in this case, has participated actively in the discussions within the Council and the reasons for the adoption of the act are well known to that State.

3. *The requirement of Council unanimity arising from the provisions contained in the previous directives*

Apart from the requirement of unanimity arising from the application of Article 100 of the Treaty as the legal basis, the applicant also deduces such a requirement from Article 5 of Directive 81/602/EEC and Article 14 of Directive 85/358/EEC which provide for a unanimous decision of the Council on the administering of the five hormones referred to in Directive 85/649/EEC. In the two previous directives the Council undertook by unanimity to adopt another decision by unanimity. The applicant, which does not expressly rely on the principle of estoppel which the Council considers inapplicable in this case, submits that it is contrary to the principles of good faith and respect for legitimate expectation to adopt the later decision only by majority decision. Where the Council undertakes to act by unanimity, the governments act in reliance upon that undertaking, in particular by negotiating with a view to arriving at a consensus.

A legislative body (a parliamentary assembly or the Council) may be obliged to respect an undertaking given in antecedent legislation to follow a specified procedure (see *Attorney-General for New South Wales* v *Trethowan* [1931] 44 CLR 394; *Harris* v *Donges* [1952] 1 TLR 1245).

The Council states first of all that Directive 85/649/EEC is not the decision envisaged in the first paragraph of Article 5 of Directive 81/602/EEC and Article 14 of Directive 85/358/EEC. Those provisions refer to the 'administering' of five specified substances whereas the directive in question prohibits a number of unspecified substances and contains provisions relating to the importation of animals and meat from non-member countries. Directive 85/649/EEC therefore constitutes a measure of approximation, as envisaged in the second paragraph of Article 5 of Directive 81/602/EEC, and a set of rules on imported products, as envisaged in Article 6 of that directive. None of those provisions requires unanimity.

The Council admits that, substantively, the matter of the administering of the five substances listed in the first paragraph of Article 5 of Directive 81/602/EEC has been dealt with in a different fashion from that envisaged in that provision. However, the Council could have chosen, for policy reasons and in the exercise of its discretion, to act pursuant to the second instead of the first paragraph of Article 5 of Directive 81/602/EEC. It is now for the Commission, from whom a proposal is necessary for future action by the Council, to draw the conclusions from that situation.

The Council denies that the applicant's legitimate expectations were breached, even if the directive had been the decision envisaged in the first paragraph of Article 5 of Directive 81/602/EEC.

It is difficult to translate the theory of legitimate expectations from the sphere of decisions affecting individuals to the sphere of the general powers of decision-making by a legislative body. Such an application is not completely excluded (see the judgment of 9 June 1973 in Case 81/72 *Commission* v *Council* [1973] ECR 575). However, according to the judgment of 29 March 1971 in Case 113/77 *NTN Toyo Bearing Company Limited and Others* v *Council* [1979] ECR 1185, the Council is forbidden only to disregard a general rule in its application to individual cases, but nothing prevents it from changing that rule. If the principle of legitimate expectation had to be extended to Member States taking part in the Council's proceedings, the Council would be virtually unable to take new decisions and Community law could not develop.

As regards the two English cases relied on by the applicant, the Council does not consider them relevant in this case. In *Attorney-General for New South Wales* v *Trethowan*, the limitation on the legislature arose from a higher law and *Harris* v *Donges* concerned entrenched rights which could be revoked only in a particular way.

Finally, the Council, without wishing to call in question the applicant's right to sue, expresses doubts as to whether it suffered detriment as a consequence of the fact that the directive was adopted by a qualified majority. The only alternative would have been to maintain the pre-existing situation which was prejudicial to the common market as a whole and to each of the Member States in particular owing to barriers to intra-Community trade and distortions of competition. An applicant has no legitimate interest in securing the annulment of a decision for a formal defect where such annulment can only, as in this case, give rise to another decision substantially identical to the decision annulled.

The applicant replies that the second paragraph of Article 173 of the Treaty imposes no obligation on the Member States to prove that they have suffered detriment. Member States as such have an interest in the Council's observance of the law. The Council does not dispute that argument.

The Commission supports the Council, in particular in its interpretation of Article 5 of Directive 81/602/EEC. The contested directive goes beyond the administration of the five named substances. In addition to the prohibition of those substances, it provides for procedures for the inclusion of other substances (Article 3 (c)), the monitoring of the production of the hormonal substances (Article 4) and on the importation of animals and meat from non-member countries (Article 6). The Commission also stresses that a provision such as the first subparagraph of Article 5 of Directive 81/602/EEC not only cannot bind

the Council but would also interfere with the Commission's prerogatives under Article 155 of the Treaty if it were to exclude the choice of other procedures.

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

The applicant considers that the use of the written procedure for the adoption of Directive 85/649/EEC was in flagrant violation of Article 6 (1) of the Council's own Rules of Procedure because two Member States had raised objections to the use of that procedure. This constitutes a breach of an essential procedural requirement since a meeting of the Council affords each member all the advantages of direct negotiations, which are particularly important when unanimity is required. Besides the breach of Article 6 itself there is another breach of Community law arising from the failure to give reasons for departing from that rule.

The Council contends that special circumstances allowed recourse to the written procedure in spite of the negative vote of two of its members. Since the Council's proposal had arrived only the previous day and the Council's translation service was overworked because of the preparations for the imminent accession of Spain and Portugal, the Council meeting of 19 December 1985 could not come to a final agreement. The solution normally adopted in such situations — putting the text to adoption at a further Council meeting by 'A point procedure' referred to in Article 2, paragraphs 6 and 7, of the Council's Rules of Procedure — was not feasible in this case since the last Council of the year 1985 was due to take place the following day. After consulting its Legal Service, the Council decided to have recourse to the written procedure so that the directive might be formally approved in all languages before the end of 1985. The Council admits that the date of 31 December 1985 mentioned in the second paragraph of Article 14 of Directive 85/358/EEC is only indicative and confirms its interpretation of the same provision, namely that Directive 85/649/EEC is not the decision envisaged in that article.

In such a situation the Council considers that the interpretation it gave of Article 6 (1) of its Rules of Procedure is correct. The purpose of that rule, underlined by the applicant, namely to allow each Member of the Council to request a meeting of the Council to hold direct discussions, was fulfilled. The applicant had the full opportunity of developing its position at length in two Councils. Therefore the request for an additional meeting would only have led to unnecessary delay and in legal terms probably amounts to a misuse of procedure.

In the Council's view, its interpretation of Article 6 of its Rules of Procedure, giving precedence to the *ratio legis* as opposed to the exact wording of the provision, is supported in a series of judgments of the Court. The Council refers to the judgments in Case 20/70 *Transports Lesage & Cie* v *Hauptzollamt Freiburg* [1970] ECR 861, Case 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279, Case 7/77 *von Wüllerstorff und Urbair* v *Commission* [1978] ECR 769 and Case 25/83 *Buick* v *Commission* [1984] ECR 1773.

In its written answer to a question asked by the Court the Council explained that in the exercise of its discretionary power it considered it appropriate and necessary to adopt the directive before the end of 1985. Its adoption was urgently needed owing to the existence of distortions of competition and obstacles to trade.

The applicant replies that the discussion in the Council on 19 November 1985 was on a Commission draft of that date which, moreover, differed in several material respects from the directive finally adopted. The Member States did not have the opportunity of examining the Commission's draft or the contested directive. This was also true of the discussion on 19 December on the draft distributed the previous day and not even translated from the French. Thus the United Kingdom did not have a full opportunity of developing its position at length or of consulting its legislative and governmental authorities.

The inadequacy of the procedure applied is illustrated by the fact that the text published in the Official Journal differs in three respects from the text notified to the Member States.

The judgments of the Court cited by the Council to justify the departure from the wording of Article 6 of its Rules of Procedure in the interests of its objectives do not support that view. Rather, they only support the proposition that in the event of ambiguity an interpretation which accords with the objectives of the instrument in question is to be preferred to one which merely accords with its literal language. That proposition is cognate with the rule found in Article 31 of the Vienna Convention on the Law of Treaties. However, in the present case, there is no ambiguity.

In its rejoinder the Council states that, although in its opinion the Vienna Convention is not relevant in Community law, it considers that Article 31 supports its argument that a text must be interpreted 'in accordance with the ordinary meaning to be given to its terms . . . in their context as well as having regard to its object and purpose'.

The Council also contests the claim that the applicant did not have an opportunity to consider the Commission's proposals sufficiently. The draft discussed on 19 November 1985 was not distributed the same day but on 12 November. Between 19 November and 19 December 1985 various high-level meetings took place. The members of the Council were entirely familiar with the issues before them. The final Commission proposal, submitted during the session on 19 December 1985, merely reflected the intensive discussions which had been taking place during the previous month and which were merely the culmination of discussions within the Council over a period of at least 18 months.

Moreover, the general political agreement reached on 19 December 1985, despite the absence of language versions other than the French text, constituted another element justifying recourse to the written procedure.

As regards the differences between the notified text and the published text, the Council relies on Article 191 of the Treaty which provides that: 'Directives . . . shall be notified to those to whom they are addressed and shall take effect upon such notification' (second paragraph). Consequently, it is the notified text alone which imposes a legal obligation and which may be used in order to interpret the intention of the legislator.

The Danish Government considers that the Council must comply with its Rules of Procedure. The rule in Article 6 (1) is clear. Its application could never be regarded as a misuse of procedure merely because a Community institution considers that a Member State has had sufficient opportunity to express its views. Such an assessment by the Council is not acceptable. The breach of Article 6 (1) of the Council's Rules of Procedure implies that the measure adopted by the Council could not take effect.

5. *Failure to consult the Parliament and the Economic and Social Committee*

The applicant submits further that there was an infringement of an essential procedural requirement arising from the Council's failure to consult the Parliament on the text of the draft submitted by the Commission in November 1985. That draft did not contain a single article which had been the subject of the Parliament's scrutiny. There were several substantive amendments in relation to the text which had been examined (the proposal of June 1984, amended in April 1985) and in relation to the alternative text proposed by the Parliament in October 1985. Since the directive had also to be based on Article 100 of the Treaty, a reconsultation of the Economic and Social Committee was also necessary.

The Council considers that it is appropriate to reconsult the Parliament on an amended proposal only if the amendments exceed the scope of the original proposal and substantive changes have been made to the initial proposal. It relies on the judgment of 15 July 1970 in Case 41/69 *ACF Chemiefarma NV* v *Commission* [1970] ECR 661 and of 4 February 1982 in Case 1253/79 *Battaglia* v *Commission* [1982] ECR 297. In the present case, the amendments (a mere change of method in dealing with the hormonal substances) did not exceed the scope of the original proposal. Furthermore, reconsultation was also unnecessary owing to the fact that the amendments suggested by the Parliament were materially incorporated by the Commission in its amended proposal. Subsequently, those amendments were in general incorporated by the Council in the final text of the directive. As regards the amendments specifically mentioned by the applicant, the Council explains in detail that they were necessitated by a decision taken in the mean time or because they were a logical consequence of other provisions or because they were added by the Parliament. In any event, none of them constitutes a substantive change.

The Council also points out that the fact that the President of the European Parliament did not request that the Parliament be consulted a second time militates in favour of the Council's conclusions.

The Commission observes that it drafted its amended proposal of November 1985 precisely on the lines of the key conclusions of the European Parliament adopted in its Resolution of 11 October 1985. It acted exactly as envisaged in the second subparagraph of Article 149 of the Treaty. It would be contrary to that provision and to the institutional balance to reconsult the Parliament on changes which take account of its suggestions. In practice, no such reconsultation takes place, although the Parliament is informed of the extent to which the Commission has taken up its proposed amendments.

6. *Material justification for the directive*

As regards the substance of the directive, the applicant puts forward submissions based on the principle of proportionality, the impossibility of enforcing the directive and the principle of Community preference.

According to the applicant, the Court has the power and the duty to review the accuracy of statements appearing in the preamble to a Community act in order to determine whether the reasons given in the preamble amount to a legal justification (see the judgment of 1 July 1965 in Joined Cases 106 and 107/63 *Toepfer* v *Commission* [1965] ECR 405 and the Opinion of Mr Advocate General Lagrange in Case 13/63 *Italy* v *Commission* [1963] ECR 165, at p. 181).

The applicant submits that the reasons given in the preamble to the contested directive, namely the necessity of avoiding distortions

of competition and barriers to trade, cannot legally amount to a justification for the imposition of the obligations laid down in the directive. Without Directive 85/649/EEC, the Member States could not prevent, by reason of Articles 7 and 30 of the Treaty, the importation of animals or meat treated with the hormones, irrespective of their own legislation. For, as is clear from the scientific report and the draft second report, the use of the five hormonal substances is not, in principle, dangerous. Thus it seems very doubtful that a Member State would have been able under Article 36 of the Treaty to prohibit the importation of animals or meat on the grounds of the protection of health.

Moreover, the prohibition of the five hormones is disproportionate in relation to the objective pursued. If it was desired to ensure that no person should be deterred from consuming meat by reason of mistrust of the effects of the five hormones, this objective could have been met by alternative means, such as by elaboration of the rules governing the marking or packaging of meat. The applicant refers in this regard to the judgment of 8 February 1983 in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203.

The applicant further points out that the obligations imposed by Directive 85/649/EEC cannot be enforced. Since natural hormones are present in all livestock, meat of beasts treated with natural hormones is indistinguishable from that of untreated beasts.

Finally, the applicant relies on the principle of Community preference (see Article 44 (2) of the Treaty; judgment of 13 March 1968 in Case 5/67 *W. Beus GmbH & Co.* v *Hauptzollamt München* [1968] ECR 83; judgment of 24 June 1970 in Case 73/69 *H. Oehlmann & Co.* v *Hauptzollamt Münster* [1970] ECR 467) which requires *inter alia* that the legal position of intra-Community trade should be no less favourable than that of trade with non-member countries. Article 6 of the contested directive recognizes this principle in providing for the drawing up of a control programme to ensure that imports do not receive more favourable treatment than Community products. Nevertheless, the prohibition of the use of hormones will increase Community production costs whilst producers in non-member countries, although subject to that prohibition as regards their exports to the Community, will be able to offset against the price of those exports the commercial advantage that they gain by the use of hormones in the production of meat for other markets.

As regards the applicant's argument to the effect that the reasons given cannot justify the measures adopted, the Council refers to the Court's case-law on the principle of proportionality and the discretion of the Council (judgment of 5 July 1977 in Case 114/76 *Bela-Mühle Josef Bergmann KG* v *Grows Farm GmbH & Co. KG* [1977] ECR 1211; judgment of 20 February 1979 in Case 122/78 *Buitoni SA* v *Forma* [1979] ECR 677; judgment of 6 December 1984 in Case 59/83 *Biovilac SA* v *EEC* [1984] ECR 4057) and on the extensive powers granted to it in agricultural matters to achieve unity of the market (judgment of 20 April 1978 in Joined Cases 80 and 81/77 *Commissionnaires réunis* v *Receveur des douanes* [1978] ECR 927). In view of that case-law, the Council considers that the measures adopted are not manifestly unsuitable, inappropriate or unnecessary. As regards the conclusions to be drawn from the scientific report, the Council points out that in its view it has no legal obligation to take the report into account.

As regards the question whether meat treated with hormones is indistinguishable from untreated meat, the Council takes the view that the burden of proof is on the applicant. The Council would not be opposed to seeking an independent expert's report.

The claim that there has been a breach of the principle of Community preference is merely an economically unsubstantiated hypothesis. That principle is protected by Article 6 of the contested directive.

The Commission submits that without Directive 85/649/EEC there would indeed be obstacles to intra-Community trade. Like all partial harmonizing rules, the second subparagraph of Article 5 of Directive 81/602/EEC leaves open the question of the extent to which Member States may adopt measures not covered by the directive. In fact, the Commission opened infringement proceedings against a Member State for applying trade restrictions on imports of meat treated with hormones and it sent a reasoned opinion to another Member State for an infringement of the 'standstill' provision in the third paragraph of Article 5 of Directive 81/602/EEC.

As far as distortion of conditions of competition is concerned, it is obvious that where substances increasing production may be used in some Member States and not in others such conditions are distorted.

It is quite clear that rules governing the marking and packaging of meat would not have been sufficient to eliminate the distortion of the conditions of competition and barriers to intra-Community trade. Consequently, the measures adopted are far from being patently unsuited to attain the objectives.

In order to refute the applicant's argument that the directive is unenforceable the Commission refers to Directive 85/358/EEC and Directive 86/469/EEC of 16 September 1986 concerning the examination of animals and fresh meat for the presence of residues (Official Journal 1986, L 275, p. 36). Those directives provide detailed provisions for the control of hormonal substances from the stage of their manufacture up to their administration.

The Commission takes the view that the principle of Community preference is not affected by indirect subsidies such as those mentioned by the applicant. If non-member countries were actually to introduce such subsidies, appropriate counter-measures would be provided for in the Community's market regulations. In a world becoming more and more 'consumer-minded', the fact that meat is produced 'hormone-free' might, in the longer term, have an advantageous effect on Community exports.

G. C. Rodríguez Iglesias
Judge-Rapporteur