OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 14 October 1987 *

Mr President,
Members of the Court,

1. In support of its action for the annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages (Official Journal 1986, L 95, p. 45), the United Kingdom has made the following two submissions:

(1) The contested directive is based solely on Articles 42 and 43 of the EEC Treaty to the exclusion of Article 100.

(2) The version of the directive notified to it and published in the Official Journal differs from the version voted on and adopted by the Council.

2. The fact that the United Kingdom's action is thus founded on considerations of legal basis, procedure and form rather than of substance has led the Council to question its interest in bringing proceedings, especially since the United Kingdom states that it trusts that should the contested directive be annulled the Council will, in order to achieve the aims in question, adopt a new directive largely identical in content (paragraph 10 of the application) and that it would in principle approve of the adoption of such a measure (paragraph 28 of the reply).

3. On that point I need merely refer to the judgment of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1493, in which the Court held that

'concerning the Commission's interest in bringing proceedings . . . it is sufficient to observe that Article 173 of the EEC Treaty draws a clear distinction between the right of action available to the Community institutions and the Member States, on the one hand, and that available to natural or legal persons, on the other, in so far as the first paragraph of Article 173 gives the Commission and any Member State the right to bring an action for annulment to challenge the legality of any Council regulation without making the exercise of that right conditional on proof of an interest in bringing proceedings' (paragraph 3).

4. What was true in that case in respect of an action for annulment brought by the Commission against a Council regulation is equally true in this case, brought by a Member State against a Council directive, since Article 173 puts the institutions and the Member States on the same footing and concerns all acts of the Council and the Commission with the sole exception of recommendations and opinions. The action of the United Kingdom is therefore admissible.

A — The legal basis of Directive 86/113/EEC

5. In its judgment of 26 March 1987 the Court pointed out that where the dispute as to the correct legal basis concerns Treaty articles laying down different rules for the adoption of measures by the Council, it is not purely formal in scope inasmuch as the

* Translated from the French.

choice of the legal basis may have consequences for the content of such measures (paragraph 12).

6. That is the case here, since under Article 43 the Council may act by a qualified majority, whereas Article 100 requires unanimity.

7. The Court had previously stated that

'in the context of the organization of the powers of the Community the choice of a legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review' (paragraph 11).

8. It therefore seems prudent, in examining this dispute, not to attach too much importance to the more or less standard practice of adopting most directives in the veterinary, feed and phytosanitary sectors on the basis of both Article 43 and Article 100.

9. That practice has never been approved by the Commission, and its proposals in such matters continue to be based solely on Article 43. Furthermore, a number of Member States have accepted the practice only in the context of a political compromise reached within the Agriculture Council at its meeting in June 1964.

10. Indeed, it appears from the document of that date submitted by the Council as Annex II to its Rejoinder that

'the Belgian, French, Italian, Luxembourg and Netherlands delegations consider that these directives [concerning matters of health and health policy affecting intra-Community trade in fresh meat and in bovine animals and swine] should be based exclusively on Article 43. They have agreed to the solution adopted only in order to make it possible — owing to the importance of these texts for the creation of a single market in the relevant areas — for these directives to enter into force at the earliest opportunity . . . '

and that

'all the delegations retain their complete freedom as regards the legal basis for any directives which might be adopted in the same or similar fields . . . thereafter'.

11. The same is true of those few directives concerned more directly with animal welfare, mentioned at page 7 of the Council's defence and page 19 of its rejoinder.

12. As for Council Decision No 78/923/EEC of 19 June 1978, concerning the conclusion of the European Convention for the Protection of Animals kept for Farming Purposes (Official Journal 1978, L 323, p. 12), its value as a legal precedent seems to me to be even more dubious. It is odd to note that it is based additionally on Article 100, although the only acts which the Council may adopt on that basis are directives. (It is a little as if the Council had given the act disputed in these proceedings the form of a regulation but had based it on Articles 43 and 100.)

13. Having said that, what are the objective factors which should have guided the Community institutions in their choice of the legal basis for the contested directive?

14. First of all, as its title indicates and as Article 1 states, it lays down minimum standards for the protection of laying hens kept in battery cages. These standards concern on the one hand the dimensions of battery cages (Article 3) and on the other the conditions for laying hens kept in battery cages (Article 4), as laid down in the annex to the directive.

15. The annex contains provisions concerning in particular the form and type of materials employed for constructing cages, the design and size of cage openings, insulation, ventilation, lighting, the maintenance of equipment, feeding and rest periods for the animals, their care and the inspections which must be made. Virtually all those provisions are intended to avoid any injury or unnecessary suffering to the animals and to safeguard their health and welfare.

16. Furthermore, there can be no doubt that the Council's objective, from the political point of view, so to speak, was indeed that of improving the lot of laying hens.

17. That concern may be seen clearly in the Council resolution of 22 July 1980 on the protection of layer hens in cages (Official Journal 1980, C 196, p. 1), which gave political impetus to the Community's activity which resulted in the adoption of the contested directive. The Council agreed that

'the keeping of layer hens in cages must be subject to compliance with minimum standards and criteria established in order to ensure the protection of these animals'.

18. From the legal point of view, however, the Council was obliged to recognize, as it did as early as 19 June 1978 in its decision approving the European Convention for the Protection of Animals kept for Farming Purposes, that 'the protection of animals is not in itself one of the objectives of the Community'.

19. How, then, could measures to protect laying hens be taken under the EEC Treaty?

20. The reply to that question may be found in the same decision, since the Council stated that

'there are *disparities between* existing *national laws* on the protection of animals kept for farming purposes which may give rise to *unequal conditions of competition* and which may consequently have an indirect effect on the proper functioning of the common market'

and that

'the Convention deals with matters which are covered by the common agricultural policy'.

21. These remarks also explain why the Member States wished to act together, in the framework of the Community, rather than in the framework of the Council of Europe or separately.

22. The recital in the preamble to that decision concerning disparities in national legislation is repeated word for word in the Council resolution of 22 July 1980. It also appears in a slightly more elaborate form in the Commission's proposal for a directive laying down minimum standards for the protection of laying hens kept in battery cages and in Document 11489/85 of the General Secretariat, Agrileg 252 of 18 December 1985, on the basis of which the Council voted at its meeting on 25 and 26 March 1986.[1] That document, like the Commission proposal, goes on to state that

1 — Since the preamble to the directive as it was notified is disputed by the United Kingdom, I shall base my reasoning solely on the preamble to the text submitted by the Committee of Permanent Representatives to the Council.

'there is therefore a need to establish priority parameters and to define common minimum requirements applicable in all intensive housing systems, *in order to enable the market to operate satisfactorily in comparison, in particular, with Article 39* of the Treaty, while bearing in mind the need to protect animals . . . '.

23. In its judgment of 1 April 1982 in Joined Cases 141 to 143/81 *Holdijk* [1982] ECR 1299, the Court, for its part, had clearly shown that problems of animal welfare were to be assessed in the more general context of the establishment and functioning of the common market, particularly in the field of agriculture.

24. With regard to this case, it appears from the documents I have just cited that the Council based its power to adopt the directive on laying hens on the existence of disparities in national legislation and on the harmful consequences which they might have for the operation of the common market in agricultural products.

25. The United Kingdom infers from this that the directive should have been based on both Article 43 and Article 100, since 'the necessity of mentioning the article empowering the author to adopt a binding Community measure is particularly pressing in a case in which the measure has a bearing on two or more Community policies, in relation to which the Treaty applies different procedural requirements' (paragraph 15 of the application).

26. That assertion cannot be disputed, but I think it could only have significant consequences in this case if the Treaty had intended to give the Community institutions the task of establishing a common policy on animal welfare and if Article 100 were the provision defining the Community's powers in that respect.

27. As we have seen, the protection of animals is not in itself one of the objectives of the Community. As for Article 100, it requires the Council, acting unanimously on a proposal from the Commission, to adopt 'directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market'.

28. It is thus because it makes possible the approximation of the Member States' legislation that Article 100 might come into consideration, and not because it makes it possible to protect animals.

29. It cannot be said, however, that there is a 'Community policy on the approximation of legislation' whose legal basis is Article 100 in the same way as there is a 'common agricultural policy' whose legal basis is Article 43. Article 100 is not the only provision of the Treaty which allows the Community institutions to harmonize national legislation. The approximation of laws is an instrument used by the Treaty for the purposes of different common policies.

30. It is sufficient in that regard to refer to Articles 27 (customs matters), 54 (freedom of establishment), 56 (special treatment for foreign nationals on grounds of public policy, public security or public health), 57 (mutual recognition of diplomas and access to activities as self-employed persons) and

66 (freedom to provide services). Only Article 99, on the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation, states that it is 'without prejudice to the provisions of Articles 100 and 101'. It follows that all the other articles referred to constitute a *lex specialis* in relation to Articles 100 and 101 and must therefore be given priority.

31. The reference in Article 99 to Article 101 leads me to wonder, moreover, whether Article 100 is really the provision which should contend with Article 43 in this case, or whether it is not Article 101 instead. Article 101 provides in particular that, after the end of the first stage of the transition period, the Council is to adopt, by a qualified majority, the necessary directives where a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and the resultant distortion needs to be eliminated.

32. In any event, the Council is correct to emphasize that by virtue of the maxim *lex specialis derogat legi generali* Article 100 (and in my view Article 101 too) should apply only in the absence of any specific provision permitting the harmonization of national legislation, in particular by means of directives. I should point out that the Court has already upheld that principle, in holding in its judgment of 8 April 1976 in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, that

'in the absence of any express reference in Article 119 to the possible action to be taken by the Community for the purposes of implementing the social policy, it is appropriate to refer to the general scheme of the Treaty and the courses of action for which it provided, such as those laid down in Articles 100, 155 and, where appropriate, 235' (paragraph 63).

33. Having regard to all the foregoing remarks, the problem with which the Court is faced in this case may be defined as follows: 'Does Article 43, in relation to Articles 100 and 101, constitute a further *lex specialis* allowing the institutions to adopt measures harmonizing national legislationsuch as those which appear in the directive? If Article 43 constitutes an appropriate and sufficient legal basis, recourse to Article 100 or Article 101 is unnecessary.

34. What is the position, then, in regard to Article 43?

35. (a) That article does not use the expression 'harmonization of legislation', but to my mind it grants the institutions powers even broader than those conferred by Articles 100 and 101 since Article 43 (3) provides as follows:

'The Council may, acting by a qualified majority and in accordance with paragraph 2, replace the national market organizations by the common organization provided for in Article 40 (2) if:

(a) ...

(b) such an organization ensures conditions for trade within the Community similar to those existing in a national market'.

36. As a matter of principle, therefore, right from its establishment a common organ-

ization of the market should create conditions similar to those existing in a national market. If that is not the case, the institutions have the power and even the duty to intervene at any time in order to supplement the common organization of the market or to prevent measures in force in certain Member States (in this case, Denmark and the United Kingdom) or measures which may be adopted from jeopardizing, on one point or another, the uniformity of the market.

37. For that purpose the Council may use regulations as well as directives (Article 43 (2) *in fine*).

38. (b) It might be asserted, without fear of error, that the intention of the authors of the Treaty was that 'the common organization of agricultural markets' should lead to the harmonization of national legislation even if it did not take the form of a 'European market organization' (Article 40 (2) (c)). Indeed, there can be no more complete harmonization than a common policy based on common rules applicable in all Member States.

39. As the Court itself pointed out in its judgment of 21 February 1979 in Case 138/78 *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713,

'Article 43 of the Treaty must be interpreted in the light of Article 39, which sets out the objectives of the common agricultural policy, and Article 40, which regulates its implementation by providing *inter alia* that in order to attain the objectives set out in Article 39 a common organization of agricultural markets shall be established and that this organization may include *all measures required* to attain the said objectives' (paragraph 4).

40. In that judgment the Court upheld the legality of the regulation which, on the basis of Article 43, introduced the co-responsibility levy in the dairy sector. Similarly, in its judgment of 24 October 1973 in Case 5/73 *Balkan* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091 it held that monetary compensatory amounts should normally be introduced by virtue of the powers conferred on the Council by Articles 40 and 43.

41. It should also be noted that under Article 40 (2) (a) the common organization of the market may be limited to common rules on competition.

42. Rules such as those laid down in the directive could therefore have been adopted directly on the basis of Article 43, even in the absence of an organization of the market as complex as that which has been established.

43. (c) It cannot reasonably be denied that the directive in question pursues objectives laid down in Article 39 of the Treaty, in particular that of ensuring a fair standard of living for the agricultural community (while avoiding distortions of competition). It may be added, as the Commission points out, that stabilization of the market requires optimum productivity, not maximum productivity.

44. (d) Article 2 (1) of the regulation on the common organization of the market in eggs,[2] based on Articles 42 and 43, provides for the possibility of adopting, in respect of products covered by that organization of the market, 'measures to promote better

2 — Council Regulation No 2771/75 of 29 October 1975, Official Journal 1975, L 282, p. 49.

organization of production, processing and marketing'.

45. Article 2 (2) provides for the adoption of marketing standards for eggs; such standards were adopted by Regulation No 2772/75,[3] subsequently amended several times.[4] A Commission implementing regulation[5] authorizes the following indications on packs containing eggs: free-range eggs, semi-intensive eggs, deep-litter eggs and perchery eggs (barn eggs). The annex to the regulation lays down very precise conditions to be met by undertakings producing eggs of any of those four categories. With regard to stocking density, for example, the successive standards are one hen per 10 m^2, one hen per 2.5 m^2, seven hens per m^2 and, in the last category, 25 hens per m^2 on condition that each hen has at least 15 cm of perch space.

46. The Commission could at the same time have authorized an indication 'battery eggs' and laid down standards for the keeping of hens in battery cages. It did not do so because, 'in view of current commercial practice, it seems unnecessary to provide for specific indications for the eggs of laying hens kept in batteries' (fourth recital in the preamble to Regulation No 1943/85). It is true that such an indication would hardly have contributed to improved marketing of such eggs.

47. The fact remains that the Commission could, on the basis of the regulation on the common organization of the market in eggs and thus on the basis of Articles 42 and 43 alone, have adopted marketing standards amounting to regulation of the conditions of production.

48. Indeed, in its observations the Commission correctly points out that the market organizations for fruit and vegetables, fisheries products and wine lay down common packing and quality standards.

49. Nor should it be forgotten that in the area of fisheries the Community has restricted total allowable catches and the conditions under which fish may be caught (vessel characteristics, fishing methods, mesh sizes). Similarly, in the dairy sector the restriction of quantities which may be brought into intervention amounts to regulation of the conditions of production.

50. (e) In accordance with the principle that a common organization may include all the measures necessary to achieve the objectives laid down in Article 39, Articles 42 and 43 have traditionally been the only legal bases of common organizations of the market, even if they include provisions which would normally fall under other articles of the Treaty.

51. That is true first of all with regard to the free movement of goods, since the Court has held that

'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'.[6]

3 — Council Regulation No 2772/75 of 29 October 1975, Official Journal 1975, L 282, p. 56.

4 — See Council Regulation No 1831/84 of 19 June 1984 (Official Journal 1984, L 172, p. 2) and Council Regulation No 3341/84 of 28 November 1984 (Official Journal 1984, L 312, p. 7).

5 — Commission Regulation No 1943/85 of 12 July 1985 amending Regulation No 95/69 as regards certain marketing standards for eggs (Official Journal 1985, L 181, p. 34).

6 — See the judgment of 29 November 1978 in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, in particular at paragraph 55.

52. It is equally true in respect of trade with non-Member countries. For example, the regulation on the common organization of the market in eggs contains provisions taking account 'in appropriate manner and at the same time of the objectives set out in Articles 39 and 110 of the Treaty',[7] but the regulation is not based additionally on Article 113 of the Treaty.

53. Moreover, in relation to Article 113 the Court pointed out in its aforementioned judgment of 26 March 1987 with regard to the system of generalized tariff preferences that 'the existence of a link with development problems does not cause a measure to be excluded from the sphere of the common commercial policy as defined by the Treaty' (paragraph 20).

54. Similarly, it seems to me legitimate to consider that the fact that the contested directive is also intended, through the harmonization of conditions of competition, to protect animals does not cause it to be excluded from the sphere of the common agricultural policy.

55. (f) Finally, it must not be forgotten that the common agricultural policy is not restricted to the common organization of agricultural markets, referred to in Article 40 of the Treaty. On the contrary, on the basis of Article 43 (2) the Community institutions are empowered (if not obliged) to adopt the necessary measures for 'working out and implementing the common agricultural policy, including the replacement of the national organizations by one of the forms of common organization provided for in Article 40 (2), and for implementing the measures specified in this title.'

56. It must therefore be concluded that where, in relation to products listed in Annex II of the Treaty, a measure is intended to contribute to the achievement of the objectives of the common agricultural policy as defined in Article 39, and especially where national organizations have been replaced by one of the forms of common organization provided for in Article 40 (2), Article 43 is an appropriate and sufficient legal basis for the adoption by the Council of common standards for the protection of animals in order to avoid any distortion of competition and to permit the normal and satisfactory functioning of the common organization of the markets in question.

57. The United Kingdom's submission concerning Article 100 of the Treaty cannot therefore be upheld.

B — Procedural irregularities

58. It is not disputed that the preamble to the directive, in the version notified on 15 April 1986 to the Member States and published in the Official Journal, differs in certain respects from the text submitted to the Council at its meeting on 25 March 1986, as reproduced in Council Document No 11489/85 Agrileg 252 of 18 December 1985.

59. The applicant regards these changes as procedural irregularities justifying the annulment of the directive. For the Council, they constitute minor rewording intended to express more clearly and accurately theintentions of the Community legislature. Such

7 — See the thirteenth recital in the preamble to Council Regulation No 2771/75, *supra*, footnote 2.

purely formal changes not affecting the substance of the instrument itself are permissible.

What are we to think of this?

60. It should be said first of all that we are faced with a paradoxical situation: the Council, in its capacity as Community legislator, is telling us that it is not troubled by the fact that one of its legal measures was amended after the fact by its administrative staff. Certainly, I agree with the Council that the changes made to the preamble did have the merit of showing more clearly the legal basis on which the Council was able to legislate in this regard.

61. Nevertheless, I find it unacceptable that the text of a Council measure should be changed after the fact by the General Secretariat. The Secretariat is simply an administrative department. Its legal basis is to be found in Article 17 of the Council's Rules of Procedure,[8] which provides that

'The Council shall be assisted by a General Secretariat under the direction of a Secretary-General.'

62. Although Article 15 of those Rules of Procedure allows the President of the Council to entrust to the Secretary-General the task of notifying directives, decisions and recommendations on his behalf, that cannot include the right for the Secretary-General or his assistants to change a text once it has been adopted by the Council. In particular, no provision of the Rules of Procedure gives the General Secretariat the task of carrying out a final revision of texts in the light of the Council's discussions.

63. Under Article 8 (2) of the Rules of Procedure 'any member of the Council may oppose discussion if the texts of any proposed amendments are not drawn up in such of the said languages as he may specify'. That provision shows that amendments to meeting documents must at the very least be available in writing in one of the official languages before the Council adopts a position. It is true that the Council's discussions rarely concern the wording of the preamble to an act which it adopts. But where the preamble must be amended in accordance with changes made to the operative part of the act during the meeting or for other reasons the text must always, in my view, be returned to the Council itself for final approval unless the Council expressly decides to the contrary. Otherwise, such an act could not be regarded as having been adopted by the Council for the purposes of the first paragraph of Article 189 of the Treaty.

64. It is no coincidence that the Council has developed the practice, at the end of its meetings, of referring texts to the Committee of Permanent Representatives (Coreper) or to the Special Committee on Agriculture for final revision in so far as that is found to be necessary. Even if that task is carried out, from the practical point of view, by the secretariat, it is on the request of Coreper or of the Special Committee on Agriculture and underthe control and responsibility of one of those committees. It is they who ensure that the result of such revision is in accordance with the Council's decisions.

65. Finally, it is Coreper, an organ provided for by the Treaties[9] (which the Special

8 — Rules of Procedure adopted by the Council on 24 July 1979 on the basis of Article 5 of the Treaty of 8 April 1965 establishing a single Council and a single Commission of the European Communities (79/868/ECSC, EEC, Euratom, Official Journal 1979, L 268, p. 1)

9 — Article 4 of the Treaty of 8 April 1965 establishing a single Council and a single Commission of the European Communities (Official Journal 1967, L 152, p. 2).

Committee on Agriculture is not), which determines whether the final version of the act should be approved by the Council under the written procedure or by inclusion in part A of the agenda of a subsequent Council meeting (see Article 2 (6) of the Rules of Procedure).

66. Even the verification of agreement between the different language versions of texts adopted by the Council is carried out according to a procedure which allows the Member States to ensure that the scope of the Council's decision is not altered, even in a single language version. Meetings of the 'legal/linguistic experts' group (officials of the secretariat) are announced to the Member States by telex, and they are invited to send representatives if they so desire.

67. In establishing those procedures the Council clearly intended to ensure absolute conformity between acts published or notified and the decisions taken.

68. It should also be recalled that

'where, in pursuance of this Treaty, the Council acts on a proposal from the Commission, unanimity shall be required for an act constituting an amendment to that proposal' (Article 149).

69. A decision by a qualified majority is thus possible only where the Council simply follows the Commission's proposal.

70. However, since virtually all Commission proposals are altered by the Council, a vote by a qualified majority is possible only if the Commission first alters its proposal so that it becomes identical to the text which the Council is about to adopt. Such an amendment of the Commission's proposal is usually effected by an oral statement by the member of the Commission taking part in the discussion, who must of course have been empowered by the Commission to take such action. During the oral procedure the Commission confirmed that that in fact happened in this case.

71. All this delicate mechanism would clearly be disrupted if alterations of a more than purely formal nature were made to the text of an act after the Council had taken its decision.

72. That is true even where such alterations concern only the preamble of an act. In Community law the statement of the reasons on which acts of the institutions are based, expressly required by Article 190 of the Treaty, is extremely important. The Court has emphasized on several occasions that

'Community measures must include a statement of the facts and law which led the institution in question to adopt them, so as to make possible review by the Court and so that the Member States and the nationals concerned may have knowledge of the conditions under which the Community institutions have applied the Treaty.' [10]

73. In this case it must be concluded that the conditions under which the competent institution, the Council, adopted the directive on laying hens are those set out in the preamble to the document of the Council secretariat of 18 December 1985 bearing the number 11489/85 Agrileg 252.

10 — Judgment of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1493, at paragraph 5.

74. The majority of the members of the Council clearly considered that the text of the operative part of that directive and the reasons set out in the preamble justified the adoption of that measure by a qualified majority on the basis of Article 43 of the Treaty alone.

75. Neither at the meeting, nor by the written procedure, nor by the part A procedure did the Council approve the text of the directive in the version signed by the President-in-Office on 25 March 1986, notified to the Member States and published in Official Journal, L 95 of 10 April 1986 (p. 45). The Council thus did not adopt, for the purposes of Article 189, a directive in those terms. It did however adopt a directive in the terms of Document 11489/85, since it was that text which was put to the vote. A distinction may indeed be made between an adopted text and a signed text since under Article 9 of the Rules of Procedure:

'the texts of the acts adopted by the Council shall be signed by the President-in-Office at the time of their adoption and by the Secretary-General.'

76. It is true that only the preamble to the directive was not approved in those terms by the Council. I do not think it possible, however, to separate the preamble from the rest of the measure. It is the whole 'directive' of 25 March 1986 that must be annulled.

77. Since, on the other hand, a directive in the terms of Document 11489/85 was validly adopted by the Council for the purposes of the first paragraph of Article 189, it is sufficient that, after the judgment of the Court, the President-in-Office at the time of its adoption should sign it and notify it to the Member States. No further discussion in the Council is necessary.

78. If however the Court were not, in these proceedings, to deal with theissue concerning Article 100, that problem would certainly arise again immediately in the Council and in the event of a further vote by a qualified majority would in all probability result in a second application to the Court, focused exclusively on that question.

Conclusion

79. On the grounds set out above I propose that the Court uphold the second submission of the United Kingdom and annul Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages.

80. With regard to costs, it should be borne in mind that although the applicant has succeeded it did fail in its principal submission. I therefore propose that, pursuant to the first subparagraph of Article 69 (3) of the Rules of Procedure, each of the original parties should bear its own costs and that the applicant should also bear the costs incurred by the Commission, which intervened only in respect of that submission.