# OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 18 May 1999 *

1. By this action the Commission is seeking the annulment of Council Regulation (EC) No 820/97 of 21 April 1997 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products [1] (hereinafter 'the Regulation'). The action challenges the choice of Article 43 of the EC Treaty (now Article 37 EC) as the legal basis for that Regulation which was adopted in the context of the crisis caused by 'mad cow disease' referred to in scientific terms as bovine spongiform encephalopathy (hereinafter 'BSE'). In that context the Commission, whose action is supported by the European Parliament, considers that the contested measure should have been taken on the basis of Article 100a of the EC Treaty (now Article 95 EC) as its primary objective is to protect human health. However, the Council maintains that the choice of legal measure should be based solely on the content and aims of the measures envisaged and that, consequently, in the present case account must be taken of Article 43 of the EC Treaty since the production or marketing of agricultural products listed in Annex II of the Treaty is at issue.

## Facts of the case

2. On 2 October 1996 the Commission submitted to the Council two proposals for regulations, one concerning the labelling of beef and beef products, the other the establishment of a system for the identification and registration of bovine animals. [2] Article 37 of the EC Treaty was given as legal basis for both proposals.

3. The European Parliament proposed Article 100a of the EC Treaty, rather than Article 43 thereof, as the legal basis for one of the proposals — that concerning labelling. As for the other proposal — that concerning the identification and registration of bovine animals — the members of the Parliament were unable to agree on such an amendment. However, the rapporteur of the Agriculture Committee, supported by several members of the Parlia-

* Original language: Italian.

1 — OJ 1996 L 177, p. 1.

2 — Proposal for a Council Regulation (EC) establishing a system for the identification and registration of bovine animals and Proposal for a Council Regulation (EC) regarding the labelling of beef and beef products (OJ C 349 of 20 November 1996, pp. 10 and 14).

ment, suggested to the Commission that Article 100a of the Treaty should also be chosen as the legal basis for that measure.

4. The Commission then combined the originally separate proposals to form a new, single proposal based on Article 100a of the Treaty and submitted that new proposal, thus amended, to the Council on 7 March 1997.

5. On 21 April 1997 the Council unanimously adopted the contested Regulation but gave Article 43 of the Treaty as its legal basis.

**Pleas in law and arguments of the parties**

6. The Commission maintains that the Council has infringed essential procedural requirements by taking Article 43 of the Treaty as the legal basis for the Regulation. Since Article 100a of the Treaty, which should have formed the legal basis for the measure, provides for the application of the codecision procedure referred to in Article 189b of the EC Treaty (now Article 251 EC) — in contrast to Article 43(2) of the Treaty which merely provides for consultation with the Parliament — that procedure should have been used to adopt the contested measure.

7. The Commission considers that provisions governing the marketing of beef and the tracing of the animals from which it derives already existed prior to the adoption of the contested regulation. Some of those provisions had been adopted in the context of the common agricultural policy, others in connection with the operation of the internal market, in particular with regard to consumer protection. [3] However, the BSE crisis revealed the inadequacies of those provisions, in particular as regards the effects of the disease on consumer health, and led the Commission to propose, firstly the labelling of beef and beef products and, secondly the establishment of an efficient system for the identification and registration of bovine animals in order to increase consumer confidence in the information given on labels.

8. The Commission then examines the content and aims of the contested regulation in order to determine the correct legal basis for the measure in the light thereof.

3 — In that respect the Commission refers, first, to Council Directive of 27 November 1992 on the identification and registration of animals (92/102/EEC) (OJ L 355, p. 32) and Council Regulation (EEC) No 1208/81 of 28 April 1981 determining the Community scale for the classification of carcases of adult bovine animals (OJ 1992 L 123, p. 3), and second, to a Council Directive of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (79/112/EEC) (OJ 1979 L 33, p. 1).

9. As regards the establishment of a system for the identification and registration of bovine animals, the Commission refers to Title I of the contested regulation. Article 3 sets out the elements on which the system is based: eartags to identify animals individually, computerised databases, animal passports and individual registers kept on each holding. Articles 4 to 7 then lay down the requirements which those individual elements must satisfy. The provisions in question are intended to enable rapid and accurate tracing of bovine animals. [4]

10. As regards the system for the labelling of beef and beef products, the Commission refers to Title II of the Regulation. Firstly, Article 12 of that Title sets out the information which a label must contain at the point of sale. For example, Article 12(1) refers to information concerning the origin or decisive characteristics or production conditions of the labelled meat or of the animal from which it derives. Under Article 19 of the Regulation, that beef-labelling system will be obligatory in all Member States from 1 January 2000 onwards. To market beef, operators require a specification approved by the competent authority of the Member State concerned. In accordance with Article 14 of the Regulation, the specifications must indicate the information to be included on the label, the measures to be taken to ensure the accuracy of information, and the control system which will be applied at all stages of production and sale. Article 16 sets out in detail the information which a label may contain. Furthermore, Title II also sets out the penalties which may be imposed on operators if they breach the provisions relating to labelling.

11. As regards the contents of the Regulation, the Council, as defendant, has not contested the Commission's submission.

12. However, the parties' opinions differ greatly as to the purposes of the Regulation.

13. The Commission acknowledges that the Regulation relates to products listed in Annex II to the Treaty and forming part of a common organisation of the market. [5] However, in its view that does not necessarily mean that the Regulation pursues, in the main, an objective of agricultural policy.

14. In particular, it maintains that the first and third recitals in the preamble to the Regulation reveal the actual purpose of the

4 — See the first recital in the preamble to Regulation No 820/97.

5 — Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal (OJ, English Special Edition: 1968(1), p. 187).

Regulation. BSE caused concern among the public which feared that consumption of beef could pose a danger to human health. Therefore, it was necessary to take measures which guarantee consumers a high level of health protection.

15. The actual and fundamental reason for the adoption of the contested regulation, namely the protection of human health, is evident only against the background of the crisis caused by BSE. Although the labelling of beef could admittedly also be regarded in general terms without any link to health protection, in the present case the measures taken were intended solely to provide consumers with information on the origin of the product and certain characteristics thereof or production conditions. Moreover, it is precisely that information which is intended to assure the consumer that the product he intends to purchase poses no risk to his health.

16. The measures relating to traceability provided for in the Regulation were adopted specifically to combat BSE. That explains why those measures apply solely to bovine animals. Those measures make it possible not only to identify individual animals but also to trace the herds and holdings from which they derive. That provides not only a greater insight into the disease, but also offers the best system for combating it.

17. The Commission maintains that if the context in which the regulation at issue was adopted is examined, it is evident that the decisive factor was not the common organisation of the market but the need to protect human health.

18. Therefore, the Commission concludes that the correct legal basis for the Regulation should have been Article 100a of the Treaty.

19. The Commission was guided by the case-law of the Court of Justice when it drew up the original two proposals for a directive. Initially it envisaged a regulation concerning products listed in Annex II to the Treaty and considered that public-interest requirements, in particular the protection of health, could not be disregarded when pursing the objectives of the common agricultural policy. For that reason, it initially chose Article 43 as the legal basis for its proposals. However, after closer consideration it concluded that the BSE crisis called for special measures directed particularly and primarily at protecting the health of consumers. For that reason it finally gave Article 100a of the Treaty as the legal basis for its proposals.

20. Furthermore, in the context of Article 100a the Commission refers to the idea

which informs Article 129 of the EC Treaty (now Article 152 EC), that is to say to ensure that the Parliament is involved in the adoption of measures regarding public health by instituting the procedure referred to in Article 189 (codecision). To preclude legal measures whose direct aim is to protect health from the provisions relating to codecision merely because that they are contained in rules concerning agricultural products would create an 'anomaly' in the Treaty. In this case it should be noted in particular that the principal aim of the contested regulation is the protection of human health and the intention of laying down rules on the production and marketing of agricultural products is only a secondary aim. For those reasons, Article 100a, and not Article 43, of the Treaty should have been chosen as the legal basis.

21. In the alternative, the Commission claims that at least Article 100a should have been given as the legal basis in addition to Article 43.

22. Moreover, the Commission considers that if Regulation No 820/97 is annulled, the Court of Justice should rule that the effects thereof are definitive in accordance with the second paragraph of Article 174 of the EC Treaty (now the second paragraph of Article 231 EC). It claims that the normative mechanism laid down by the Regulation constitutes an important step in the fight against BSE. In particular, the Commission has already adopted, on the basis of the Regulation, implementation procedures which must also remain in force.

23. Consequently, on 22 July 1997 the Commission brought an action against the Council of the European Union and claimed that the Court of Justice should:

(1) annul Council Regulation (EC) No 820/97 of 21 April 1997 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products;

(2) preserve the effects of the annulled regulation until new rules on the subject, adopted by the Community legislature on the proper legal basis, enter into force;

(3) order the Council to pay the costs.

24. The Parliament, which intervened in the proceedings in support of the form of order sought by the Commission, also considers that the principal aim of the Regulation is to protect human health. It submits that in order to gain a better understanding of a measure account must

be taken not only of its contents and aims, but also the factual and political context. In the context of the BSE crisis the Regulation pursues two important aims. Firstly, it seeks to protect human health from the risks associated with BSE. Secondly, it seeks to provide the consumer with better information on the origin and quality of the beef. For those reasons, the legislature decided to create a large measure of transparency with regard to the rearing of bovine animals and the production and marketing of beef. The principal, if not sole, aim was to create an uninterrupted chain which enables the consumer to check each individual stage of the process from the origin to consumption. The means made available for that purpose are the identification and registration of bovine animals and the labelling of beef.

25. As far as the Parliament is concerned, in the present case there is no difference between this and other provisions concerning the labelling of foodstuffs in general which must be based on Article 100a and not Article 43 of the Treaty. Thus far case-law has dealt only with measures whose principal aim was the marketing of agricultural products on the internal market and which sought to protect human health only as a secondary aim. However, that is not the case here where the principal aim of the Regulation is to protect human health.

26. It also is evident from the Treaty itself that, in matters relating to health protection, the Parliament must be involved in the legislative procedure as provided for in Article 189 of the EC Treaty. For the reasons set out above, Article 100a would have been the correct legal basis for the contested Regulation.

27. The Parliament also submits, in the alternative, that it was at least necessary to take both the articles in question, that is to say Article 43 and Article 100a, as the legal basis. The aim of the Regulation was not only to re-establish stability in the market in beef and beef products but, at the very least, also to restore consumer confidence in those products.

28. Finally, the Parliament also considers that if the Regulation is annulled its effects should be preserved.

29. The Council contends that the Court of Justice should dismiss the action and order the Commission to pay the costs.

30. The Council considers that although the context in which a measure is adopted may also be taken into account in order better to understand the scope thereof, it is not the decisive factor in the choice of a legal basis. That is because such choice must be based on objective factors which are amenable to judicial review. According to the case-law of the Court of Justice, the

content and aim of the measure constitute those factors.

31. The parties do not disagree as to the content of the Regulation.

32. However, as regards the aim of the Regulation, the Council maintains that it does not seek primarily to protect human health. In that respect it refers to the first recital in the preamble to the Regulation which states as follows:

'... the market in beef and beef products has been destabilised by the bovine spongiform encephalopathy crisis;... it is necessary to re-establish stability in this market;... such re-establishment of stability can most effectively be achieved by improving the transparency of the conditions for the production and marketing of the products concerned particularly as regards traceability.'

33. The Council considers that such transparency is capable of restoring consumer confidence both in the market and the products and will thus enable the stability of the market, which has been thrown into crisis by BSE, to be re-established.

34. To that end it was essential to establish an efficient identification and registration system at the production stage and a Community labelling system based on objective criteria at the marketing stage. [6]

35. The Council adds that certain public-interest requirements, in particular the protection of human and animal health, are also taken into account in addition to the principal aim of the Regulation, that is to say to establish stability in the market in beef and beef products. [7]

36. However, it claims that the protection of human and animal health is merely a secondary aim of the Regulation which also lays down rules for the intra-Community trade in live animals, since animals for that trade have to be identified and registered in accordance with Community rules. Such identification and registration must make it possible to trace the original or transit holding, centre or organisation. [8] The individual identification of certain types of livestock, in this case bovine animals, also

6 — See the second recital in the preamble to Regulation No 820/97.

7 — See the third recital in the preamble to Regulation No 820/97.

8 — See the fifth recital in the preamble to Regulation No 820/97.

enables certain Community aid schemes for agriculture to be properly managed. [9]

37. As regards the labelling of beef and beef products, this system merely provides the consumer with information on a purchase that is important to him. However, it does not give him a guarantee that the meat on sale poses no danger to his health. The consumer is given such guarantees by other — veterinary — measures which are designed to do so.

38. As regards the provisions concerning the tracing of animals, they were not adopted solely to combat BSE. Although the progress of an animal can now be traced from rearing to the abattoir, that cannot, in terms of protecting human health, be regarded as constituting a measure capable of eradicating BSE.

39. Furthermore, the Council observes that Directive 92/102, which applied previously to the identification and registration of bovine animals, proved to be not entirely satisfactory for those animals and had to be amended. The contested regulation, which applies specifically to bovine animals, was adopted in order to extend the provisions of the abovementioned directive. [10] That directive was also adopted on the basis of Article 37 of the Treaty without that choice of legal basis subsequently being contested.

40. A further reason for adopting the provisions concerning the identification and registration of bovine animals is that the possibility which is thus created to trace bovine animals more accurately constitutes an indispensable source of information of the labelling of beef.

41. Moreover, the protection of animal health is linked quite closely to the marketing of the product concerned. If the animals satisfy the requirements imposed on them to protect health, it will be possible, eventually, to win back and maintain customer confidence more easily and consequently to establish stability in the market. The fact that the Regulation applies only to bovine animals and beef and not pigs, sheep and goats and meat derived therefrom is not due to the fact that greater account is taken of the health-protection requirements in that case, but simply because the market in beef was thrown into such serious crisis by mad cow disease that immediate action in the form of stabilising measures was necessary.

42. As regards the choice of legal basis, the Council argues that it must, in the final analysis, be made solely in the light of the

9 — See the seventh and eleventh recitals in the preamble to Regulation No 820/97.

10 — See the ninth recital in the preamble to Regulation No 820/97.

content and aim of the measures envisaged. Since this case concerns the production and marketing of products listed in Annex II to the Treaty and also the pursuit of essential aims of common agricultural policy, the contested regulation was rightly based on Article 43 of the Treaty.

43. The arguments put forward by the Commission and Parliament could ultimately reduce to nothing the field of application of Article 43 of the Treaty since any measure which also seeks to protect human health would also have to be based on Article 100 of the EC Treaty (now Article 94 EC) or Article 95 thereof. However, the Council contends that public-interest requirements, in particular the protection of consumers or human and animal health, are also taken into account where Article 43 is chosen as the legal basis for a measure since such public interests cannot be disregarded where objectives of the common agricultural policy are being pursued, as is clear from the first subparagraph of Article 129(1) of the Treaty and the case-law of the Court of Justice.

44. Moreover, the Regulation seeks, *inter alia*, to achieve the aim referred to Article 39 of the EC Treaty (now Article 33 EC), that is to say to stabilise markets. Furthermore, the measures provided for in the Regulation are referred to in Article 2 of Regulation No 805/68. [11] On account of that provision, measures may be adopted within the context of the common organisation of the market in beef to promote better organisation of production, processing and marketing and to improve quality. That is precisely the objective the Council was pursuing when it adopted the Regulation with a view to producing a positive effect on the market. Since public interests are also part of agricultural policy, which in turn must form part of the general economic context, the arguments put forward by the Commission and the Parliament would result in Article 43, which constitutes a *lex specialis*, being rejected in favour of Article 100a when choosing the legal basis for a measure every time the adoption of a measure was connected directly or indirectly with the BSE crisis since the objective would always be to protect public health. That would reduce considerably the scope of the objectives of the common agriculture policy set out in Article 39 of the Treaty.

45. The Council concludes that if the criteria which are decisive for the choice of legal basis for the provisions envisaged — content and aim — are examined, the action which it took in the present case must be regarded as right and proper.

46. As for the argument by which the Commission and the Parliament proposed, in the alternative, that Article 43 and

11 — Regulation on the common organisation of the market in beef and veal (cited above in footnote 5).

Article 100a of the Treaty should both have been taken as the correct legal basis, the Council contends that that would be possible only if the measure concerned simultaneously pursued two separate, equivalent objectives. However, that is by no means the case here since the principal aim of the Regulation is to re-establish stability in the market in beef and beef products which has been jeopardised by the BSE crisis. The other aims referred to in the recitals in the preamble to the Regulation are only secondary objectives and therefore can have no bearing on the choice of legal basis.

**Substance**

47. According to the settled case-law of the Court of Justice, the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. [12]

*Content of the Regulation*

48. The Regulation is divided into two parts. Title I provides that the Member States must establish a system for the identification and registration of bovine animals. Title II contains the provisions relating to the labelling of beef and beef products.

49. Under Article 3 of the Regulation, the system for the identification and registration of bovine animals must comprise the following elements:

— eartags to identify animals individually;

— computerised databases;

— animal passports;

— individual registers kept on each holding.

The Commission, the competent authority of the Member State concerned and all interested parties, including the relevant consumer associations, must have access to all such information. Article 4 then specifies the animals which must be identified by eartags and the characteristics which those tags must have. Article 5 sets out the

12 — Judgments in Case C-45/96 *Commission* v *Council* [1987] ECR 1493, at paragraph 11, Case C-131/96 *United Kingdom* v *Council* [1988] ECR 905, at paragraph 29, and Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, at paragraph 14.

information which the computerised databases must store. The requirements relating to the animal passports and registers are set out in Articles 6 and 7. Under Article 7(3), keepers of bovine animals must supply the competent authority, upon request, with all information concerning the origin, identification and, where appropriate, destination of animals which they have owned, kept, transported, marketed or slaughtered.

50. Those provisions thus essentially contain the factual and technical requirements concerning control mechanisms. They lay down the procedure for identifying and registering bovine animals in the Member States by introducing a control on the keepers of those animals as from the rearing stage.

51. The second part of the Regulation governs the labelling of beef and beef products. Article 19 introduces a compulsory beef-labelling system which will be obligatory in all Member States from 1 January 2000 onwards. Moreover, the provisions contained in Title II apply to each operator who wishes to label beef at the point of sale in such a way as to provide information concerning the origin or certain characteristics or production conditions of the labelled meat or of the animal from which it derives. [13]

52. Furthermore, under Article 14, each operator must submit a specification for approval to the competent authority of each Member State in which production or sale of the beef in question takes place. That article then sets out in detail what such specifications must indicate, in particular the information to be included on the label, the control system to be applied and the measures to be taken in the event of a breach of the provision. Article 15 of the Regulation sets out the provisions which apply where the production of beef takes place, in full or in part, in a third country.

53. As regards the label itself, Article 16 of the Regulation sets out the information which it may contain: place of birth, place of fattening, place of slaughter, the identification number and sex of the animal, the method of fattening or feeding, information on slaughtering and any other information which the operator concerned wishes to indicate and to which the competent authority concerned has agreed.

54. Furthermore, this part of the Regulation lays down possible penalties if the

13 — Article 12(1) of Regulation No 820/97.

provisions contained in the individual articles are infringed.

55. The abovementioned provisions also relate essentially to the factual and technical requirements concerning the labelling of beef and beef products. Although they are also directed at the producer, they relate primarily to the marketing stage of the product. The connecting factor for the labelling of beef is the point of sale (Article 12(1) of the Regulation).

56. Moreover, since the parties agree on the content of the Regulation, it appears unnecessary to dwell on this matter any further.

*Aim of the Regulation*

57. The argument put forward by the Commission and the Parliament may be summarised by stating that in their submission the principal, if not sole, aim of the Regulation is to safeguard human health at the highest possible level. The Council counters that contention by arguing that the principal aim of the Regulation is to re-establish stability in the market in beef and beef products which has been hit by the 'mad cow' crisis.

58. The aims of the Regulation can be determined essentially from the individual provisions thereof and the recitals in the preamble thereto.

59. From these it may be seen that the Regulation is aimed at improving the transparency of the conditions for the production and marketing of beef, particularly as regards traceability. That is intended to enable stability in the market, which has been destabilised by the BSE crisis, to be re-established. [14]

60. In order to achieve such transparency, it is essential to establish a more efficient system for the identification and registration of bovine animals at the production stage. [15] As a result certain public-interest requirements, in particular the protection of human and animal health, will also be attained. [16] In conclusion, it is hoped that, as a result, consumer confidence in the quality of beef and beef products will be encouraged. [17]

14 — See the first recital in the preamble to Regulation No 820/97.

15 — See the second recital in the preamble to Regulation No 820/97.

16 — See the third recital in the preamble to Regulation No 820/97.

17 — See the fourth recital in the preamble to Regulation No 820/97.

61. However, the Regulation also seeks to manage properly certain Community aid schemes in the field of agriculture for which it is necessary to identify certain types of livestock individually. [18]

62. Moreover, the establishment of the system for the identification and registration of bovine animals is intended to enable them to be traced easily and accurately. The rules previously in force proved to be not entirely satisfactory, in particular during the BSE crisis, and needed improvement [19] (which was brought about by adopting the contested regulation).

63. Moreover, an efficient labelling system must be established to make it possible to trace back any labelled beef to the animal or animals of origin. [20]

64. With a view to guaranteeing the reliable operation of that system, appropriate penalties had to be laid down in the event of a breach of the provisions of the Regulation. [21]

18 — See the seventh recital in the preamble to Regulation No 820/97.

19 — See the ninth and eleventh recitals in the preamble to Regulation No 820/97.

20 — See the twenty-third recital in the preamble to Regulation No 820/97.

21 — See the twenty-sixth and twenty-seventh recital in the preamble to Regulation No 820/97.

65. In view of the foregoing, Council's argument must be accepted in so far as it claims that the Regulation relates to the production and marketing of products listed in Annex II to the Treaty. It must also be acknowledged that the Regulation seeks to implement the objectives of the common agricultural policy as set out in Article 39(1) of the Treaty and in particular to increase agricultural productivity and stabilise markets.

66. However, it is uncertain whether that is the sole and decisive aim of the Regulation.

67. In the submission of the Commission and the Parliament, in order to determine the principal aim of a measure, account must also be taken of the factual and political circumstances which led to its adoption.

68. However, in that connection reference must again be made to the settled case-law of the Court of Justice, according to which the choice of legal basis for a measure must be based solely on objective factors which are amenable to judicial review. In that respect the Court of Justice has referred in particular to the aim and content of the

measure adopted, [22] which are of particular importance.

69. However, in principle that does not preclude other criteria from also being taken into account to determine the legal basis, provided that they are objective and amenable to judicial review.

70. However, it is more than doubtful whether the factual circumstances and political consideration which are taken into account when a measure is adopted may be assessed, for the purpose of determining the aim of that measure, in the same way as the content and aim thereof. The political circumstances in particular are open to rather subjective assessments and may vary to such a considerable extent, depending on the various views and political necessities, that for reasons of coherence and legal certainty they cannot be regarded as a decisive criterion for the determination of the legal basis of a measure.

71. However, that does not mean that the context in which the measure was adopted must be disregarded completely when the correct legal basis is being determined.

72. In this case the Council does not dispute the factual context, namely the BSE crisis. On the contrary, it states that it was the crisis which necessitated the adoption of the contested regulation. However, it adds that the measure was not specifically taken primarily to guarantee a high level of human-health protection, but rather because it was necessary to strengthen, by means of stabilisation measures, the market in beef and beef products which was in serious difficulty. One of the means of attaining that aim was to restore and encourage consumer confidence in the products in question by means of identification and labelling.

73. However, the Commission and the Parliament contend, having regard to the BSE crisis, that the principal aim of the Regulation was to protect human and animal health.

74. As is evident from the third recital in the preamble, the aim of the Regulation is to protect public-interest requirements, in particular human and animal health.

22 — Judgment in Case C-131/87 *Commission* v *Council* [1989] ECR 3743, at paragraph 7, Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, at paragraph 10, and Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, at paragraph 12.

75. However, the Court of Justice has also consistently held that efforts to attain the objectives of the common agricultural policy cannot disregard requirements of public interest, such as the protection of consumers or of the health and life of humans and animals, which the Community institutions must take into account in exercising their powers. [23]

76. Therefore, the relevant aim of the Regulation, as set out in the third recital in the preamble, is consistent with the provisions contained in Article 129(1) of the EC Treaty and appears to be confirmed by settled case-law.

77. However, the mere fact that public-interest requirements are taken into account does not automatically mean that they constitute the principal aim of the measure taken.

78. The fact that in any event rules are laid down for the production and marketing of agricultural products in order to stabilise the market means that Article 100a cannot be the sole legal basis for the contested regulation.

79. However, it is uncertain whether or not the contested regulation should have been based on both the provisions at issue, that is to say Article 43 and Article 100a.

80. That would be the case here if, amongst other things, two sets of contents and two substantially different objectives existing in parallel could be distinguished in the Regulation as a whole.

81. If we begin by looking at the history of the Regulation and its content, we cannot fail to observe that a single measure governs two separate and distinct subject-matters together. On the one hand, the system for identifying and registering bovine animals is set out in detail, and on the other, a system is established for the labelling of beef and beef products. Those two subject-matters operate on different levels from the outset (production and sale respectively). They have equal status and therefore may also differ in terms of their respective purposes.

82. As regards the rules on the identification and registration of bovine animals which apply at the production stage, it can be stated, in the light of the foregoing, that

23 — Order in Case C-180/96 R *United Kingdom* v *Commission* [1996] ECR I-3903, at paragraph 63, and judgment in Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, at paragraph 120.

they are principally provisions concerning production whose principal aim is to stabilise the market in the products in question. On account of the rules laid down for identification it is possible (also for stock farmers) to trace livestock rapidly and accurately. It is thus possible for the Commission and the competent authorities of the individual Member State effectively to trace the animals at the production level. Therefore, the aim of stabilising the market takes priority over the concern to protect consumers who, at that stage, derive no direct benefit from the identification and registration of bovine animals.

83. As regards that part of the Regulation it must therefore be found that it is not necessary to take account of Article 100a of the Treaty in addition to Article 43 with regard to the choice of legal basis.

84. However, matters are slightly different with regard to the second part of the Regulation, namely the labelling of beef.

85. It should be noted at the outset that it forms an entirely independent part of the Regulation. The provisions of Title II (Labelling) could exist even without Title I (Identification and registration). Initially neither the Commission nor the Parliament raised any objections to that part forming the subject of a separate regulation. The provisions relating to labelling are relevant (only) at the stage of sale and it is at that stage alone that they are directed at commercial operators.

86. However, where a regulation governs two separate subject-matters, to be considered separately, which co-exist side by side, it would appear logical to examine whether the two parts of the regulation pursue the same aims or whether different aims are in point. If the latter is the case, it is not possible to apply the conventional hierarchy of aims (principal and secondary aim) when examining the regulation as a whole since such a distinction makes sense only where rules are laid down for a single subject-matter. A second, independent, subject-matter cannot be subordinated to another subject-matter simply because it is governed by the same rules. In particular, the linking of two independent subject-matters must not (be able to) result in an independent (and separate) aim being reduced to a secondary aim merely because it is linked to another important objective. The division into principal and secondary aim is of no significance where there is a risk — albeit unintentional — of one aim being subordinated to another simply on account of the link made between two different subject-matters. It would then be possible to imagine a case — of course only theoretically from the point of view of the Court — where through a 'shrewdly calcu-

lated' linkage other legal bases could be concealed, which would fall for consideration if a separate examination were conducted, and where the relevant provisions relating to procedure and co-involvement might be circumvented.

87. Consequently, where a measure governs two different subject-matters it is quite logical to examine whether or not the aims pursued are the same. Such examination is unnecessary only where it is evident that one of the aims is less important than the other and is therefore secondary.

88. If the aims of Title II of the Regulation are examined, it is clear that they themselves relate to the marketing of beef products.

89. Labelling is intended to make it possible to establish a link between any labelled beef and the animal or animals of origin.

90. However, the information is essentially for the benefit of consumers. On account of that system, which is initially voluntary but will be obligatory from the 1 January 2000 onwards, the consumer can have the information that he needs to make a decision on a purchase. That will undoubtedly also affect the markets, in the sense that increased demand may lead to a stabilisation of those markets, but it is the consumer's freedom to decide which is taken as the point of reference for the Regulation.

91. The consumer cannot be given an absolute guarantee as to the health quality of the beef — moreover, a 100% guarantee would be impossible to give — but he must be placed in a position where he can establish, on the basis of the decisive criteria which are clear from the labelling, whether or not the purchase of beef poses an acceptable risk to him.

92. Since the aim and effect of this is to provide the consumer with better information on the product he intends to buy, the decisive aim of Title II of the Regulation appears to be, in respect of this part of the Regulation, to inform the consumer.

93. However, the second aim, that is to say to stabilise the markets, takes second place as regards this part of the Regulation.

94. However, it follows that the (separate) principal aim of that part of the Regulation is not the same as that pursued by Title I. Having regard to the foregoing (see paragraph 86), there are, therefore, two different aims for two separate subject-matters which are nevertheless incorporated into a single regulation. None the less, as regards the problem of choosing a correct legal basis it must be concluded that when the Regulation was adopted account should have been taken of the (equal) importance of those aims without subordinating one of them to the other.

95. Consequently, account should have been taken both of Article 37 and Article 100a of the Treaty as the legal basis for the contested regulation. Therefore, the claims put forward in the alternative by the Commission and the Parliament must be upheld.

96. The contested regulation must therefore be annulled because it was adopted only on the basis of Article 43 and not also of Article 100a.

97. The parties have proposed that, in the event that the measure is annulled, the effects of the Regulation should be considered as definitive pursuant to the second paragraph of Article 174 of the Treaty since they appear to be necessary in their entirety. That proposal should be accepted since the contested regulation constitutes an effective means of dealing with the crisis caused by BSE and provides the consumer with the greatest possible amount of information. In particular, it should be accepted for reasons of legal certainty as the Commission has already adopted several implementing provisions for that Regulation.

## Costs

98. Under Article 69(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for. The Commission has requested that the Council should be ordered to pay the costs. Since the Council's arguments in its defence are unsuccessful and the Regulation must be annulled in its entirety, the Council must pay the costs. Even if the Commission is successful only in its alternative claims there is no specific reason to allocate the costs differently. Under Article 69(4), the Parliament must, as intervener, bear its own costs.

## Conclusion

99. In the light of the foregoing, I propose that the Court of Justice should:

(1) annul Council Regulation (EC) No 820/97 of 21 April 1997 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products;

(2) preserve the effects of the annulled regulation until new rules on the subject, adopted by the Community legislature on the proper legal basis, enter into force;

(3) order the Council to pay the costs;

(4) order the Parliament to bear its own costs.