REPORT FOR THE HEARING
in Case C-39/90 *

I — Facts

A — *Legislative framework*

1. Pursuant to Article 5(4)(b) and (7) of Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs (Official Journal 1979 L 86, p. 30):

'4. Member States may require all or some of the following particulars only to be indicated:

(a) ...

(b) the ingredients;

...

7. Where particulars of the ingredients are given, all the ingredients present shall be listed, either by giving the quantities of each ingredient or [by stating] in descending order [...] their proportion in the compound feedingstuff. Member States may prescribe the use of one of these two forms of indication, but not both. Where no measures have been adopted pursuant to Article 10(b), Member States may group ingredients together by category or maintain existing categories and permit particulars of ingredients to be replaced by those relating to categories.'

The Council states in the fifth recital in the preamble to Directive 79/373 that

'pending the adoption of further provisions, it is necessary, given the existing practices in certain Member States, to provide temporarily for national administrations to require a fuller declaration of the composition of feedingstuffs, with regard to both analytical constituents and ingredients; ... such declarations may be required only as provided for in this directive'.

2. Article 8 of Directive 79/373 is worded as follows:

'*Article 8*

In so far as their national laws so provide at the time of adoption of this directive, Member States shall be authorized to limit the marketing of compound feedingstuffs to those:

* Language of the case: German.

— obtained from certain ingredients, or

— free from certain ingredients.'

In accordance with Article 9 of the directive:

'Member States shall ensure that compound feedingstuffs are not subject, for reasons concerning the provisions included in this directive, to marketing restrictions other than those provided for by this directive.'

3. Trade in imported or manufactured compound feedingstuffs in the Federal Republic of Germany is governed by the German Law of 2 July 1975 on feedingstuffs (BGBl. I, p. 1745, hereinafter 'FMG') and by regulations adopted on the basis of that law, including in particular that of 8 April 1981 (published in the BGBl. I, p. 352, hereinafter the 'FMV'). Pursuant to the first sentence of Paragraph 13(2) of the FMV (amended by, inter alia, the Sixth Regulation of 22 June 1988 amending the FMV, published in the BGBl. I, p. 869), it is necessary, as from 30 June 1988, that, in respect of compound feedingstuffs for breeding animals, 'all the constituent ingredients [shall be indicated] in descending order of their proportion' (hereinafter referred to as a 'semi-open declaration').

4. As early as from 1 October 1985, the FMV (as amended by the Fourth Regulation of 23 January 1985, published in the BGBl. I, p. 170) required the 'percentage by weight of all the ingredients' forming part of compound feedingstuffs for breeding animals to be indicated (hereinafter an 'open declaration'). To these particulars it was necessary to add the 'names of the ingredients' (pursuant to the Fifth Regulation amending the FMV of 2 January 1987, published in the BGBl. I, p. 94). Prior to 1976, German law required an open declaration to be made concerning the ingredients of compound feedingstuffs. Between 1976 and 1985, the German legislation on compound feedingstuffs did not require a declaration to be made concerning the ingredients of those feedingstuffs.

B — *Background to the main proceedings*

5. Denkavit Futtermittel GmbH (hereinafter referred to as 'Denkavit'), the plaintiff in the main proceedings, produces and imports feedingstuffs, in particular compound feedingstuffs. One of Denkavit's main activities is the importation into the Federal Republic of Germany of certain compound feedingstuffs manufactured in the Netherlands. Denkavit wished to import these compound feedingstuffs without complying with the obligation to declare the ingredients laid down by the first sentence of Article 13(2) of the FMV. The defendant in the main proceedings, the Land Baden-Württemberg, refused to allow those imported compound feedingstuffs to be marketed. Faced with that refusal, Denkavit claimed that the requirement to make a semi-open declaration, within the meaning of the first sentence of Paragraph 13(2) of the FMV, was contrary to Directive 79/373 and to Article 30 of the EEC Treaty and that it was not justified by one of the reasons set out in Article 36 of the Treaty.

6. At first instance the Verwaltungsgericht (Administrative Court) Stuttgart held that the requirement of the open declaration — laid down pursuant to the Fifth Regulation of 2 January 1987, applicable at the time when that court so ruled — infringed Directive 79/373.

7. The Land Baden-Württemberg brought an appeal against that decision in the Verwaltungsgerichtshof (Higher Administrative Court) Baden-Württemberg.

C — *The preliminary questions*

8. Taking the view that the proceedings raised questions concerning the interpretation and the validity of the provisions of Directive 79/373 and of the EEC Treaty, the Verwaltungsgerichtshof Baden-Württemberg, by order of 16 January 1990, stayed the proceedings and asked the Court of Justice, in accordance with Article 177 of the EEC Treaty, to give a preliminary ruling on the following questions:

'(1) Is Article 5(4)(b) of Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs, read together with Article 5(7) thereof, to be interpreted as meaning:

— that the Member States are entitled to introduce an obligation, which did not exist under national law at the time that the directive entered into force, requiring the ingredients contained in compound feedingstuffs to be listed in descending order of their proportion in the compound feedingstuff ("semi-open declaration"), or

— that the Member States are merely entitled to maintain such an obligation if it already existed in national law at the time of the entry into force of the directive?

(2) If Directive 79/373/EEC permits the Member States not merely to maintain but also to introduce an obligation of that kind in regard to labelling:

(a) is such an obligation a "measure having equivalent effect" to a quantitative restriction on imports within the meaning of Article 30 of the EEC Treaty?

(b) if it is such a measure, can the contested markings be regarded as necessary in the interest of consumer protection?

(c) if the contested markings are to be regarded as necessary in the interest of consumer protection, are they the method which results in the least hindrance to the free movement of goods?

(3) If any hindrance to the free movement of goods caused by the contested markings cannot be justified under Article 30 of the EEC Treaty, can the restrictions on trade be justified as an exception under Article 36 on grounds

of the protection of human and animal health?'

9. In the grounds of the order making the reference, the national court specifies, with respect to the first question, that both the wording of Article 5(4) and (7) of Directive 79/373 and the conclusion *a contrario* to be drawn from Article 8 of the directive constitute arguments in favour of the lawfulness of introducing the requirement to make a semi-open declaration. It adds that the introduction of the requirement stricter than those already existing in the national legislation when the directive entered into force would appear to be compatible with the purpose of the harmonization, in accordance with Article 100 of the EEC Treaty, of labelling provisions for the purposes of consumer protection. However, it remains to be determined whether the fifth recital in the preamble to the directive would, interpreting the directive in the light of its purpose, allow the choice open to the Member States to be confined purely to maintaining obligations to declare the ingredients which were already laid down by national law when the directive entered into force.

In the second preliminary question, the national court asks whether, taking account of the consistent case-law of the Court (see the judgment in Case 178/84 *Commission* v *Germany* [1987] ECR 1227), the restriction on commercial trade resulting from the requirement for the semi-open declaration may be justified by the mandatory requirements relating to, inter alia, consumer protection. In that respect, it must be determined, in the first place, whether that protection requires the 'semi-open declaration' to be made and, next, whether it constitutes the means which has least effect on trade between Member States. One of the reasons why the national legislature required an indication as to the composition of the mixture was to provide breeders with information concerning the type and quantity of the raw materials (percentage of cereals, etc.) of compound feedingstuffs.

Regarding the third preliminary question, the national court takes the view that the Council of the European Communities, acting under Article 100 of the Treaty, has laid down exhaustive rules concerning the protection of human health with regard to additives and undesirable substances. The national court infers from the judgment of the Court of 5 October 1977 in Case 5/77 *Tedeschi* [(1977] ECR 1555) that, where directives provide for the harmonization of the measures necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 of the Treaty is no longer justified. The Bundesverwaltungsgericht (Federal Administrative Court), in a judgment of 5 June 1986 (published in the *Bundesverwaltungsgerichtsentscheidungen* No 74, p. 241), explained that it was not possible to have recourse to Article 36 of the Treaty because of the harmonization which had taken place with regard to feedingstuffs.

II — Procedure

10. The order making the reference was lodged at the Court Registry on 12 February 1990.

11. Pursuant to Article 20 of the Protocol on the Statute of the Court, written observations were submitted:

— on behalf of Denkavit Futtermittel GmbH, by V. Schiller, Rechtsanwalt, Cologne,

— on behalf of Land Baden-Württemberg, by the Ministry for Rural Development, Food, Agriculture and Forestry, represented by W. Ziegler,

— on behalf of the French Republic, by the Ministry of Foreign Affairs, represented by P. Pouzoulet and G. de Bergues,

— on behalf of the Italian Republic, by the Avvocatura Generale dello Stato, represented by Ivo M. Braguglia,

— on behalf of the Council of the European Communities, by Guus Houttuin, Administrator in its Legal Service, acting as Agent, and

— on behalf of the Commission of the European Communities, by J. Sack, Legal Adviser of the Commission, acting as Agent.

12. 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.

13. By decision of 5 December 1990, in application of Article 95(1) and (2) of its Rules of Procedure, the Court decided to assign the case to the Second Chamber.

III — Summary of the written observations submitted to the Court

A — *The first preliminary question*

14. Denkavit notes *in limine* that the national legislature justified the reintroduction, in 1985, of the requirement to make an open declaration by its concern that stock farmers should be provided with information regarding the type and quantity of raw materials, in particular the cereals, used in the manufacture of compound feedstuffs. According to Denkavit, a (semi-)open declaration does not, however, constitute an essential item of information in that respect and Directive 79/373 therefore does not make it compulsory. The Community legislature rightly considered that the information necessary for the stock farmer concerned only the 'analytical constituents', particulars of which are to be mandatorily prescribed in all the Member States pursuant to Article 5(1)(e) of Directive 79/373.

Moreover, Denkavit contends that the (semi-)open declaration entails a disproportionate economic burden. The (semi-)open declaration hinders scientific research, since the results of this research are immediately made known to the public and to competitors who are thus informed of the producer's know-how. In that respect, Denkavit states that it has specialized in the sale of compound feedingstuffs whose composition, quality and type are, above all, the result of costly scientific and technical research. Because of those high costs, it is inconceivable that a manufacturer of such specialized feedingstuffs should be obliged to divulge his know-how by means of a

(semi-)open declaration. The Economic and Social Committee, in its Opinion of 23 November 1988 on the proposal for a Council Directive amending Directive 79/373/EEC on the marketing of compound feedingstuffs (Official Journal 1989 C 23, p. 10), stated that a requirement to make an open or semi-open declaration did not offer the necessary guarantees for the protection of know-how.

15. Denkavit considers that the requirement to make a (semi-)open declaration is contrary to Directive 79/373 because a standstill clause is inherent in the nature of that directive.

It follows, first of all, from Article 9 of Directive 79/373 that the Member States must refrain from making the marketing of compound feedingstuffs subject to restrictions other than those provided for by the directive. Any contrary national provision is inapplicable. Article 9 is concerned with all compound feedingstuffs, irrespective of where they are produced.

Next, Denkavit adds that it is only at first sight that the wording of Article 5 of Directive 79/373 appears to permit the introduction of a mandatory (semi-)open declaration. Although the text of Article 5 makes no distinction between national provisions which were already in existence when Directive 79/373 was adopted (that is, on 2 April 1979) and those which no longer existed, or which did not yet exist, on that date, it follows from the spirit and the purpose of the Directive, as well as from the recitals in the preamble thereto, that the introduction of a requirement to make a (semi-)open declaration is incompatible with the general wording of Directive 79/373 and with its purpose of harmonizing national legislation. To introduce such a requirement would be to create a new obstacle to the free movement of goods. The fifth recital of the preamble to Directive 79/373 confirms that, by means of Article 5(4)(b), the Community legislator intended only to make it possible to maintain, temporarily, the practice existing in certain Member States. Denkavit states that the spirit and the purpose of the directive are expressed in the recitals thereto and that the Court of Justice has on numerous occasions confirmed the importance of the recitals (see, in particular, the judgment in Case 278/85 *Commission* v *Denmark* [1987] ECR 4069. It follows from the principles laid down by that case-law and from the fifth recital in the preamble to Directive 79/373 that the directive is opposed to the introduction, after its adoption, of a mandatory (semi-)open declaration. The expression 'existing practices in certain Member States' in the fifth recital in the preamble must be given the same meaning as the references to regulations already existing 'when this directive is adopted' in the seventh and eighth recitals.

Finally, Denkavit considers that the standstill rules do not lead to unlawful discrimination. The standstill rules in question, based on the objective existence of certain national provisions when Directive 79/373 was adopted, are not arbitrary and are sufficiently justified within the meaning of the judgment of 15 September 1982 in Case 106/81 *Julius Kind* [1982] ECR 2885.

16. As far as Denkavit is concerned, it is common ground that on 2 April 1979 no mandatory declaration, either open or

semi-open, was required by German legislation. The mere fact that there existed, in Article 6(2), third indent, of the FMG, a legal power which authorized the adoption of laws requiring such a declaration is insufficient for it to be concluded that a mandatory obligation existed in 1979. The Court ruled to that effect regarding a similar power, in its judgment of 3 October 1985 in Case 28/84 *Commission* v *Germany* [(1985] ECR 3097).

17. Finally, Denkavit states that Council Directive 90/44/EEC of 22 January 1990, amending Directive 79/373/EEC on the marketing of compound feedingstuffs (Official Journal 1990 L 27, p. 35), does not enter into force until 22 January 1992 and, as a result, is inapplicable in this case. Furthermore, Directive 90/44, far from making a semi-open declaration mandatory, leaves manufacturers of compound feedingstuffs free to choose a declaration indicating only the categories of ingredients.

18. In support of its argument, Denkavit cites a letter from the Commission of 14 March 1986, sent to the Federal Republic of Germany, in which the Commission essentially anticipates arguments which it puts forward in the written observations submitted in these proceedings.

19. Denkavit suggests that the Court should answer the first question as follows:

'Article 5(4)(b) and (7) of and the fifth recital in the preamble to Directive 79/373/EEC on the marketing of compound feedingstuffs, in the version in force until 22 January 1992, must be interpreted as meaning that the Member States do not have the right to introduce an obligation to indicate the ingredients of compound feedingstuffs, whether by percentage ("detailed declaration") or in descending order of their proportion ("simplified declaration"), if such an obligation was not already mandatorily prescribed in the national law of the Member State in question when the Directive on compound feedingstuffs was adopted (2 April 1979).'

20. In the opinion of the *Land Baden-Württemberg*, the text of Article 5(4)(b) of Directive 79/373 is clear and does not require interpretation. It is only possible to have recourse to the recitals in the preamble if the provision to be interpreted is susceptible of several interpretations, which is not the case here.

21. However, the Land Baden-Württemberg adds that the seventh and eighth recitals in the preamble to Directive 79/373 expressly state that only the Member States may maintain regulations (concerning the manufacture and labelling of compound feedingstuffs) which already existed when Directive 79/373 was adopted. This is not the case in respect of the fifth recital in the preamble, which is concerned with a sector in which the complete approximation of laws has not been possible. On that basis, this sector must continue to be governed at the national level within the framework defined by Article 5(4)(b) and (7) of Directive 79/373. The fifth recital in the preamble no longer constitutes a 'standstill' provision. If that had been the objective sought by the Community legislator, then the latter would

have had to insert a provision to that effect into Article 5 of Directive 79/373, just as the restriction mentioned in the eighth recital in the preamble finds its expression in Article 8 of the directive.

22. The Land Baden-Württemberg points out, moreover, that Article 6(2), third indent, (d), of the FMG contained, when the directive was adopted, a legal power authorizing the adoption of regulations requiring a declaration to be made concerning the composition of feedingstuffs. That power was known to the Council when the directive was adopted. Furthermore, the semi-open declaration has become a uniform Community prescription by virtue of Directive 90/44.

23. In conclusion, the Land Baden-Württemberg suggests that the Court answer the first preliminary question as follows:

'The combined provisions of Article 5(4)(b) and (7) of Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs must be interpreted as meaning that they entitle the Member States to introduce an obligation to indicate the ingredients used in a compound feedingstuff in descending order of their proportion (semi-open declaration) when that obligation did not yet exist in national law when the directive entered into force.'

24. The *French Government* considers that the expression 'Member States may require' in Article 5(4) of Directive 79/373 clearly indicates that the Member States may introduce into their legislation, even after the directive has come into force, regulations prescribing the declaration of the ingredients. The expression could be compared with Article 28(3) of Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (Official Journal 1977 L 145, p. 1), which distinguishes cases where the Member States 'may provide' from cases where they 'may continue to apply' measures derogating from the principles laid down by that directive.

25. The French Government adds that the fifth recital in the preamble to Directive 79/373/EEC mentions only the existence, in certain Member States, of national regulations requiring a declaration of the ingredients, without however excluding other Member States from adopting such regulations after Directive 79/373 came into force. It should be pointed out that the semi-open declaration, which was only an option for the Member States pursuant to Directive 79/373, has become mandatory by virtue of Directive 90/44.

26. In the light of those considerations, the French Government suggests that the Court answer the first preliminary question as follows:

'The combined provisions of Article 5(4)(b) and (7) must be interpreted as permitting regulations, even those introduced after the directive came into force, which require a declaration, in decreasing order of their

proportion, of the ingredients used in compound feedingstuffs.'

27. The *Italian Government* takes the view that the text of Article 5(4) of Directive 79/373 is clear and that the Member States may require a semi-open declaration even if such a requirement did not already exist in national law when the directive was adopted.

28. All that may be inferred from the fifth recital in the preamble to Directive 79/373 is that all the Member States may require a semi-open declaration. Because such a practice existed in certain Member States, the Council decided, when the harmonizing Directive 79/373 was adopted, to place all the States on an equal footing by giving them all the option of requiring a semi-open declaration. That statement is confirmed by the seventh recital in the preamble, in which power to prohibit the marketing of compound feedingstuffs is conferred on the Member States provided that '. . . their regulations contain these limitations when this directive is adopted'.

29. The Italian Government considers that the reply to the first question should be that, on the basis of Article 5(4)(b) and (7) of Directive 79/373, the Member States may maintain, as well as introduce *ex novo*, a requirement to make a semi-open declaration.

30. The *Council of the European Communities* makes no observations on the first preliminary question and relies on the assumption that the Member States were authorized not only to maintain, but also to introduce for the first time, the requirement to make a semi-open declaration.

31. The *Commission of the European Communities* argues that Article 5(4)(b) of Directive 79/373 entitles the Member States only to maintain the requirement to make a declaration, whether open or semi-open, even though the text of that article appears to indicate that the Member States may introduce the requirement for such a declaration and even though Article 8 of the directive expressly mentions the words '. . . in so far as their (the Member States') national laws so provide at the time of adoption of this directive . . . '. According to the Commission, the argument that it is possible to introduce a requirement to make an open or semi-open declaration goes against the fifth recital of the preamble to Directive 79/373. It follows from the reference in that recital to existing practices, and from the temporary nature of the provision, that there is no reason to make it possible for all the Member States to provide that, in future, the ingredients utilized must be indicated.

32. The argument put forward by the Commission is borne out by the sense and purpose of a partial harmonization such as that brought about by Directive 79/373. Such harmonization is not meant to make worse the existing legal situation regarding the free movement of goods, yet that would certainly have been the case if Member States whose national provisions did not already envisage a mandatory indication of the ingredients had been able to introduce such an obligation. In order to achieve the objectives of harmonization, the Council had either to introduce a mandatory obli-

gation in all the Member States or at least (as was actually the case) to stipulate that the existing legal situation must be provisionally maintained. In neither case, however, was it required to introduce in a directive measures which would introduce new obstacles.

33. Consequently, the Commission suggests the following reply to the first preliminary question:

'The combined provisions of Article 5(4)(b) and (7) of Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs in the version in force until 21 January 1992 must be interpreted as meaning that they entitle the Member States only to maintain an obligation to indicate the ingredients utilized, and not to introduce such an obligation.'

B — *The second and third preliminary questions*

34. *Denkavit* emphasizes, first of all, that the second question is concerned with compound feedingstuffs imported from another Member State, which do not require a semi-open declaration to be made in the national territory, and not those which are produced in that territory.

35. Denkavit then goes on to make a detailed legal analysis of the case-law of the Court according to which it is necessary to regard as a measure equivalent to a quantitative restriction any trading rules of the Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, in particular, the judgment in Case 8/74 *Dassonville* [1974] ECR 837). The prohibition laid down by Article 30 of the Treaty has direct effect and confers rights on individuals which the courts of the Member States must protect (in this connection, see, in particular, the judgment in Case 251/78 *Denkavit* [1979] ECR 3369). The Court has consistently ruled that the extension to imported products of a national rule requiring certain ingredients, a certain packaging or a certain labelling constituted a measure which, even though it did not absolutely preclude the importation of products originating in other Member States, was none the less of such a kind as to make their marketing in the State of importation more difficult or more expensive (see, in that connection, in particular, the judgments in Case 90/86 *Zoni* [1988] ECR 4285 and Case 298/87 *Smanor* [1988] ECR 4489). Also, obstacles to intra-Community trade which result from disparities between the national regulations are only to be accepted in so far as the national regulations concerned, applicable without distinction to domestic goods and to imported goods, are justified in order to meet imperative requirements, connected in particular with the protection of public health, consumer protection and the fairness in commercial transactions. Such regulations must, none the less, be proportionate to the aim in view, and when a Member State has a choice between various methods to attain the same objective, it must choose the one which least affects the free movement of goods.

Denkavit contends that, with regard to consumer protection and fair trading, it follows from the case-law of the Court that as regards imported products which have been lawfully manufactured and labelled in

another Member State, national requirements on labelling may be regarded as compatible with Article 30 of the EEC Treaty only if they are indispensable in order to safeguard consumers against an actual risk of confusion. The burden of proof regarding mandatory requirements falls on the Member State which invokes those requirements in order to avoid the prohibition in Article 30 of the Treaty.

Denkavit refers to the Commission's Communication concerning the free movement of foodstuffs within the Community (Official Journal 1989 C 271, p. 3), and states that the examination made by the Commission in that document of the 'Cassis de Dijon' case-law confirms Denkavit's legal analysis, despite the fact that that Communication is concerned with foodstuffs and not feedingstuffs.

36. Denkavit considers, next, that the semi-open declaration is incompatible with Article 30 of the Treaty, since it hinders the marketing in the Federal Republic of Germany of compound feedingstuffs which are lawfully manufactured and marketed in the Netherlands.

The labelling is not indispensable for the protection of consumers and fair trading within the meaning of the case-law of the Court, for the absence of a semi-open declaration does not give rise to the risk of confusion or uncertainty with regard to the nature or the characteristics of the product. Pursuant to Directive 79/373, compound feedingstuffs may not be presented or marketed in a manner liable to mislead (Article 3 of Directive 79/373). The contents as regards analytical constituents of the feedingstuffs should also mandatorily appear on compound feedingstuffs (Article 5(1) of Directive 79/373). On the other hand, an indication of the ingredients of compound feedingstuffs, although not required by the directive, may be required by way of 'other information'. As a result, a compound feedingstuff, labelled in accordance with the provisions of Articles 3 and 5(1) of Directive 79/373, would satisfy the requisite provisions for the protection of consumers and fairness in commercial transactions even without the optional indication of the ingredients. The argument that a mandatory (semi-)open declaration is necessary for the protection of consumers would assume the presence of inconsistency in Directive 79/373. It is contradictory to provide, on the one hand, only an option for the Member States to prescribe this declaration if, on the other hand, the declaration were mandatory to satisfy the explicit requirements of that same directive regarding the protection of consumers and fair trading.

Furthermore, a purchaser is in any event free to avoid purchasing products on which the (semi-)open declaration does not appear.

37. In addition, Denkavit examines the requirement of the semi-open declaration in the light of the judgment in Case 150/88 *Parfumerie-Fabrik 4711* v *Provide* [1989] ECR 3891. It concludes that the requirement of the (semi-)open declaration hinders intra-Community trade because it requires the packaging in which conditions under which compound feedingstuffs are

lawfully marketed in certain Member States to be altered. Moreover, a distributor could encounter difficulty in exporting compound feedingstuffs to another Member State which required a (semi-)open declaration if the producer of compound feedingstuffs did not indicate the ingredients thereof. Finally, in Case 150/88 the Court ruled that the protection of consumers could be achieved by means less restrictive of Community trade, for example by a general prohibition on any indication likely to mislead the consumer. The whole of the reasoning applies equally to the case in point.

38. Denkavit also argues that the requirement of a (semi-)open declaration is not automatically compatible with Article 30 of the Treaty just because it satisfies the provisions of Article 5(4)(b) of Directive 79/373. To affirm the contrary would be to ignore the relationship between primary and secondary Community law according to which a directive may not relieve the Member States of their obligations under Articles 30 to 36 of the Treaty (in that connection, see, in particular, Case 76/86 *Commission* v *Germany* [1989] ECR 1021). It follows from an examination of the case-law of the Court that, if the German law providing for a (semi-)open declaration constituted a measure which was prohibited under Article 30 of the Treaty, it could not be authorized under Directive 79/373. In the case in point, it is sufficient to state that the German legislation at issue is incompatible with Article 30 of the Treaty, without its being necessary to determine whether the provision in the directive which forms the basis for the German legislation is compatible with Article 30 of the Treaty.

39. Denkavit denies, furthermore, that the 'Cassis de Dijon' case-law allows the conclusion to be drawn that a regulation concerning labelling is *per se* compatible with Article 30. What was at issue in the judgments which go to make up that case-law was the importation of products whose composition or quality did not comply with national law. In this case, the composition and the quality of the imported compound feedingstuffs do satisfy the German regulations and thus those feedingstuffs are not liable to mislead consumers.

40. Moreover, Denkavit considers that the reverse discrimination which results from the marketing in German territory of compound feedingstuffs imported without the (semi-)open declaration in parallel with those manufactured in the Federal Republic of Germany and compulsorily provided with that declaration cannot be regarded as unlawful discrimination against national products. As far as the Court is concerned, such a difference in treatment has nothing to do with Article 30 of the Treaty and does not infringe other prohibitions on discrimination under Community law (see, in that connection, Case 98/86 *Mathot* [1987] ECR 809).

41. Finally, Denkavit points out that the requirement of a (semi-)open declaration may not be justified by the fact that it contributes to the reduction of surplus cereals. The reduction of surplus cereals is a matter exclusively for the Community, and the Member States must refrain from adopting any unilateral measure in that area.

42. With regard to the third question, Denkavit argues that Article 36 of the Treaty must be interpreted strictly and that consumer protection and fair trading do not form part of it. As a result, it is necessary to decide whether the requirement of a (semi-)open declaration may be justified on grounds connected with the protection of health.

43. In that respect, Denkavit points out that the reduction of toxic and undesirable substances in compound feedingstuffs is specifically and exhaustively governed by Council Directive 74/63/EEC of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs (Official Journal 1974 L 38, p. 31). That is confirmed by the judgments in Case 5/77, *supra*, Case 28/84, *supra*, and Case 195/84 *Denkavit* [1985] ECR 3181.

It follows that a question arising from Directive 74/63 is not to be debated within the framework of Directive 79/373. The first of those directives does not provide for the requirement of a (semi-)open declaration, and therefore such a requirement cannot be imposed as regards compound feedingstuffs for the purpose of reducing the use of undesirable substances or avoiding contamination by such substances. Moreover, it is superfluous to require a (semi-)open declaration when the compound feedingstuff could, where appropriate, be prohibited from being marketed because one of the ingredients is undesirable within the meaning of Directive 74/63.

The exhaustive nature of Directive 74/63 rules out recourse to Article 36 of the Treaty in the sector covered by the directive. Since no ground connected with the protection of health other than that of the reduction in the use of undesirable substances has been invoked, there can be no question of justifying the requirement of a (semi-)open declaration by reference to Article 36 of the Treaty.

44. In conclusion, Denkavit suggests that the Court answer the second and third questions as follows:

'*Suggested reply to the second question*

(a) The extension of an obligation unilaterally prescribed by a Member State to indicate the ingredients (combined provisions of Article 5(4)(b) and (7) of the directive on compound feedingstuffs) to compound feedingstuffs imported from another Member State which does not prescribe such an indication is a measure having equivalent effect to quantitative restrictions on imports and is therefore incompatible with Article 30 of the EEC Treaty.

(b) The extension to such imports of an obligation to indicate the ingredients cannot be justified by mandatory requirements connected with consumer protection or fair trading, which are already guaranteed by Article 3 and by Article 5(1) of the directive on compound feedingstuffs.

(c) In view of the general prohibition on the use of information liable to mislead laid down by Article 3 of the directive on compound feedingstuffs, the extension to such imports of an obligation to indicate the ingredients constitutes a means of consumer protection which is disproportionate to its aims.

Suggested reply to the third question

Article 36 of the EEC Treaty, especially considered in conjunction with Directive 74/63/EEC on undesirable substances, must be interpreted as meaning that the extension to imported compound feedingstuffs of an obligation to indicate the ingredients forming part of the composition of compound feedingstuffs cannot be justified on grounds relating to the protection of health.'

45. The *Land Baden-Wurttemberg* considers that the 'Cassis de Dijon' case-law is not applicable in this case because one condition is not satisfied, the condition requiring the 'absence of common rules'. The compound feedingstuffs sector is governed by a common set of rules, contained in Directive 79/373.

46. The Land Baden-Württemberg argues, in the alternative, that the semi-open declaration protects purchasers against error and fraud and contributes to fair trading in that it enables the consumer to acquire a sufficiently accurate knowledge of the nature and the quality of the product and to distinguish it from other products (see, to that effect, the judgment in Case 220/81 *Robertson* [1982] ECR 2349). By virtue of the semi-open declaration, the purchaser is in a position to evaluate approximately the risk of the presence of toxic substances. These considerations also apply to the possibilities of inspections by the competent authorities within the framework of the administrative inspections of feedingstuffs.

47. The Land Baden-Württemberg adds that the requirement for a semi-open declaration is proportionate to the objective pursued and constitutes the means which least restricts the free movement of goods within the meaning of the judgment in *Commission* v *Germany*, above.

48. The Land Baden-Württemberg concludes by suggesting that the Court reply to part (a) of the second question as follows:

'The introduction of the obligation to make a simplified declaration, which constitutes a set of rules corresponding to the provisions of Community law, cannot constitute a prohibited measure as envisaged in Article 30 of the EEC Treaty.'

49. As regards the third preliminary question, the Land Baden-Württemberg accepts that the requirement for a semi-open declaration is justified under Article 36 of the Treaty. The requirement to make that declaration contributes to the protection of the health of humans and animals.

50. The *French Government* considers, with regard to the second preliminary question, that, as far as the Court is concerned, labelling is a requirement which is justified

by the need to ensure that consumers are properly informed. The interest in such a declaration has not, moreover, escaped the Community legislature, since the semi-open declaration, which is merely optional in Directive 79/373, has become obligatory for the Member States under Directive 90/44. Furthermore, it does not appear that another means less restrictive of the free movement of goods could provide as full a knowledge of the product as that marking.

51. The French Government concludes that the labelling obligation at issue cannot constitute a measure having an effect equivalent to a quantitative restriction on importation prohibited by Article 30 of the Treaty. In those circumstances, it is not necessary to reply to the third preliminary question.

52. To the *Italian Government* it seems that the second and third preliminary questions must be regarded as devoid of purpose.

If it is accepted that Directive 79/373 authorizes the Member States to impose, even *ex novo*, the obligation to make a semi-open declaration as regards the ingredients, the purported contradiction with Article 30 must not be related to the obligation imposed by the national legal systems, but, where appropriate, to the Community rule on authorization, it would have to be maintained that the rule in the directive which authorizes the Member States to lay down for the first time, and not only to maintain, a requirement to make a semi-open declaration of the ingredients is invalid because it is contrary to Article 30 of the Treaty. No such question has been submitted by the national court.

It is obvious that the purpose of the rule at issue is intended to satisfy the requirements of the protection of consumers, who are guaranteed — by a means the proportionality of which, in relation to the aim in view, appears to be indisputable — the possibility of learning, when choosing which product to buy, of the nature and the quantity of the substances contained in the compound feedingstuff.

53. In conclusion, the Italian Government submits, as its primary proposition, that the second and third questions are devoid of purpose. In the alternative, the Government adds that the requirement of a semi-open declaration, also where it is imposed *ex novo* on the basis of the relevant provisions of Article 5 of Directive 79/373 which are intended to satisfy, in a proportionate manner, the imperative requirements of consumer protection, is compatible with the prohibition laid down in Article 30 of the EEC Treaty.

54. The *Council of the European Communities* considers that the second and third preliminary questions relate to the compatibility of Article 5(4)(b) and (7) of Directive 79/373 with Article 30 of the Treaty.

In that respect, it is necessary to examine the objectives and the scope of the directive and its relation with other Community legislation on feedingstuffs. Thus, Directive 79/373 is intended to bring about the common agricultural market by contributing to the free movement of agricultural products and by ensuring the availability of appropriate feedingstuffs of good quality which are regarded as an important factor in improving agricultural productivity. The

directive is based on the conditions governing the packaging and presentation of feedingstuffs and, more particularly, on the harmonization of the substantive conditions concerning the information to be given to the user. In its judgment in *Commission* v *Germany* (Case 28/84, above), the Court ruled that Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs (Official Journal, Special English Edition 1970 (III), p. 840), in conjunction with Directives 74/63 and 79/373, constitutes a coherent system covering the manufacture and marketing of compound feedingstuffs. The three directives govern the legal sector in question, without, however, achieving a complete harmonization of national rules, since, on the one hand, they leave room for the application of the differing national legislation and, on the other hand, they allow obstacles to the free movement of goods between Member States to remain. The directive is a measure of gradual harmonization by stages as defined in the judgment of 29 February 1984 in Case 37/83 *Rewe-Zentrale* [1984] ECR 1229. The fact that the directive is not a true harmonizing measure, since it creates new obstacles to trade, is the only ground which could be put forward for submitting that the directive is incompatible with Article 30 of the Treaty.

55. It is therefore necessary to consider whether, independently of the directive, it was open to the Member States to introduce for the first time the requirement of a semi-open declaration. In the opinion of the Council there is no doubt that, before Directive 79/373 was adopted, the Member States had, by virtue of the principle established by the 'Cassis de Dijon' judgment, the option of introducing, and not merely of maintaining, a requirement to make a semi-open declaration. On the basis of that decision it should be noted that the requirement of a semi-open declaration responds to an objective relating to consumer protection. The purchasers of compound feedingstuffs are informed of the type and quality of the ingredients of those feedingstuffs.

56. Finally, the Council adds that the requirement of a semi-open declaration constitutes the definitive solution laid down by Directive 90/44, so that the Member States which do not yet require such a declaration are under an obligation to prescribe it.

57. The Council considers, in conclusion, that the requirement for the semi-open declaration does not constitute a measure having equivalent effect within the meaning of Article 30 of the Treaty and that, on that view of the matter, Article 36 of the Treaty does not fall to be applied. The Council therefore proposes that the Court reply, in answer to the second and third preliminary questions, that consideration of those questions has disclosed no factors of such a kind as to affect the validity of Article 5(4)(b) and (7) of Directive 79/373.

58. The *Commission* considers that, although the second question relates to the interpretation of Article 30 of the Treaty, it concerns the validity of Article 5(4)(b) of Directive 79/373 in the light of Article 30 et seq. of the Treaty. In order to avoid such a conflict, it is necessary to apply the principle of interpretation which requires that this provision be construed in a manner consistent with the Treaty (see, in that connection, the judgment in Case 218/82 *Commission* v *Council* [1983] ECR 4063). It does not follow from the fact that a directive has not eliminated all the

disparities between national laws that the directive is invalid. It cannot be ruled out, however, that the aggravation, by a Council directive, of the existing disparities between national laws may constitute a ground of invalidity.

That is confirmed by Directive 90/44, since, by laying down a specific date (22 January 1992) for the adoption of a semi-open declaration, instead of using the formula 'before the . . . ', the Council attached importance to the directive's not being transposed on different dates.

G. F. Mancini
Judge-Rapporteur