OPINION OF ADVOCATE GENERAL CHRISTINE STIX-HACKL

delivered on 9 October 2001 [1]

I — Introductory remarks

1. This dispute between the Parliament and the Council is one of a number of cases relating to the beef sector. [2] By the present action the Parliament is seeking the annulment of Council Regulation (EC) No 2772/1999 of 21 December 1999 providing for the general rules for a compulsory beef labelling system [3] (hereinafter 'Regulation No 2772/1999'). These proceedings essentially relate to the legal basis for this regulation, that is to say 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 [4] (hereinafter 'Regulation No 820/97'). It also raises the fundamental question as to whether and on what conditions the Council may enact measures on the basis of other acts adopted by it alone or together with the Parliament.

1 — Original language: German.

2 — See, to that effect, Case C-269/97 *Commission* v *Council* [2000] ECR I-2257 and pending Case C-1/00 concerning infringement proceedings against the French Republic in connection with the lifting of the ban on British beef; see also Case C-477/98 *Eurostock Meat Marketing* v *Department of Agriculture for Northern Ireland* [2000] ECR I-10695 and Case C-365/99 *Portugal* v *Commission* [2001] ECR I-5645.

3 — OJ 1999 L 334, p. 1.

4 — OJ 1997 L 117, p. 1.

II — Legislative background

A — *Regulation (EC) No 820/97*

2. Regulation No 820/97 was adopted in response to the BSE crisis to improve the transparency of the conditions for the production and marketing of beef and beef products. Whereas Title I (Article 1 to Article 11) governs the identification and registration of bovine animals, Title II (Articles 12 to 20) covers the labelling of beef and beef products.

3. Article 3 reads:

'The system for the identification and registration of bovine animals shall comprise the following elements:

(a) eartags to identify animals individually;

(b) computerised databases;

(c) animal passports;

(d) individual registers kept on each holding.

The Commission and the competent authority of the Member State concerned shall have access to all information under this Title. The Member States and the Commission shall take the measures necessary to ensure access to this data for all parties concerned, including consumer organisations having a particular interest which are recognised by the Member State, provided that the data confidentiality and protection prescribed by national law are ensured.'

4. Article 12(1) reads (in part):

'If an operator or an organisation, as defined in Article 13, 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, it shall do so in accordance with this Title.

However, this Title shall not affect:

— compulsory indications as referred to in Article 3(1) of Council Directive 79/112/EEC with the exception of point 7,

— the indications as referred to in Regulations (EEC) No 1208/81 and (EEC) No 1186/90,

— indications relating to the health mark as provided for in Directive 64/433/EEC and other similar indications provided for in the relevant veterinary legislation...'.

5. Article 19 reads:

'1. A compulsory beef-labelling system shall be introduced which shall be obligatory in all Member States from 1 January 2000 onwards. However, this compulsory system shall not exclude the possibility for a Member State to decide to apply the system merely on an optional basis to beef sold in that same Member State. The labelling system provided for in this Regulation shall apply until 31 December 1999.

On the basis of the report provided for in paragraph 3, the Council, acting by a qualified majority on a proposal from the Commission, shall therefore take a decision before 1 January 2000 on the general rules for a compulsory beef-labelling system to apply as from that date, in accordance with the Community's international commitments.

2. Save where otherwise decided by the Council, the labelling system compulsory as from 1 January 2000 shall, in accordance with the Community's international commitments, in addition to the labelling information referred to in Article 16(3), also require indication of the Member State or third country where the animal from which the beef is derived was born, the Member States or third countries where the animal was raised and the Member State or third country where the animal was slaughtered.

3. Member States shall submit to the Commission, by 1 May 1999, reports on the implementation of the labelling system for beef. The Commission shall submit to the Council a report on the situation regarding the implementation of beef labelling systems in the different Member States.

4. However, Member States where there is a sufficiently developed identification and registration system for bovine animals may before 1 January 2000 impose a compulsory labelling system for beef from animals born, fattened and slaughtered on their territory. Furthermore, they may decide that one or more of the items of information referred to in Article 16(1) and (2) must be indicated on labels.

5. A compulsory system as provided for in paragraph 4 must not lead to any disruption of trade between the Member States.

The implementation arrangements applicable in those Member States intending to apply the provisions of paragraph 4 shall require prior approval from the Commission.

6. By 1 January 2000, the Council, acting by a qualified majority on a proposal from the Commission, shall take a decision as to

whether compulsory indication of data other than those provided for in paragraph 2 and extension of the scope of this Regulation to products other than those indicated in the first indent of Article 13 are possible and desirable.'

7. The Commission therefore concluded that most Member States could not implement a compulsory beef labelling system. This would provoke 'an unsatisfactory situation of confusion, unfairness and uncertainty for the entire EU beef sector, from producer to consumer.' [6]

B — *Regulation (EC) No 2772/1999*

1. History

8. In the light of the above the Commission put forward two proposals based on Article 152 EC concerning the introduction of a system of identification and registration of bovine animals and the labelling of beef and beef products: one was that Regulation No 820/97 be replaced by a compulsory system as of 1 January 2003, the other that the regulation be temporarily prolonged to bridge the period prior to the adoption of the first proposal.

6. On 13 October 1999 the Commission presented to the Parliament and the Council a report on the implementation of beef labelling systems in the Member States, as prescribed by Article 19(3) of Council Regulation (EC) No 820/97. [5] In that report the Commission noted certain failings by the Member States in relation to the identification and registration of bovine animals and in particular that animal passports were available only for animals born after 1 January 1998 and that difficulties existed regarding the transfer of information about a particular animal if it was exported. Furthermore, it had not been possible to set up the databases by the prescribed date.

9. In its report the Commission emphasises that the rapid adoption of the second proposal is necessary to avoid a collapse in the optional labelling system and its automatic replacement by a compulsory system with no general rules to guide it. Furthermore, the Commission points out that it reserves the possibility to present to the Council an urgent proposal before the end of 1999 if the Council and the Parlia-

5 — COM(1999) 486 final.

6 — COM(1999) 486 final, p. 10.

ment have failed to adopt the proposals by that time. This proposal based on Article 19 of Regulation (EC) No 820/97 is intended to avoid a legal void through the expiry of the optional system. [7]

10. On 14 December 1999 the Council declared that a regulation based on Article 19 of Regulation No 820/97 should be adopted if the Parliament did not adopt the Commission's proposal unamended — with the exception of the additional legal basis of Article 37 EC.

11. On 16 December 1999 the Parliament adopted certain amendments relating to the proposal to amend Regulation No 820/97 in first reading as part of the co-decision procedure. In accordance with those amendments, the compulsory system was to be introduced on 1 September 2000 — following a prolongation of the previous system by eight months — with certain elements of the information system applying earlier as of 1 January 2000.

12. Thereupon, the Council adopted Regulation No 2772/1999 on the basis of Article 19 of Regulation No 820/97.

7 — COM(1999) 486 final, p. 11.

2. Content of Regulation No 2772/1999

13. The second recital in the preamble reads:

'These general rules for a compulsory beef labelling system should be applicable only on a provisional basis for a maximum period of eight months to enable the European Parliament and the Council to come to a decision on the proposal for a Regulation, establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products, and repealing Regulation (EC) No 820/97, presented by the Commission on 13 October 1999.'

14. The third recital in the preamble reads:

'It is therefore appropriate to establish simple general rules for a compulsory beef labelling system, which all Member States can currently fulfil; the rules should refer to the provisions laid down in Article 12(1) of Regulation (EC) No 820/97.'

15. Article 1 reads:

'1. Operators and organisations marketing beef within the meaning of Article 13 of Regulation (EC) No 820/97 shall label it in accordance with the rules referred to in the first, third and fourth indents of the second subparagraph of Article 12(1) of Regulation (EC) No 820/97.

However, Member States may continue to have recourse to the possibility provided for in Article 19(4) of Regulation (EC) No 820/97 after 1 January 2000. In this case, the provisions of Article 19(5) of Regulation (EC) No 820/97 shall continue to apply.

2. The rules relating to the voluntary system, which applied until 31 December 1999 in accordance with the provisions of Article 19 of Council Regulation (EC) No 820/97, will continue to be applicable to any voluntary indication, additional to the obligatory labelling system referred to in paragraph 1.'

III — Proceedings before the Court and forms of order sought by the parties

16. The Parliament's application was lodged at the Registry on 10 March 2000.

By orders of the President of 4 August and 13 September 2000, the Court granted the Kingdom of Spain and the Commission leave to intervene in support of the form of order sought by the Council.

17. The Parliament claims that the Court should annul Regulation No 2772/1999 and, should it do so, maintain the effects of the regulation until the Council adopts a new measure on the basis of Article 152 EC, and order the defendant to pay the costs.

18. The Council and the interveners supporting it contend that the Court should dismiss the action as unfounded and order the applicant to pay the costs. The Commission further contends that the Court should, if it annuls the regulation, maintain its effects.

IV — First plea: lack of competence of the Council

19. In the context of the first plea it is necessary to examine whether or not the Council had competence to adopt Regulation No 2772/1999 on the legal basis which it chose.

A — *Submissions of the original parties and the interveners*

20. The *Parliament* submits that the Council lacked competence either to prolong the application of the voluntary beef labelling system beyond 31 December 1999, or to postpone the introduction of the compulsory beef labelling system. Even if it were assumed that the Council reserved the right to adopt implementing provisions in respect of Regulation No 820/97, the principle relating to the compulsory labelling system and a relevant date of entry into force were laid down in that regulation. By amending those elements the Council had not adopted an implementing provision, but amended the regulation.

21. The reference contained in the first subparagraph of Article 1(1) of Regulation No 2772/1999 to the applicable provisions listed in Regulation No 820/97 is only confirmative in nature in that it relates to the existing legislation, that is to say to the labelling of foodstuffs pursuant to Directive 79/112, to Regulations No 1208/81 and No 1186/90, and to identification pursuant to Directive 64/433. Those provisions concern, in part, general requirements relating to identification which apply to all foodstuffs and not the labelling of products for sale to the consumer.

22. The Parliament accepts that the second subparagraph of Article 19(1) of Regulation No 820/97 grants the Council the power to adopt implementing provisions under Article 19(2).

23. Furthermore, the Parliament disputes the Council's contention concerning a derived legal basis, which, in the present case, is characterised by a simplified decision-making procedure, that is to say it disputes the contention that the Council is permitted to adopt a legislative act relating to the common agricultural policy without consulting the Parliament, arguing that to do so is contrary to Article 37 EC.

24. According to the consistent case-law of the Court, particularly as regards the common agricultural policy, implementing measures may be adopted in accordance

with a different procedure where the essential elements of the matters to be dealt with have been adopted in accordance with the procedure laid down by the Treaty, that is to say, in this case, the third subparagraph of Article 37(2) EC. In that context the implementing measure must comply with the requirements laid down in the act upon which it is based.

25. In the submission of the Parliament, no third kind of act exists in addition to legislative acts and implementing provisions. Either Regulation No 2772/1999 is a legislative act and must comply with the procedural requirements which the Treaty lays down in respect of its adoption, or it must be construed as an implementing measure in the sense contemplated in Article 202 EC.

26. The Parliament recalls that according to the wording of the second subparagraph of Article 7(1) EC, '[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty'. According to the case-law of the Court,[8] the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves.

27. In the submission of the Parliament, the Treaty does not empower the Council, as a legislature within the framework of Article 37 EC, to evade compulsory procedures. The Treaty contains only a few provisions which — on strict conditions — empower the Council to alter the decision-making procedure laid down by the Treaty, such as, for example, the second subparagraph of Article 175(2) EC or the second indent of Article 67(2) EC. They relate to very unusual situations which are quite unconnected with that at issue here.

28. Even if it is assumed that the Council does in fact have a legislative power of the third kind, the Parliament points out that the power laid down in Article 19(1) of Regulation No 820/97 relating to its scope *ratione materiae* and *ratione temporis* is limited, that is to say that it does not, in any event, empower the Council to postpone the entry into force of a compulsory labelling system beyond 1 January 2000.

29. As regards the Council's argument that it would have had to state reasons for reserving the right to exercise implementing powers, the Parliament submits that it is not convincing in law. What is decisive is not the Council's intention but the fact that a specific, objective situation has been created. Moreover, in view of present comitology practice the Parliament doubts in general that the Council always takes care to state grounds as to whether or why it reserves the right to adopt implementing provisions itself.

8 — Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 38.

30. As regards its alleged lack of competence, the *Council* disputes the Parliament's arguments concerning the scope of the legal basis contained in Article 19 of Regulation No 820/97 and the characterisation of Regulation No 2772/1999 as an implementing measure. The Council contends that the legal basis in question has a much broader scope, which enabled it to adopt the regulation at issue on a proposal from the Commission.

31. In the submission of the Council, it does not follow from the Treaty that any legislative measure relating to the common agricultural policy is subject to the Parliament's participation in the consultation or co-decision procedure. On the contrary, the Community legislature may provide that in a legislative act adopted by means of the consultation or co-decision procedure a legal basis may be prescribed which does not provide for the participation of the European Parliament.

32. Furthermore, the Council contends that the comparison which the Parliament makes between the implementing provisions in Article 11(5) and (6) of the Commission's proposal which resulted in Regulation No 820/97 and the general rules within the meaning of the second subparagraph of Article 19(1) thereof is erroneous. In amending the Commission's proposal in this respect, the Council intended to create a derived legal basis to adopt not implementing provisions but rather general rules for a compulsory beef labelling system. By contrast, if the Council had intended to reserve the right to exercise implementing powers, it would, by virtue of Article 202 EC, have had to express its intention to do so in the recitals in the preamble to Regulation No 820/97, which, however, it did not do.

33. That contention of the Council is, it maintains, confirmed by the fact that the Commission made provision for the participation of the Parliament in the decision-making process in its second proposal of October 1999 relating to the derived legal basis.

34. In the light of the experimental nature of the measure adopted and the difficulty which its application might entail, the Council decided to create a derived legal basis which enabled it, on the basis of the experience in applying the optional system, to make any adjustments which might prove necessary in order to develop it into a compulsory system.

35. Furthermore, the Council points out that on 17 July 2000 the Parliament and the Council adopted Regulation No 1760/2000 which replaced Regulation No 820/97. That regulation was based on Articles 37 and 152(4)(b) EC. The adoption of Regulation No 1760/2000 shows

that Regulation No 2772/1999 was a provisional measure intended to give the Parliament and the Council the time necessary to elaborate and adopt an appropriate compulsory labelling system and thus to avoid a legal vacuum.

36. In addition, the Council stands by its view that the Treaty does not prohibit the incorporation in an act adopted in accordance with the procedure laid down by the Treaty of a derived legal basis which provides for a simplified decision-making procedure. In that respect the Council disputes the Parliament's interpretation of the case-law of the Court. In the Council's submission, all that can be inferred from that case-law is that the Treaty precludes a provision by virtue of which the adoption of an act founded on a derived legal basis requires unanimity but in respect of which the Treaty provides for adoption by a qualified majority. In this context the Council cites certain examples of acts which contain derived legal bases.

37. In the submission of the *Spanish Government*, the Council was competent to adopt Regulation No 2772/1999 on the basis of Article 19 of Regulation No 820/97. Regulation No 2772/1999 lays down general rules for a compulsory labelling system by referring to the second subparagraph of Article 12(1) of Regulation No 820/97.

38. The *Commission* submits that, on account of the time pressure caused by the Parliament's proposed amendments, it had no choice but to resort to the procedure laid down in Article 19 of Regulation No 820/97. The Commission's objective was to establish a realistic labelling system to prevent consumer confidence being undermined further. There is a connection between Title I of Regulation No 820/97 concerning the identification and registration of bovine animals and Title II concerning the labelling of beef and beef products. Labelling cannot perform its function unless it is accurate and that accuracy presupposes that it is possible to rely on the data collected pursuant to Title I.

39. The Commission emphasises that Regulation No 2772/1999 was absolutely necessary as a provisional measure in order to avoid a legal vacuum.

B — *Appraisal*

40. In considering whether or not the Council had competence to base Regulation No 2772/1999 on Article 19 of Regulation No 820/97, it is necessary first to examine the content of that provision. It is then necessary to ask whether Regulation No 2772/1999 fulfils the requirements laid down in Article 19.

41. In addition to other rules, Article 19 of Regulation No 820/97 contains a legal basis for the adoption of acts. Since that legal basis is anchored not in primary law, but in secondary law, that is to say in a Council regulation, it constitutes what is called a derived legal basis. As the Council correctly points out, such a legal basis is, in principle, permissible provided that certain requirements are fulfilled.

42. Article 19 also lays down a number of requirements under which an act can be adopted on the basis thereof.

43. Firstly, Article 19 lays down certain procedural requirements.

As regards competence, Article 19(1) provides that the Council is to have competence, although the formulation 'take a decision' does not define the form of the act in question. As regards procedure, Article 19 provides that on the basis of a Commission report provided for in Article 19(3) the Council is to take a decision acting by a qualified majority on a proposal from the Commission. Article 19 also contains a temporal requirement. The decision is to be taken before 1 January 2000.

Regulation No 2772/1999 fulfils those procedural requirements.

44. Secondly, Article 19 also lays down certain substantive requirements. Thus, the decision must also contain general rules for a compulsory beef labelling system which are in accordance with the Community's international commitments.

45. If Regulation No 2772/1999 is measured against those requirements, it is evident that it does not introduce a compulsory labelling system, but rather prolongs the previous optional labelling system and the recourse of the Member States to the possibility of imposing a compulsory labelling system, as is clear from the reference to certain provisions of Regulation No 820/97. Finally, Regulation No 2772/1999 takes over certain provisions relating to labelling in the second subparagraph of Article 12(1) of Regulation No 820/97, that is to say it merely reiterates the existing requirements relating to labelling and lays down no new general rules concerning the labelling of beef.

46. Even if the provisions which the Council adopted by Regulation No 2772/1999 were classified as a compulsory labelling system, they do not constitute 'general rules' within the meaning of Article 19(1) of Regulation No 820/97. By such 'general rules' the Community legislature no doubt meant something different from the information set out in Article 12 and the recourse of Member States to the possibility of imposing a compulsory system set out in Article 19. Instead, the Community legislature clearly intended to go beyond the labelling system already provided for in Regulation No 820/97 and to create additional rules. Otherwise, the provision relating to 'general rules' would be superfluous.

Contrary to the contention of the Commission, it is not, consequently, sufficient that legal provisions on labelling are laid down at all.

47. In adopting a regulation which does not fulfil the requirements of the provision to which it had recourse as a legal basis, the Council has exceeded the powers conferred upon it. The Council therefore lacked competence to adopt Regulation No 2772/1999. Consequently, it must be held that Article 19 of Regulation No 820/97 does not empower the Council to adopt Regulation No 2772/1999. In light of those considerations, it cannot, furthermore, constitute an implementing regulation.

48. Even assuming that in the case in point what was concerned was a provisional measure designed to avoid a legal vacuum, that in no way alters the fact that in such a case the requirements of Article 19 of Regulation No 820/97 must also be complied with.

V — Second plea: infringement of the prerogatives of the Parliament

49. In connection with the second plea it is necessary to consider on which legal basis Regulation No 2772/1999 could have been based.

A — *Submissions of the original parties and the interveners*

50. The *Parliament* disputes that the Council had the power to alter the content of Regulation No 820/97 without respecting the prerogatives of the Parliament which would, as the legislature, have had to have been involved, through the co-decision procedure, if the regulation had been adopted on the basis of Article 152 EC, as the Commission's proposal also intended.

51. The Parliament rejects the criticism that it is responsible for the proposed measure not being adopted before 31 December 1999. It stresses that the exercise of its powers through the co-decision procedure is not limited to what is approved by the Council in first reading. Furthermore, the Council laid down a *conditio sine qua non*, namely the addition of Article 37 EC as a legal basis.

52. In the submission of the *Council*, essentially the two following objectives are pursued by Regulation No 2772/1999: firstly, thereby to gain the time necessary to introduce an effective compulsory labelling

system to be adopted by the co-decision procedure; and secondly to fulfil, as far as possible, the desire expressed by the Parliament to limit the transitional period to eight months. In the light of those circumstances, the Council considers that the prerogatives of the Parliament have not been infringed.

53. The Council recalls that in the context of the first reading the Parliament sought to provide for a compulsory labelling system which laid down a number of requirements relating to information even though the Parliament must have known that that information was not available and that this would have resulted in an almost complete ban on the marketing of beef. This would have been difficult to reconcile with the principle of proportionality and would have led to disputes with operators who might have claimed that the Community had incurred non-contractual liability.

54. By adopting, through the legislative procedure, a resolution containing elements unacceptable to the Council, the Parliament made it impossible for the co-decision procedure relating to the Commission's proposal to be completed by 31 December 1999.

55. The *Spanish Government* contends that the prerogatives of the Parliament have not been infringed. It follows, it argues, from the judgment in Case C-269/97[9] that Article 152 EC was not the correct legal basis for adopting Regulation No 2772/1999 and thus that that regulation was not to be adopted by the co-decision procedure.

56. As regards the judgment in Case C-267/97, the *Parliament* submits that it concerned the legal basis before the Treaty of Amsterdam entered into force. In respect of the period thereafter Article 152(4)(b) EC was undeniably the correct legal basis for a regulation such as Regulation No 2772/1999.

B — *Appraisal*

57. Since Regulation No 2772/1999 could not be adopted on the basis of the second subparagraph of Article 19(1) of Regulation No 820/97, the question arises as to what the correct legal basis for the regulation at issue would have been.

58. There are basically three possible alternatives: Article 37 EC or Article 152(4)(b) EC or, as a dual legal basis, Article 37 EC read in conjunction with Article 152(4)(b) EC.

9 — Case C-267/97, cited in footnote 2.

1. Article 37 EC or Article 152(4)(b) EC

59. According to settled case-law of the Court, [10] in the context of the organisation of the powers of the Community the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure.

60. It is therefore first necessary to consider which objective Regulation No 2772/1999 pursues, that is to say whether or not it pursues objectives of agricultural policy or health policy.

61. As is clear in particular from the second, third and fourth recitals in its preamble, Regulation No 2772/1999 is intended to establish general rules for a compulsory labelling system. Therefore, in terms of objectives the rules concerned are rules such as those relating to the matters addressed in Title II of Regulation No 820/97, that is to say rules on the labelling of beef and beef products, and not rules such as those concerning the identification and registration of bovine animals under Title I. Consequently, the regulation could constitute a measure within the meaning of Article 152(4)(b) EC, that is to say a measure in the veterinary field which has as its direct objective the protection of public health.

62. As regards the content of Regulation No 2772/1999, it should be noted that it contains rules on the labelling of beef. Therefore, the regulation concerns the marketing of an agricultural product mentioned in Annex I to the EC Treaty.

63. More specifically, Regulation No 2772/1999 firstly limits itself to a reference to the provisions of Regulation No 820/97 concerning labelling and, secondly, prolongs the validity of certain provisions of Regulation No 820/97 which are valid for a limited period only. As is clear from the second subparagraph of Article 1(1) of Regulation No 2772/1999, the Member States may continue to introduce or maintain their own compulsory labelling systems. The optional labelling system also remains in force.

64. If no compulsory labelling system is also thereby established but instead the existing system of Regulation No 820/97 is taken over, the provisions concerned do indeed constitute provisions which have as their direct objective the protection of public health.

65. In that connection, it could also be argued that the basic regulation, Regula-

10 — See, to that effect, Case C-267/97, cited in footnote 2, paragraph 43, and the case-law cited therein.

tion No 820/97, to which Regulation No 2772/1999 does indeed refer and which is, in certain respects, prolonged by Regulation No 2772/1999, was, according to a judgment of the Court, properly adopted solely on the basis of Article 43 of the EC Treaty (now Article 37 EC).

66. As is clear from the judgment in Case C-269/97, in accordance with the previous legal situation, that is to say in accordance with the third subparagraph of Article 129(1) of the EC Treaty, health protection requirements formed a constituent part of the Community's other policies and therefore had to be taken into account in connection with the common agricultural policy. [11] Therefore, even if a regulation 'will have positive effects for the protection of public health', it has to be adopted on the basis of Article 43 of the EC Treaty (now Article 37 EC). [12]

67. However, in this connection it must be borne in mind that as regards the adoption of an act it is the legal situation at the time at which it was adopted which is decisive, and in the case of Regulation No 2772/1999 that was that obtaining on 21 December 1999.

68. The time at which the regulation was adopted is relevant to the present dispute in so far as the Treaty of Amsterdam had already entered into force at that time. Thus, the public-health provisions amended by that Treaty also applied. Those amendments are, specifically, a reaction to the BSE crisis. [13]

69. Upon the entry into force of the Treaty of Amsterdam the legal situation changed in so far as 'health protection requirements' no longer form 'a constituent part of the Community's other policies', but instead 'a high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities' in accordance with Article 152(1) EC. The upward revaluation of the health policy was effected as much by this 'ensuring' as by the express inclusion of Community activities ('actions'). That revaluation also finds expression in the positioning of that provision at the beginning of the article. [14]

70. That aspect, in connection with the creation of the new legal basis — Article 152(4)(b) EC — underscores the intention of the 'authors of the Treaties' to lay

11 — Case C-269/97, cited in footnote 2, paragraph 48.

12 — Case C-269/97, cited in footnote 2, paragraph 61.

13 — Eckert, 'Auswirkung des Vertrages von Amsterdam auf das gemeinschaftliche Lebensmittelrecht', *Zeitschrift für das gesamte Lebensmittelrecht 1998*, p. 118 (p. 119); Hollmann/Schulz-Weidner, 'Der Einfluss der EG auf das Gesundheitswesen der Mitgliedstaaten', *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht 1998*, p. 180 (p. 185).

14 — Karagiannis, 'La politique communautaire de santé publique et le Traité d'Amsterdam', in: *Études en l'honneur de Pierre Sandevour*, 2000, p. 221 (p. 231 et seq.).

increased stress on the provisions relating to public health also so far as their nature as a legal basis *vis-à-vis* Article 37 EC is concerned and to emphasise their independent character. [15]

71. Although Article 152 EC provides, in the same way as Article 129 of the EC Treaty, the previous provision, that acts are to be adopted in accordance with the co-decision procedure, Article 152(4)(b) EC differs from the relevant previous provision in that under Article 152(4)(b) 'measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health' are to be adopted 'by way of derogation from Article 37'. This expresses the intention of the parties to the Treaty to limit the scope of Article 37 EC. [16] For the Parliament, Article 152 EC is relevant in so far as such measures are, precisely, subject to the co-decision procedure and not, as was previously the case within the agricultural policy, to a mere consultation procedure. In a deliberate departure from the case-law of the Court, it is no longer the subject-matter of the act but rather the objective thereof which is to be decisive. [17]

72. Therefore, even the reference by Regulation No 2772/1999 to Regulation No 820/97 in no way alters the fact that recourse must be had not to the legal basis which was appropriate at the time when Regulation No 820/97 was adopted but to that which was appropriate at the time when the new act was adopted. That is because provisions such as those contained in Regulation No 820/97 may no longer be founded on the same legal basis after the entry into force of the Treaty of Amsterdam.

2. Article 37 EC, read in conjunction with Article 152(4)(b) EC

73. If it is not possible to regard the core of Regulation No 2772/1999 as having as its direct objective the protection of public health, it is necessary to consider whether or not it should have been founded on a dual legal basis, that is to say on Article 37 EC and Article 152(4)(b) EC. Even following the entry into force of the Treaty of Amsterdam, the question arises as to whether or not a dual legal basis was necessary. The narrow terms in which Article 152(4)(b) EC is formulated suggests that Article 37 EC retains a broad scope.

74. If two (or even more) aspects of an act constitute 'essential components' [18] or are 'equally essential', the act must be adopted

15 — Karagiannis, cited in footnote 14, p. 243.

16 — As regards the history of Article 152 EC, see Oreja Aguirre/Fonseca Morillo/Calvo Hornero, *El Tratado de Amsterdam de la Unión Europea*, 1998, Volume I, p. 246 et seq. See also Berg, 'Artikel 152, paragraph 35', in: Schwarze (publisher), EU-Kommentar, 2000.

17 — Gosalbo Bono, 'Les politiques et actions communautaires', *Revue trimestrielle du droit européen 1997*, p. 769 (p. 793).

18 — Judgment in Case C-42/97 *Parliament* v *Council* [1999] ECR I-869, paragraph 43.

by the institution 'on the basis of both of the provisions from which its competence derives'. [19]

75. By contrast, the Court has consistently held that recourse need be had to only one legal basis where the measures in question 'relate principally to a particular field of action' and have 'only incidental effects on other policies' [20] or incidental and indirect effects. [21]

76. Where health protection forms only one of several components or objectives of an act, Article 37 EC remains one legal basis among others. This follows from the fact that Article 152(4)(b) EC is aimed at measures which 'have as their direct objective the protection of public health.' [22]

77. However, as has been shown above, by taking over only parts of Regulation No 820/97, Regulation No 2772/1999 pursues, unlike the latter, only one principal objective, that it to say, directly, the protection of human health. Furthermore, its content does not disclose two components which are equally essential — unlike Regulation No 820/97 with its Titles I and II. This means that Regulation No 2772/1999 should have been founded on only one legal basis, that is to say Article 152 EC. Consequently, the Parliament should have been involved through the co-decision procedure in accordance with Article 251 EC.

78. However, if it is considered, contrary to the view taken here, that Regulation No 2772/1999 also pursues two objectives and discloses two components, that is to say the protection of human health and objectives of agricultural policy in the beef sector, it is also necessary, according to the case-law of the Court, [23] to consider whether the legislative procedures laid down in the two legal bases, that is to say Article 37 EC and Article 152 EC, are compatible. This requirement is fulfilled because the co-decision procedure prescribed in Article 251 EC for acts based on Article 152(4)(b) EC is compatible with the merely consultative procedure provided for in respect of acts based on Article 37 EC in so far as, as the procedure which provides for more extensive rights of the Parliament,

19 — Joined Cases C-164/97 and C-165/97 *Parliament* v *Council* [1999] ECR I-1139, paragraph 14; Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraphs 6 to 13.

20 — Joined Cases C-164/97 and C-165/97, cited in footnote 19, paragraph 14; Case C-70/88 *Parliament* v *Council* [1991] ECR I-4529, paragraph 17; and Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, paragraphs 32 and 33.

21 — Case C-42/97, cited in footnote 18, paragraph 63.

22 — Hix, 'Artikel 37, paragraph 14'; in: Schwarz (publisher), EU-Kommentar, 2000.

23 — Joined Cases C-164/97 and C-165/97, cited in footnote 19, paragraph 14; Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraphs 17 to 21.

it 'absorbs' the merely consultative procedure. As regards the requirement that there be a majority in the Council, provision is made for a qualified majority in respect of both procedures.

79. The regulation which succeeded Regulation No 820/97, that is to say Regulation No 1760/2000, was also adopted on the dual legal basis of Articles 37 EC and 152 EC.

3. Conclusion

80. Since the Council based Regulation No 2772/1999 on Article 19 of Regulation No 820/97 and not on Article 152(4)(b) EC, it excluded the participation of the Parliament through the co-decision procedure and thereby infringed the prerogatives of the Parliament. Even if it is considered that recourse should have been had to a dual legal basis for Regulation No 2772/1999, that is to say Article 152(4)(b) EC and Article 37 EC, the Council infringed the prerogatives of the Parliament.

VI — Third plea: infringement of Regulation No 820/97

81. The third plea relates to the infringement of Regulation No 820/97.

A — *Submissions of the original parties and the interveners*

82. The *Parliament* submits that the Council failed on two counts to comply with the obligations imposed by Regulation No 820/97. Firstly, it changed the content thereof by prolonging the optional beef labelling system and postponing the introduction of the compulsory labelling system without having recourse to the co-decision procedure, as required by the Treaty. Secondly, the Council failed to comply with the obligation laid down in Article 19 of Regulation No 820/97, namely to adopt general rules for a compulsory beef labelling system before 1 January 2000.

83. The Parliament points out that in Article 19(2) of Regulation No 820/97 the Council reserved the right to reduce the content of the compulsory labelling system. It states that it was able to do so on the basis of reports from the Commission.

84. In the submission of the Parliament, there was no compelling reason which would have prevented the introduction of a compulsory labelling system by the prescribed date. The arguments concerning the failings on the part of the Member States and the lack of identification in relation to bovine animals born before 1 January 1998 must be rejected. The Council itself provided that only bovine animals born after that date were to be identified and also concluded that this would not impede the introduction of the compulsory system as of 1 January 2000.

85. Therefore, the Parliament comes to the conclusion that the transition to the compulsory labelling system was not impossible, but that the Council considered it to be inopportune. The introduction of the compulsory labelling system should have been postponed by an amendment to Regulation No 820/97 and not by an implementing provision.

86. The Parliament further recalls that the Council itself had laid down the date of 1 January 2000. The Parliament fails to see how the difficulties involved in applying Article 19 of Regulation No 820/97 could justify the adoption of Regulation No 2772/1999.

87. The Parliament acknowledges that it is not possible to expect a co-decision procedure to be concluded in under three months. However, the question arises as to why the Commission's proposal was not made earlier. Regulation No 820/97 requires the Commission to submit a proposal on general rules for a compulsory labelling system. That regulation requires the Council, in turn, to adopt those rules by 1 January 2000. The argument that compulsory labelling could not be introduced for want of complete information cannot be accepted. As regards the adoption of general rules, there was a large margin of discretion in respect of the information necessary for labelling. The termination of the optional labelling system did not create a legal vacuum because the relevant rules were voluntary.

88. The Parliament contends that the Commission made it clear that the proposal which led to the adoption of Regulation No 820/97 was intended to attain a result which should have been attained though the co-decision procedure.

89. As regards the failure of the Member States to act in respect of the identification and registration of bovine animals, the Parliament claims to have discovered an inconsistency on the part of the Commission. In spite of the various failings on the part of the Member States it was possible, in the submission of the Parliament, at least to adopt certain rules concerning a compulsory labelling system in the light of Article 19(3) of Regulation No 820/97.

90. The *Council* submits that it has not infringed Regulation No 820/97 but instead exploited a mechanism for which Article 19 of the regulation itself makes provision and whose lawfulness *per se* is also not disputed by the Parliament.

91. Furthermore, the Council takes the view that Regulation No 2772/1999 does not constitute an implementing provision. On the contrary, Article 19 of Regulation No 820/97 contains a derived legal basis of which the Council lawfully availed itself in the present case. It stands to reason that such a derived legal basis permits it to determine the transition from the old to the new regime because that derived legal basis even permits it to introduce general rules for that new regime.

92. The Council stresses that it is surprised by the Parliament's criticism that it failed to adopt the general rules for the compulsory labelling system in good time at a time when such rules are the subject of the co-decision procedure. The Council acknowledges its obligation to adopt such rules, to which the Parliament refers, and stresses that it fulfilled this obligation within the prescribed period by adopting Regulation No 2772/1999.

93. The Parliament's contention that the exercise of the Council's powers depends on how the Commission exercises its role as guardian of the Treaties must be rejected. The Council can proceed only on the basis of the economic and legal situation which actually exists and not a 'hypothetical situation'.

94. The Council further points out that in adopting Regulation No 820/97 it merely availed itself of its power to amend the Commission's proposal with due regard to the provisions of the Treaty.

95. The *Spanish Government* contends that there has been no infringement of Regulation No 820/97. As is clear from the Commission's report, the Member States were not ready to introduce a compulsory labelling system. By adopting Regulation No 2772/1999 the Council made it possible to complete the databases to enable operators in the Member States to act in accordance with the provisions relating to labelling.

96. The *Commission* points out that Regulation No 820/97 does not define the term 'general rules' and consequently the Council has broad powers under the procedure laid down by Article 19. The fact that Regulation No 2772/1999 provides for the application of certain provisions concerning labelling listed in Article 12 of Regulation No 820/97 and permits the Member

States to provide for a labelling system does not constitute an infringement of procedural provisions. That is because provisions on labelling are laid down which are binding on operators.

B — *Appraisal*

97. The third plea concerns infringement of Regulation No 820/97 by the Council.

98. In so far as the Parliament submits that the Council infringed Regulation No 820/97 in that it should have adopted the measures taken by means of Regulation No 2772/1999 by having recourse to the co-decision procedure, I would refer to my appraisal of the second plea.

99. In so far as the Parliament complains that the Council infringed Article 19 of Regulation No 820/97 in that it did not adopt general rules for a compulsory labelling system within the prescribed period, that is to say by 1 January 2000, that complaint is, strictly speaking, one which relates to failure to act. However, under the system of legal protection provided by Community law, this forms the subject-matter of a separate action, that is to say an action for failure to act under Article 232 EC. Since, in accordance with the form of order sought, the action brought by the Parliament seeks the annulment of an act of the Council and not a declaration of failure to act on the part of the Council, this aspect need not be examined further.

100. Furthermore, an action relating to a possible failure to act on the part of the Council could be regarded as having become devoid of purpose in so far as Regulation No 1760/2000, which contains general rules for a compulsory labelling system, has since been adopted. A judgment of the Court which declared the failure to act unlawful could no longer bring about the consequences prescribed by Article 232 EC. [24]

101. However, even if the Parliament's submission concerning failure to comply with the requirement to adopt general rules for a compulsory labelling system by 1 January 2000 were construed merely as an argument intended to support the plea alleging infringement of Regulation No 820/97, this aspect need not be examined separately. The obligation to introduce a compulsory labelling system may be relevant, but in a different way. For example, that obligation, laid down in Article 19 of Regulation No 820/97, could be affected in so far as the Council modified it by adopting Regulation No 2772/1999.

24 — See Case 377/87 *Parliament* v *Council* [1988] ECR 4017, paragraph 10.

102. As the Parliament also correctly submits, in Regulation No 2772/1999 the Council advanced the date by which the compulsory system was to be introduced. In doing so, it not only failed to comply with its obligation to introduce such a system — which, however, need not be examined in further detail here — but also amended the substance of that obligation in an essential, that is to say temporal, respect. It did not do so expressly, but in this regard Regulation No 2772/1999 can be regarded as a substantive derogation from the obligation to introduce the compulsory labelling system. Since Regulation No 820/97 does not provide for a relevant power, the Council could not itself have made this amendment to the obligation on it and on the Commission merely by amending Regulation No 820/97.

103. Finally, it should be noted that the 'difficulties' involved in introducing the compulsory system, to which several participants in these proceedings have referred, can be of no relevance to the legal assessment of Regulation No 2772/1999 in this context.

VII — Maintenance of the effects of Regulation No 2772/1999

104. In the event that Regulation No 2772/1999 is annulled in accordance with the second paragraph of Article 231 EC, the Parliament and Commission claim that the Court should maintain in force the effects of the regulation in the interest of consumers.

105. In the meantime the legislation succeeding Regulation No 820/97, and thus also Regulation No 2772/1999, has been adopted, that is to say Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97. [25]

106. However, the maintenance of the effects of Regulation No 2772/1999 continues to be of importance. This concerns primarily the lawfulness of the acts of the Member States adopted between the entry into force of Regulation No 2772/1999 and the entry into force of the rules succeeding it, contained in Regulation No 1760/2000.

107. This application should be granted since the contested regulation constitutes a measure to combat the crisis caused by BSE and to provide the consumer with a minimum level of information. Therefore, the application should be granted in order to avoid a legal vacuum in respect of the period between the annulment of Regulation No 2772/1999, which otherwise would have retrospective effect, and the entry into force of the rules succeeding it, contained in Regulation No 1760/2000, and also on grounds of legal certainty.

25 — OJ 2000 L 204, p. 1.

VIII — Costs

108. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Council is unsuccessful in its submissions, it must be ordered to pay the costs. As interveners, the Kingdom of Spain and the Commission must bear their own costs pursuant to Article 69(4) of the Rules of Procedure.

IX — Conclusion

109. In the light of the foregoing I therefore propose that the Court should:

(1) annul Council Regulation (EC) No 2772/1999 of 21 December 1999 providing for general rules for a compulsory beef labelling system;

(2) order that the effects of the annulled regulation be maintained until new rules adopted by the Community legislature on the appropriate legal basis enter into force;

(3) order the Council to bear the costs of the proceedings;

(4) order the Kingdom of Spain and the Commission to bear their own costs.