OPINION OF ADVOCATE GENERAL JACOBS
delivered on 18 May 1995 *

1. This case concerns the difficult and emotive issue of the inclusion or exclusion of genetically modified micro-organisms ('GMMOs') in organically produced agricultural products. The Parliament seeks the annulment in whole or in part of Commission Regulation (EEC) No 207/93 of 29 January 1993 ('the Regulation') defining the content of Annex VI to Regulation (EEC) No 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs and laying down detailed rules for implementing the provisions of Article 5(4) thereto. [1]

2. The Parliament claims that, in adopting the Regulation, the Commission has opened the way for GMMOs to be included in organically produced agricultural products and has done so in a manner which violates the Parliament's prerogatives.

The relevant Community legislation

a) Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms [2]

3. This Directive lays down common measures for the contained use of genetically modified micro-organisms with a view to protecting human health and the environment (Article 1). It was adopted by the Council on the basis of Article 130s of the Treaty.

4. The Directive lays down certain rules and procedures which must be followed by users of GMMOs when engaged in their use or manipulation. The Directive does not lay down rules on the types of products, whether agricultural or otherwise, into which GMMOs can or cannot be incorporated. It is only relevant to the present

* Original language: English.

1 — OJ 1993 L 25, p. 5.

2 — OJ 1990 L 117, p. 1.

proceedings in so far as it contains a definition of GMMOs.

5. Article 2(a) defines 'micro-organism' as 'any microbiological entity, cellular or non-cellular, capable of replication or of transferring genetic material'. Article 2(b) defines 'genetically modified micro-organism' as a 'micro-organism in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination'. 'Contained use' is defined by Article 2(c) as 'any operation in which micro-organisms are genetically modified or in which such genetically modified micro-organisms are cultured, stored, used, transported, destroyed or disposed of and for which physical barriers, or a combination of physical barriers together with chemical and/or biological barriers, are used to limit their contact with the general population and the environment.'

b) Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms [3]

6. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States and to protect human health and the environment when genetically modified organisms are released deliberately into the environment or when products are placed on the market containing or consisting of genetically modified organisms intended for subsequent deliberate release into the environment. The legal basis of the Directive is Article 100a of the Treaty.

7. Article 2(1) of the Directive defines 'organism' as 'any biological entity capable of replication or of transferring genetic material'. Article 2(2) defines 'genetically modified organism' ('GMO') as 'an organism in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination.' This Directive has a wider scope *ratione materiae* than Directive 90/219/EEC: the latter only applies to micro-organisms whereas the former applies to both micro-organisms and to organisms which include micro-organisms.

8. Article 2(3) of the Directive defines 'deliberate release' as any intentional introduction into the environment of a GMO or combination of GMOs without provisions for containment such as physical barriers or

3 — Above, note, p. 15.

a combination of physical barriers together with chemical and/or biological barriers used to limit their contact with the general population and the environment.

9. Article 4 requires Member States to ensure that all appropriate measures are taken to avoid any adverse effects on human health and the environment which may arise from the deliberate release or placing on the market of GMOs. Part B of the Directive (Articles 5 to 9) deals with the deliberate release of GMOs into the environment for research and development purposes or for any other purpose than for placing on the market. That part is not germane to these proceedings.

10. Of relevance is Part C (Articles 10 to 18) which concerns the placing on the market of products containing GMOs. The procedure according to which a manufacturer or importer of a GMO (or a combination of GMOs) obtains consent to place it on the market can be summarized as follows:

1) The manufacturer or importer into the Community submits a notification to the competent authority of the Member State where the product is to be placed on the market for the first time (Article 11 (1)). The content of the notification is set out in Article 11 and Annexes II and III. In particular, the application makes a proposal for labelling and packaging the product which should comprise at least the requirements laid down in Annex III.

2) The competent authority of the Member State then examines the notification. It may, within 90 days of receipt, inform the notifier that the proposed release does not fulfil the conditions of the Directive and that it is rejected (Article 12(2)(b)). Or, if the competent authority does not reject the application, it may forward the dossier to the Commission with a favourable opinion (Article 12(2)(a)).

3) The Commission, on receipt of the dossier, forwards it to the competent authorities of all the Member States. If, within a certain fixed period, the competent authority which received the notification does not receive any indication to the contrary from another Member State, it must give its consent in writing to the notification so that the product can be placed on the market and must inform the Commission and the other Member States thereof (Article 13(1) and (2)).

4) The competent authority of another Member State may raise an objection within the period specified. It must state its reasons for so doing. If the competent authorities concerned cannot reach an agreement the Commission takes a decision in accordance with the committee procedure laid down in Article 21 [4] (Article 13(3)). The Commission's decision may or may not be favourable.

5) According to Article 13(4), where the Commission has taken a favourable decision, the competent authority which received the notification shall give consent in writing to the product being placed on the market.

6) Once consent is given, the product in question may be used without further notification throughout the Community provided that any conditions imposed are complied with (Article 13(5)).

11. The procedure thus embodies a number of safeguards. No product containing a GMO can be placed on the market without consent. The competent authorities of the Member State which receive the notification can deny permission for placing the product on the market. Consent can only be given if the Commission and a qualified majority of the Member States agree (subject to the committee procedure which provides for the Council to act in certain circumstances). Article 10 of the Directive lays down the basic conditions which must be fulfilled before consent can be given. Article 16 of the Directive provides an extra safeguard. If, consent having been given to a product, a Member State has reason to consider that it constitutes a risk to human health, that Member State may provisionally restrict its use and/or sale.

c) Council Regulation (EEC) N° 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs [5]

12. This regulation ('the basic Regulation') is the one which the contested Regulation seeks to implement. It was adopted by the Council on the basis of Article 43 of the Treaty. The Regulation lays down rules on production, labelling and inspection enabling organic farming to be protected. It seeks to ensure conditions of fair competition between producers of products bearing the prescribed indications and to give the market

4 — A regulatory committee procedure, namely Procedure III variant a) as set out in Article 2 of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33).

5 — OJ 1991 L 198, p. 1.

for organic products a more distinctive profile by ensuring transparency at all stages of production and processing. It applies to organically produced unprocessed agricultural crop products as well as animals and unprocessed animal products in certain circumstances (Article 1(1)(a)) and organically produced products intended for human consumption composed essentially of one or more ingredients of plant origin or, in certain circumstances, products intended for human consumption containing ingredients of animal origin (Article 1(1)(b)).

13. Article 3 provides that the Regulation shall apply without prejudice to other Community provisions governing the production, preparation, marketing, labelling and inspection of the products specified in Article 1.

14. Articles 6 and 7 define the rules of organic production. In essence, organic production means that the methods defined in Annex I to the basic Regulation are complied with and only the substances listed in Annex II to the basic Regulation are applied to the products during the course of their cultivation. Article 6(2) contains a derogation according to which seeds treated by a substance not listed in Annex II can be used in certain circumstances.

15. Article 5 of the basic Regulation lays down the rules for the labelling and advertising of organic products. Article 5(3) in particular provides in its material parts:

'3. The labelling and advertising of a product specified in Article 1(1)(b) [i. e. products intended for human consumption composed essentially of one or more ingredients of plant origin or in certain circumstances containing ingredients of animal origin] may refer, in the sales description of the product, to organic production methods only where:

(a) all the ingredients of agricultural origin of the product are, or are derived from, products obtained in accordance with the rules laid down in Articles 6 and 7 or imported from third countries under the agreements laid down in Article 11;

(b) the product contains only substances listed in Annex VI, Section A, as ingredients of non-agricultural origin;

(c) the product or its ingredients have not been subjected, during preparation,

to treatments involving the use of ionizing radiation or substances not listed in Annex VI, Section B;

provided for in Directive 79/112/EEC. When the products are such that less than 50% of the ingredients of agricultural origin were obtained by the organic production method, no indications referring to the organic production method are authorized in the labelling.

...'

16. In other words, Annex VI, Section A, constitutes an exhaustive 'white list' of substances which can be used. Annex VI, Section B, constitutes an exhaustive 'white list' of processing aids. If a substance is not on the list, it cannot be used in organic production. The contested Regulation seeks to define the content of Annex VI of the basic Regulation.

17. Article 5 draws a distinction between three categories of products composed of several ingredients. If all the ingredients of agricultural origin were obtained by the organic production method, then the indications referring to the organic production method may appear in the sales description in accordance with Article 5(3)(a). If the products are such that more than 50% of the ingredients of agricultural origin were obtained by the organic production method, then, according to Article 5(6), indications referring to the organic production method may appear only in relation to the ingredients concerned in the list of ingredients

18. Article 5(7) provides that detailed rules concerning the implementation of the Article may be established in accordance with the procedure laid down in Article 14, which allows the Commission, assisted by a regulatory committee, to adopt the measures concerned. [6] Article 13 further provides that amendments to Annex VI are to be adopted in accordance with the procedure laid down in Article 14.

19. Exhaustive lists of the substances and products referred to in Article 5(3)(b) and (c) and in the first and second indents of Article 5(4) are to be established in Annex VI according to the procedure laid down in Article 14 (Article 5(8)).

20. Article 5(9) provides:

'Before 1 July 1993, the Commission shall review the provisions of the Article, in particular paragraphs 5 and 6, and submit any

6 — As in note above.

appropriate proposal with a view to revision, if any.'

21. Annex VI to the basic Regulation contains three section headings but the sections had no content. They are as follows:

'A. Substances permitted as ingredients of non-agricultural origin (Article 5(3)(b)):

B. Substances permitted to be used during preparation (Article 5(3)(c)):

C. Ingredients of agricultural origin (Article 5(4)).'

22. The basic Regulation as adopted by the Council on 24 June 1991 does not mention GMMOs. The Commission's proposal for a Council Regulation on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs [7] did not mention them either. The Parliament approved the Commission proposal on 19 February 1991 but proposed a number of relevant amendments. [8] In particular, it proposed an amendment (Amendment No 12) which sought to give a definition of GMMOs. [9] It also proposed two amendments (Amendments No 15 and 60) which sought to prevent reference to organic production in labelling if GMMOs were included in the product, if the method of production involved the introduction of GMMOs or if the product or its ingredients had been subject to treatment by GMMOs. [10] The member of the Commission had indicated the day before the adoption of the amendments by the Parliament that:

'The Commission shares also the concern expressed in Amendments Nos 12, 60, 100 and 102, to exclude the use of genetically modified organisms in organic farming. These organisms, however, are not yet on the market and currently have not been authorized even in conventional farming. Any provisions in this respect need to be coherent with other Community provisions in this area and require an in-depth technical study. I regret therefore that I cannot accept these amendments in the present context but I can assure Parliament that the technical work will be started so that an appropriate ruling can be examined and developed for the organic farming context as soon as possible.' [11]

7 — OJ 1990 C 4, p. 4.
8 — OJ 1991 C 106, p. 27.
9 — OJ 1991 C 72, p. 43.
10 — OJ 1991 C 72, p. 44.
11 — Debates of the European Parliament annexed to OJ 3-401/21.

23. As a result, the Commission's amended proposal for a Council Regulation on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs [12] did not refer to GMMOs.

preserve organic foodstuffs. The sixth recital states that, with regard to enzymes derived from micro-organisms, it has to be further examined whether such products obtained from GMMOs within the meaning of Directive 90/220/EEC can be used in foodstuffs whose labelling refers to organic production methods and that the issue will be examined in detail when such enzymes are approved for use in foodstuffs according to the relevant Community legislation.

d) Commission Regulation (EEC) No 207/93 of 29 January 1993 defining the content of Annex VI to Regulation (EEC) No 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs and laying down detailed rules for implementing the provisions of Article 5(4) thereto

24. This is the contested Regulation. It was adopted by the Commission on the basis of Article 5(7) and (8) of the basic Regulation. The fourth recital of the preamble states that Annex VI should take account of consumers' expectations that processed products from organic production will be composed essentially of ingredients as they occur in nature. However, the fifth recital states that other ingredients or processing aids which may be used in conventionally processed foodstuffs and which preferably exist in nature may be included in Annex VI, provided it has been shown that, without having recourse to such substances, it is impossible to produce or

25. Article 1 of the Regulation provides that an annex to the regulation defines the content of Annex VI of the basic Regulation. Article 2 provides that no amendments shall be adopted to Sections A and B of Annex VI unless certain requirements are satisfied. The Annex contains the lists of permitted ingredients and processing aids. It also contains an introduction which sets out a number of general principles. One of those principles is couched in the following terms:

'Notwithstanding reference to any ingredient in Sections A and C or any processing aid in Section B, any ingredient or such processing aid shall be used only in accordance with relevant Community legislation and/or national legislation compatible with the Treaty and, in the absence thereof, in accordance with the principles of good manufacturing practice for foodstuffs. In particular additives shall be

12 — OJ 1991 C 101, p. 13.

used according to the provisions of Directive 89/107/EEC and, where relevant, those of any comprehensive Directive as referred to in Article 3(1) of Directive 89/107/EEC; flavourings shall be used according to the provisions of Directive 88/388/EEC and solvents according to the provisions of Council Directive 88/344/EEC of 13 June 1988 on the approximation of the laws of the Member States on extraction solvents used in the production of foodstuffs and food ingredients.'

26. Section A of Annex VI contains a point A.4 which is worded as follows:

'Micro-organism preparations

(i) Any preparations of micro-organisms normally used in food processing, *with the exception of micro-organisms genetically modified* within the meaning of Article 2(2) of Directive 90/220/EEC;

(ii) Micro-organisms genetically modified within the meaning of Article 2(2) of Directive 90/220/EEC: *if they have been included according to the decision procedure of Article 14.*' (emphasis added).

27. Section B of Annex VI contains the following point:

'Preparations of micro-organisms and enzymes:

(i) Any preparations of micro-organisms and enzymes normally used as processing aids in food processing, *with the exception of micro-organisms genetically modified* within the meaning of Article 2(2) of Directive 90/220/EEC;

(ii) Micro-organisms genetically modified within the meaning of Article 2(2) of Directive 90/220/EEC: *if they have been included hereunder according to the decision procedure of Article 14.*' (emphasis added).

28. The 'decision procedure of Article 14' referred to is the regulatory committee procedure laid down by Article 14 of the basic Regulation.

29. Thus, under the legislation as it stands at present, the use of a GMMO in the processing or the production of organic food is not permitted. No GMMOs are included in the list of substances in Annex VI, Section A.4, or in Annex VI, Section B. Although GMMOs are mentioned in Annex VI, Section A.4(ii), and Annex VI, Section B(ii), the Regulation imposes conditions to be fulfilled — some procedural and some substantive — before a GMMO may be included in the lists.

30. A GMMO can only be used in the processing or the production of organic products if two cumulative procedures are complied with:

1) consent must be obtained for the deliberate release or placing on the market of the GMMO or a product containing a GMMO in accordance with Directive 90/220/EEC as outlined above;

2) the Commission must take a measure in accordance with Article 14 of the basic Regulation in respect of the particular GMMO in question (Annex VI, Sections A.4(ii) and B(ii)).

31. Article 3 of the basic Regulation (paragraph above) makes clear that those conditions are cumulative. Article 5(8) of the basic Regulation indicates that a Member State may request that a product be added to Annex VI. Furthermore, as a consequence of Article 3, if the production, preparation, marketing, labelling or inspection of a product is governed by another Community provision, that provision applies also. That may add a third obstacle to the marketing of the product. For example, if a particular Community provision governs the use of GMMOs in the production of wheat, then that provision must be complied with as well.

32. The Commission has laid down the substantive conditions in Article 2 of the contested Regulation. Any future inclusion of a GMMO in the lists in Annex VI will be an amendment to its Section A or B. According to Article 2(b) a GMMO will only be included in the list of processing aids covered by Section B if two conditions are fulfilled: first that the GMMO be accepted in general (i. e. non-organic) food processing and second that it is impossible to produce such foodstuffs without it. Article 2 only concerns GMMOs to be included in Section B; it does not apply to GMMOs to be included in Section A.4 of Annex VI.

e) The proposal for a European Parliament and Council Regulation on novel foods and novel food ingredients

33. On 7 July 1992 the Commission adopted a proposal for a Council Regulation on novel foods and novel food ingredients. [13] The Commission made an amended proposal on 1 December 1993. [14] Both proposals referred to Article 100a of the Treaty as the legal basis for the adoption of the act. The proposal will now have to be adopted according to the co-decision procedure as a result of the amendment to Article 100a by the Treaty on European Union. The proposal seeks to regulate the placing on the market of food and food ingredients which have not hitherto been used for human consumption to a significant degree or which have been produced by processes which result in a significant change in their composition, nutritional value or intended use (Article 1). Foods and food ingredients produced from GMOs are included. The application of the proposed Regulation to organic food is not excluded by Article 2. Article 4 of the amended proposal (Articles 5 and 6 of the original proposal) provides for a written consent procedure which must be complied with before novel foods or novel food ingredients can be placed on the market. Article 5 of the amended proposal (Article 7 of the original proposal) provides for a special consent procedure for food ingredients which contain or consist of GMOs within the meaning of Directive 90/220/EEC. In essence, Article 5 would render inapplicable the consent procedure which has to be followed in accordance with Articles 11 to 18 of Directive 90/220/EEC for the placing on the market of GMOs. That is permitted by Article 10(2) of Directive 90/220/EEC. If the proposal is adopted, the consent procedure of Articles 11 to 18 of Directive 90/220/EEC will be replaced by the procedure in Article 5. The broad principles on which consent can be granted or refused are similar to those in Directive 90/220/EEC.

13 — COM(92) 295 final — SYN 426, OJ 1992 C 190, p. 3.
14 — OJ 1994 C 16, p. 10.

The submissions

34. The Parliament has made three submissions in support of its application for the annulment of the Regulation. These are:

a) The Commission, in breach of Article 155, fourth indent, of the Treaty and Article 5(8) of the basic Regulation, exceeded the powers conferred on it by the Council in including GMMOs in the annex to the Regulation. The Parliament contends that the Commission has undermined the objectives of the basic Regulation by sapping consumer confidence in the organic label, by creating conditions under which fair competition will be further jeopardized and by failing to reach a balance between agricultural production

and environmental protection. The Parliament submits that a provision on the free movement of organic foodstuffs containing GMMOs can only be adopted by the Council on the basis of Article 100a of the Treaty.

b) Alternatively, the Commission has misused the powers conferred upon it by strongly implying to Parliament that GMMOs would only be included in organic food after the matter had been referred back to Parliament. Also, the Parliament submits that the proper basis for allowing the use of GMMOs in organic production was the procedure laid down by Article 5(9) of the basic Regulation.

c) Thirdly, the Commission has failed in breach of Article 190 of the Treaty to state proper reasons for the adoption of the Regulation which allows the use of GMMOs. Furthermore, the pending proposal on novel foods and food ingredients had induced the Parliament to believe that the use of GMMOs in organic production would be dealt with by primary legislation: the Regulation contains no statement of reasons to dispel such a conviction.

35. Although the Parliament has requested that the Court annul the entire Regulation, and only in the alternative that it annul the fifth recital and point A.4(ii) of Section A and point (ii) of Section B of Annex VI, all of the submissions of the Parliament relate to GMMOs and none to any of the other substances listed in the Annex. As the Parliament has not put forward any argument in support of its request that the whole Regulation be annulled it is unnecessary to consider the matter. [15] The substance of the action is thus confined to the annulment of the Regulation in so far as it deals with GMMOs. Furthermore, the Parliament has made it clear in its application that it seeks the annulment of the Regulation in so far as it includes GMMOs in the list of substances permitted in organic production. It is only in the reply that the Parliament suggests that the process by which the Commission has decided whether GMMOs may, or may not, be permitted in organic production violates its prerogatives. As will be seen, it is not necessary to consider any practical procedural consequences of that broadening of the Parliament's submissions since it does not, in my view, affect the outcome of the proceedings.

Admissibility

36. The Commission entertains 'doubts' as to the admissibility of this action. Although it has not raised a formal plea of inadmissi-

15 — See Case C-132/88 *Commission* v *Greece* [1990] ECR I-1567, paragraph 15 of the judgment.

bility, the Commission questions whether the prerogatives of the Parliament are in issue in these proceedings.

37. In my view the question arises whether the action is inadmissible on the ground that in respect of GMMOs the Regulation does not have the legal effects which the Parliament attributes to it. It does not permit the use of GMMOs in organic food production or processing. Sections A.4(i) and B(i) of Annex VI exclude GMMOs from the 'white lists' of permitted substances or processes.

38. In substance what the Parliament objects to is the fact that the Commission has qualified the exclusion of GMMOs in Annex VI Sections A.4(i) and B(i) by including Sections A.4(ii) and B(ii).

39. The question is therefore what legal effect can be attributed to Sections A.4(ii) and B(ii). At the hearing, the Commission conceded that Sections A.4(ii) and B(ii) were devoid of substance and were added as the fruit of a political compromise in the regulatory committee.

40. Section A.4(ii) and Section B(ii) of Annex VI restate the procedure which has to be followed in order to modify Annex VI. That procedure is already set out in Article 14 of the basic Regulation. The Commission is under an obligation to follow it if it wishes to modify Annex VI whether the procedure is mentioned in Annex VI itself or not.

41. The Commission has merely declared by including Sections A.4(ii) and B(ii) in Annex VI its intention to follow the procedure in Article 14 of the basic Regulation if it wishes to allow GMMOs in organic food production at some future date. In other words, the Commission has declared its intention to follow a procedure which is obligatory in any event if Annex VI is to be modified.

42. The view could be taken that the very mention of GMMOs in the Regulation produces the legal effects claimed by the Parliament because it signals that the Commission considers that they are not *per se* excluded from organic production. It may indeed be the case that the Commission believes that GMMOs can be included in Annex VI as a matter of principle but such a belief does not produce legal effects. Even if the Commission held such a belief, it could only be translated into a legally binding act in accordance with the regulatory committee procedure laid down in Article 14 of the basic Regulation. The Parliament submits,

however, that the infringement of its prerogatives is effective immediately, whether or not subsequent acts are to be adopted, and cites the judgment of the Court in *Luxembourg* v *Parliament* [16] in support. That case concerned a resolution passed by Parliament to divide the staff of its Secretariat between Brussels and Strasbourg. The Court held that the resolution produced legal effects, in spite of the fact that implementing measures were required, because it provided for a permanent division of the services and staff between those two cities. [17] The subsequent measures were only necessary in order to implement a decision which had been taken. In the present case, on the other hand, the Commission has merely signified in Sections A.4(ii) and B(ii) of Annex VI that it may submit proposals to include GMMOs in Annex VI to the regulatory committee provided for in Article 14 of the basic Regulation: the Commission has not bound itself to make such proposals in the future.

43. The Parliament can protect its prerogatives by bringing an action to annul any future amendment of Annex VI which adds GMMOs to the 'white lists' of ingredients or processing aids which can be used in organic production. Only a modification of Annex VI will, in my view, produce legal effects.

16 — Case 108/83 [1984] ECR 1945.

17 — Ibid. at paragraph 21 of the judgment.

44. Only if the Commission amends Annex VI to include GMMOs in the lists will the issues of substance raised by the Parliament become germane. In the absence of such an amendment, the Commission has taken no measure concerning GMMOs which produces legal effects and which can be annulled at the request of the Parliament.

45. Although I am of the view that the Parliament's action is inadmissible, I turn none the less to consider the issues of substance which it raises.

Substance

(a) Submission of lack of competence

46. The main submission of the Parliament is that by adopting the contested Regulation the Commission exceeded the powers conferred upon it by the Council in the basic Regulation.

47. Article 145 of the Treaty expressly provides that the Council may confer upon the Commission powers for the implementation of the rules which the Council lays down

and that the Council may impose certain requirements in respect of the exercise of those delegated powers. In *Rey Soda* v *Cassa Conguaglio Zucchero* [18] the Court gave a broad interpretation to powers conferred by the Council on the Commission and stated that:

'... the limits of this power must be judged with regard to the basic general objectives of the organization of the market and less in terms of the literal meaning of the enabling word.'

48. The Court held in *Germany* v *Commission* [19] that the Council does not need to set out the essential elements of the delegated powers but that delegation can be validly effected even if based on a provision couched in general terms. However, the Commission is bound to act within the limits which can be deduced from the scheme and objective of the Council act. [20]

49. Measures adopted in the exercise of delegated powers are not invalid because they are adopted according to a procedure different from that used to adopt the act conferring the delegated powers. The Parliament misquotes a passage from the judgment of the Court in *Romkes* v *Officier van Justitie*. [21] There the Court stated:

'It should be borne in mind in this regard that [...] the Council cannot be required to draw up all the details of the regulations concerning the common agricultural policy according to the procedure laid down in Article 43 of the Treaty; it is sufficient for the purposes of that provision that the basic elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision; the provisions implementing the basic regulations may be adopted by the Council according to a procedure different from that laid down in Article 43 of the Treaty [...] . Nevertheless, an implementing regulation [...] must respect the basic elements laid down in the basic regulation [...] after consultation of the European Parliament.'

50. Similarly, the Commission may adopt measures under powers conferred on it by the Council, without infringing the Parliament's prerogatives, provided that the Commission respects the essential elements laid down in the basic Regulation. The position has recently been confirmed, in relation to implementing measures adopted by the Council itself, in the TACIS case. [22]

18 — Case 23/75 [1975] ECR 1279, paragraphs 13 and 14 of the judgment. See also Case 25/70 *Einfuhr- und Vorratsstelle* v *Köster* [1970] ECR 1161, paragraph 16.

19 — Case C-240/90 [1992] ECR 5383, paragraph 41 of the judgment.

20 — See Joined Cases 6/88 and 7/88 *Spain and France* v *Commission* [1989] ECR 3639, paragraph 24 of the judgment.

21 — Case 46/86 [1987] ECR 2671, paragraph 16 of the judgment.

22 — Case C-417/93 *European Parliament* v *Council* [1995] ECR I-1185, paragraphs 30 to 33.

51. In the present case an examination of the legislation shows that the Commission has not exceeded the powers conferred by Article 5(8) of the basic Regulation. In the first place, nothing in the basic Regulation as adopted by the Council expressly allows or prohibits the use of GMMOs in organic food production. The basic Regulation does not refer to GMMOs. In the original proposal made by the Commission to the Council, Article 5(2)(d) mentioned two types of substances or processes which could not be used if reference to organic production methods were to be made in labelling or advertising: those were treatments involving the use of synthetic chemicals (subject to the exception in Article 7) or ionizing rays. It will be recalled that Article 5(3)(c) of the basic Regulation as adopted by the Council does not contain the blanket prohibition of treatments involving synthetic chemicals. The only prohibition which remains in general terms is that of the use of ionizing rays.

52. The Parliament had proposed an amendment which sought to prohibit the use of GMMOs as a matter of principle in organic food production. The Commission rejected it and the Council did not reintroduce it, as it could have done. Thus no express words in Article 5 of the basic Regulation prohibit the Commission from including GMMOs in Annex VI. Nor can such a prohibition be deduced from the scheme of the basic Regulation.

53. I turn next to the Parliament's argument that only Article 100a of the Treaty can serve as the legal basis for a provision according to which certain types of agricultural products can move freely within the common market. In my view, that argument does not accord with the terms of Title II of the Treaty on agriculture. Indeed, Article 38 of the Treaty expressly refers to the establishment of the common market for agricultural products. The optimum utilization of the factors of production referred to in Article 39(1) of the Treaty postulates the establishment of a common market for agricultural products. Thus, nothing in Title II prevents Article 43 of the Treaty from being used as a legal basis for an act which contains a free movement provision, as is the general practice with regulations on the common organizations of the market. In any case, the basic thrust of this submission is to impugn Article 12 of the basic Regulation, which provides for free movement within the Community, not the contested Regulation. The latter does not require that GMMOs as such circulate freely. Once GMMOs are authorized, they are brought within the ambit of the provisions on free movement in so far as they are used in connection with organic food production.

54. The Parliament stated at the hearing that the Codex Alimentarius Commission, acting under the auspices of the Food and Agriculture Organization of the United Nations, decided to prohibit the use of GMMOs in organic foodstuffs during its 23rd session in October 1994 in Ottawa. Because the Community is now a member of the Food and Agriculture Organization, the Parliament

concludes that the Community is bound at least to have due regard to definitive decisions taken by the Codex Alimentarius Commission. However, an examination of the report of the 23rd session of the Codex Committee on Food Labelling [23] shows that no definitive decision has been taken. In fact, the report concludes:

'The Working Group considered that in view of the changing nature of organic food production techniques since the last meeting of the Committee and the need for much more time to consider the technical issues involved, the draft Guidelines should be returned to Step 6 of the procedure.' [24]

55. There is thus no need to consider what would be the legal consequences of a definitive decision of the Codex Alimentarius Commission on this point, since none has been taken.

56. Finally, the adoption of the contested Regulation has not in my view in any way affected the prerogatives of the Parliament in respect of the procedure for the adoption of the novel foods proposal referred to in paragraph above. An examination of its scope and provisions does not yield any indication of how the Parliament's prerogatives could be prejudiced by the adoption of the contested Regulation. The novel foods proposal would not affect the circumstances in which GMMOs could or could not be used in organic production. The proposal, if adopted, would merely introduce a new procedure for the approval of GMOs for use in foodstuffs in general in place of the existing one in Directive 90/220/EEC. Furthermore, it must be borne in mind that the novel foods proposal now falls to be adopted by the Parliament according to the co-decision procedure.

(b) Submission of misuse of powers

57. The Parliament submits in the alternative that the Commission has misused its powers in adopting the contested Regulation. In making that submission it relies heavily on its interpretation of the statement made by the member of the Commission which is reproduced in paragraph above. The Parliament contends that the Commissioner 'strongly implied that the issue [of the use of GMMOs in organic production] would be referred back to Parliament ...'. I cannot agree that the statement implies that. First, the Commissioner stated clearly that the Commission could not accept the amendment made by the Parliament which would have led to the prohibition in principle of the use of GMOs in organic production. The Commissioner also stated that it would be

23 — Codex Alimentarius Commission, Ottawa, Canada, 24-28 October 1994, Alinorm 95/22, paragraphs 40, 71 to 73.

24 — Ibid. at paragraph 73.

premature to take a definitive position one way or the other on the matter, until further technical work had been done. Thus, the Commissioner, although refusing the Parliament's amendments, stated that the 'Commission shares also the concern expressed ...' which, indicates that the Commission had not taken a definitive decision on GMMOs. That stance is reflected in the contested Regulation itself: although the use of GMMOs is not liberalized, their use may be authorized if certain conditions are fulfilled.

58. Nor in my view did the Commissioner's statement contain any undertaking to refer the matter back to Parliament. No such reference to fresh consultation is made expressly in the statement. Nor can the statement be seen as support for an oblique undertaking to use the procedure provided for in Article 5(9) of the basic Regulation rather than that laid down in Article 5(7) and (8). Indeed, at the time the statement was made, on 18 February 1991, the proposal for the basic Regulation did not contain a provision analogous to Article 5(9) as adopted. Therefore, indirect reference to Article 5(9) or its equivalent was impossible.

59. Even if the Commissioner's statement could be read as containing an undertaking of the sort contended by the Parliament, I agree with the Council that such an undertaking could not have the effects which the Parliament would attribute to it. The Commission could not legally bind itself without distorting the institutional balance established by the Treaty, and in any event could not do so before the Council had reached a decision on the proposal and had conferred implementing powers on the Commission.

60. The Parliament also submits that the Commission has misused its powers by using the powers conferred by Article 5(8) of the basic Regulation and not having recourse to the procedure laid down in Article 5(9) of the Regulation, which would have led to legislative proposals under Article 43 of the Treaty. I do not share that view. Article 5(9) requires the Commission to review the provisions of Article 5, but it does not oblige the Commission to make proposals under Article 43 of the Treaty. Indeed, the wording of Article 5(9) expressly reserves the right of the Commission not to initiate such legislative proposals. Article 5(8) of the basic Regulation, on the other hand, is the provision specifically designed to authorize the Commission to draw up exhaustive lists of the substances and products in question. In making use of that provision, the Commission has not used the wrong procedure or misused its powers.

(c) Submission of insufficiency of reasons

61. Finally, the Parliament submits that the Commission has infringed Article 190 of the

Treaty in failing to state sufficient reasons for the contested Regulation. It considers the matter so sensitive that very clear and explicit reasons should have been given for justifying the authorization by the Commission of the use of GMMOs in organic food production. In my view, it is questionable whether the Parliament's submission is admissible. Lack of reasoning does not infringe the Parliament's prerogatives, and it is only such an infringement that the Parliament can challenge. In any event the submission is unfounded. As seen from the analysis above, the Commission has not authorized the use of GMMOs in organic food production. Even if the contested Regulation is regarded as stating that their use will be authorized in limited circumstances, I consider that sufficient reasons are given for such a conditional authorization in the fourth and fifth recitals of the contested Regulation's preamble, referred to in paragraph above. That is especially so since subsequent regulations will need to be adopted in accordance with the procedure laid down in Article 14 of the basic Regulation and those subsequent regulations will have to contain a statement of the reasons for authorizing the particular GMMOs concerned.

Conclusion

62. I conclude that the Court should dismiss the Parliament's application. The Parliament should accordingly be ordered to pay the costs of the Commission in accordance with Article 69(2) of the Rules of Procedure. However, under Article 69(4) of those Rules, the Council must, as intervener, bear its own costs.

63. Accordingly, I am of the opinion that the Court should:

(1) dismiss the application;

(2) order the Parliament to pay the costs of the Commission;

(3) order the Council to bear its own costs.