(i) that Member States are in principle no longer permitted to restrict the marketing of feedingstuffs because of the presence of a substance not referred to in the annex to that directive by providing, for example, that the sodium content of milk-replacer feed may not exceed a certain maximum level;

(ii) that Member States may provisionally fix a maximum sodium content in accordance with Article 5 of the directive only in exceptional cases and subject to compliance with the procedures laid down in that provision.

The terms contained in Article 1 (2) (b) and (c), which define the scope of Council Directive 79/373 on the marketing of compound feedingstuffs, in conjunction with Article 3 of the directive, must be interpreted as meaning:

(i) that Directive 79/373 does not permit Member States to impose marketing restrictions of the kind prohibited by Directives 70/524 and 74/63 on feedingstuffs because of the absence of additives referred to in Directive 70/524 or the presence of undesirable substances within the meaning of Directive 74/63;

(ii) that Article 3 of Directive 79/373 does not permit Member States to impose marketing restrictions on feedingstuffs because of the absence of an additive or the presence of an undesirable substance, even where the absence of the additive or the presence of the substance in question constitutes in their opinion a health risk for animals or humans, without recourse to the adaptation procedure provided for by Article 6 (2) A (a) of Directive 70/524 or by Article 6 of Directive 74/63, without prejudice to the emergency procedure referred to in Articles 7 and 5 of those directives respectively.

# OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 9 July 1985 *

*Mr President,*
*Members of the Court,*

1. The questions referred to this Court for a preliminary ruling by the Bundesverwaltungsgericht [Federal Administrative Court] arose in proceedings between Denkavit, a German undertaking producing feedingstuffs, and the Landesamt für Ernährungswirtschaft Nordrhein-Westfalen [North-Rhine Westphalia Regional Board for Food Production and Distribution]. Denkavit wishes to market complete feedingstuffs for calves which do not

* Translated from the French.

comply with certain statutory provisions regarding minimum iron content and maximum sodium content, as a result of which they may not be marketed in German territory (Paragraph 14 (1) of the Law of 2 July 1975 on Feedingstuffs, BGBl. I, p. 1745).

Those requirements result from Paragraph 7 (2) of the Feedingstuffs Regulation of 16 June 1976 (BGBl. I, p. 1497) as amended on 19 July 1979 (BGBl. I, p. 1122) and which became Paragraph 8 (3) of the same regulation in the version in force since 8 April 1981 (BGBl. I, p. 352). Those are the same provisions upon which the Commission has asked the Court to rule in Case 28/84, in which I have just delivered my Opinion.

The question of the compatibility of those rules with Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs, hereinafter referred to as 'the additives directive' (Official Journal, English Special Edition 1970 III, p. 840), Directive 74/63/EEC of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs, hereinafter referred to as 'the undesirable substances directive' (Official Journal 1974, L 38, p. 31) and Directive 79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs, hereinafter referred to as 'the compound feedingstuffs directive' (Official Journal 1979, L 86, p. 30).

The Bundesverwaltungsgericht, to which the case came on final appeal, wishes to reach a decision on the same question of compatibility by asking the Court of Justice to give a preliminary ruling on the following four questions:

(1) Is the term 'additives' contained in Article 2 (a) of Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs to be interpreted:

   (i) as encompassing all substances which are contained in feedingstuffs and affect their characteristics or livestock production, or

   (ii) as encompassing the abovementioned substances only where they are not merely contained in the constituents of feedingstuffs (as so-called 'constituent substances') but are added — possibly on their own — to the constituents of feedingstuffs?

(2) Is the rule contained in Article 13 of Council Directive 70/524/EEC of 23 November 1970 concerning additives in feedingstuffs to be interpreted as meaning that the Member States are no longer permitted to subject feedingstuffs to a marketing restriction relating to the absence of a substance by providing that milk-replacer feed must have a certain minimum iron content?

(3) Are the rules contained in Articles 5 and 7 of Council irective 74/63/EEC of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs to be interpreted as meaning:

   (i) that the Member States are in principle no longer permitted to subject feedingstuffs to a marketing restriction relating to the presence of a substance not listed in the annex to the directive by providing that milk-replacer feed may only have a specified sodium content;

   (ii) that the Member States may only in exceptional cases, in accordance with the first sentence of Article 5 (1) of the abovedirective and subject to compliance with the second sentence of that provision, provisionally fix a maximum sodium content?

(4) (a) Is the rule contained in Article 1 (2) (b) and (c) of Council Directive

79/373/EEC of 2 April 1979 on the marketing of compound feedingstuffs to be interpreted as meaning:

— that the Member States are still not permitted to subject feedingstuffs to marketing restrictions relating to the absence of additives within the meaning of Directive 70/524/EEC and the presence of undesirable substances within the meaning of Directive 74/63/EEC which according to those directives may not be prescribed, or

(b) is the rule contained in the second sentence of Article 3 of Directive 79/373/EEC to be interpreted as meaning:

(i) that the Member States are permitted to subject feedingstuffs to a marketing restriction relating to the absence of an additive or the presence of an undesirable substance where the absence of the substance in question or the presence thereof constitutes a danger to animal or human health;

(ii) and that they may do so without having recourse to the adaptation procedure under Article 6 (2) A (a) ofDirective 70/524/EEC or Article 5 (1) of Directive 74/63/EEC?

The Bundesverwaltungsgericht's intention in referring those four questions to the Court of Justice is essentially to obtain an interpretation of the term 'additive' and to have the Court define precisely the extent of the residual powers of the Member States in regard to the three abovementioned directives.

2. The Court is familiar with examples of a reference for a preliminary ruling having the same subject-matter as an application for a declaration that a Member State has failed to fulfil its obligations. It has consistently held that though it may not, in the framework of the power to give preliminary rulings under Article 177 of the EEC Treaty, rule on the conformity of national legal provisions with Community law, it is incumbent upon the Court of Justice when interpreting Community rules whose applicability is at issue before the national court, to provide the latter with an appropriate reply enabling it to resolve the dispute before it (see, for example, Case 111/76 *Officier van Justitie* v *Van den Hazel* [1977] ECR 910, paragraph 4 of the decision).

It must further be observed that the questions referred to this Court by the Bundesverwaltungsgericht set out remarkably clearly the problems raised by the German rules *vis-à-vis* the three Community directives and to which I sought to provide an answer in my Opinion in Case 28/84. In any event the observations submitted to the Court largely repeat the submissions made in connection with the application for a declaration that the Federal Republic of Germany had failed to fulfil its obligations.

Consequently, in order not to repeat the arguments already advanced by the Commission and Germany in the course of those proceedings, I shall confine myself to presenting those advanced by Denkavit, the Land Nordrhein-Westfalen and the Italian Government.

3. Denkavit advances an argument based on four points.

It argues that fixing a minimum iron content is incompatible with the additives directive. In the light of Article 3 (1) of that directive combined with the annex thereto (Part I,

Trace-elements, No E 1), iron may be classified as an additive. However, Article 13 prohibits all marketing restrictions other than those expressly provided for in the directive itself. With regard to the argument that manufacturers are not obliged to use additives containing iron since the German rules allow them to use ingredients rich in that substance, Denkavit makes the following observations: Article 8 of the compound feedingstuffs directive prohibits the adoption of any new rules concerning ingredients subsequent to the adoption of the directive itself. Moreover, the use of iron-rich basic products would completely transform the manufacturing formula for milk-replacer feed.

Denkavit also maintains that the fixing of a maximum sodium content is contrary to the provisions of Directive 74/63. Sodium must be regarded as an undesirable substance since the directive uses that expression to refer not only to intrinsically harmful substances but also to those which become harmful by reason of the quantity in which they are present. Since the annex to the directive contains no provision regarding sodium, the conclusion must be drawn that the directive prohibits any such marketing restriction. Neither Directive 77/101 of 23 November 1976 on the marketing of straight feedingstuffs (Official Journal 1977, L 32, p. 1) nor the compound feedingstuffs directive, which both lay down permissible content levels for certain analytical constituents, may be relied upon as authority for the proposition that Directive 74/63 is not to be applied. The specific purpose of the two first-mentioned directives is not to protect health but rather to ensure fair trading. Consequently, the content levels fixed therein are laid down in accordance with the effect which the substances mentioned have on the value of the feedingstuff in question.

Denkavit further submits that Directive 79/373 is applicable only in so far as the two specific directives are not applicable. For that reason, the German rules cannot be justified on the basis of the second sentence of Article 3. Like the other directives, Directive 79/373 prohibits all marketing restrictions other than those which it expressly provides for (Article 9). Similarly, Article 8 requires the Member States to introduce no new rules regarding ingredients while Article 14 (a) permits them only to recommend the use of certain analytical constituents in feedingstuffs.

Finally, Denkavit contends, all the arguments thus presented indicate that Article 36 of the EEC Treaty is not applicable. If it wished to justify the rules adopted, the Federal Republic of Germany should have complied with the procedural rules laid down in the directives. In the alternative, Denkavit observes that in regard to Article 36 of the EEC Treaty, it is for the Member State to prove the existence of a danger to health, something which the Federal Republic of Germany has not done.

4. For its part, the Land Nordrhein-Westfalen contends that the German rules regard iron and sodium as 'constituent elements' and for that reason, the two specific directives are inapplicable. Unlike the additives authorized by Directive 70/524, constituent elements are present in feedingstuffs in their natural state and are not deliberately added to those feedingstuffs. None the less, even supposing that the iron referred to by the German rules was to be assimilated to an additive, the directive would still not apply to the fixing of a minimum level: where there is a danger to health, Article 13 allows the Member States to impose a minimum level when such a level is not provided for in the annex.

On the other hand, sodium cannot be regarded as an undesirable substance because, unlike the substances prohibited by Directive 74/63, it is not intrinsically

harmful but is in fact desirable when it is not present in excessive quantities. Finally, the Land Nordrhein-Westfalen states, the second sentence of Article 3 of Directive 79/373 constitutes the legal basis of the German rules.

5. In its observations, the Italian Government presents essentially the same arguments as the Land Nordrhein-Westfalen. At the hearing, its representatives argued that Article 8 of Directive 79/373 should be read together with Article 15: harmonization of the national rules applicable to ingredients will not and cannot be achieved until Community rules have replaced the divergent rules which still exist in each Member State. It is therefore still possible to take action under Article 36.

6. An examination of the file in the main proceedings as well as of all the observations submitted to the Court reveals no new factor capable of changing the interpretation of the three directives at issue which I proposed in my Opinion in Case 28/84.

It must however be pointed out that the limits to harmonization in regard to ingredients, as laid down not only in Articles 8 and 15 of Directive 79/373 but in all the provisions of that directive, which is principally concerned with the *packaging and presentation* of compound feedingstuffs and not their *composition*, cannot justify maintaining in operation after the entry into force of Directive 79/373 rules which in effect *prescribe* either a type of feedingstuff which meets certain analytical characteristics, whereas the directive provides only for a right of *recommendation*, or the use of iron-rich ingredients, contrary to the provisions of Article 8.

7. Consequently, the following reply should be given to the questions referred to the Court of Justice by the Bundesverwaltungsgericht:

(a) The term 'additives' in Article 2 (a) of Directive 70/524 refers to substances voluntarily added to feedingstuffs in order to improve their characteristics.

(b) Article 13 of Directive 70/524, read together with Article 3 (1), must be interpreted as meaning that the Member States are not permitted to subject feedingstuffs to marketing restrictions, particularly by reason of the absence of an additive, other than those expressly provided for in the directive in regard to substances listed in the annex.

(c) Article 7 of Directive 74/63, read together with Article 3 (1), must be interpreted as meaning that the Member States are in principle not permitted to subject feedingstuffs to marketing restrictions because of the presence of a harmful substance other than the restrictions expressly laid down in the directive in regard to the substances listed in the annex. Article 5 (1) of that

directive authorizes the Member States, subject to the procedural and substantive conditions therein laid down, to adopt any other provisional measure they see fit restricting the marketing of feedingstuffs.

(d) Under Article 9 of Directive 79/373, which, in accordance with Article 1 (2) (b) and (c), applies without prejudice to the provisions of Directives 70/524 and 74/63, Member States are prohibited from laying down marketing restrictions other than those expressly provided for in Directive 79/373 and under Article 3 of that directive they are required to adopt all laws or regulations necessary in the interest of health control, fair trading and compliance with certain quality standards.