provisions relating to the establishment of the common market, Article 100 cannot be relied on as a ground for restricting the field of application of Article 43.
Directive 86/113 laying down minimum standards for the protection of laying hens kept in battery cages, which was intended mainly to eliminate distortions of competition which might interfere with the proper functioning of the common organization of the market for eggs, while at the same time promoting animal welfare, could be adopted on the basis of Article 43 alone.

2. The determination of the appropriate legal basis for a measure does not depend on the discretion of the Community legislature but must be based on objective factors which are amenable to judicial review. A Council practice of adopting legislative measures in a particular field on a dual legal basis cannot derogate from the rules laid down in the Treaty. Such a practice cannot therefore create a precedent binding on the Community institutions with regard to the determination of the correct legal basis.

3. The statement of the reasons for a measure, which is required by Article 190 of the Treaty and is intended to enable the Court to review its legality and make the Member States and the nationals concerned aware of the conditions under which the Community institutions have applied the Treaty, is an essential part of the measure. Consequently, neither the Secretary-General of the Council nor the staff of its General Secretariat have the power to alter the statement of the reasons for a measure adopted by the Council.

REPORT FOR THE HEARING
delivered in Case 131/86 *

I — Facts

1. By a decision of 19 June 1978 based on Articles 43 and 100 of the EEC Treaty the Council approved on behalf of the European Economic Community the European Convention for the Protection of Animals kept for Farming Purposes, drawn up by the Council of Europe (Official Journal 1978, L 323, p. 12). According to the fourth recital in the preamble to that decision,

'. . . the protection of animals is not in itself one of the objectives of the Community; . . . however, there are disparities between the existing national laws on the protection of animals kept for farming purposes which may give rise to unequal conditions of competition and which may consequently have an indirect effect on the proper functioning of the common market;'

2. On 22 July 1980, the Council adopted a resolution on the protection of layer hens in

* Language of the Case: English.

cages, and asked the Commission to submit appropriate proposals for achieving that objective, taking into account the economic implications (Official Journal 1980, C 196, p. 1).

3. On 5 August 1981 the Commission submitted to the Council a proposal for a Council directive laying down minimum standards for the protection of laying hens kept in battery cages (Official Journal 1981, C 208, p. 5).

Following the adoption of an opinion on the proposal for a directive by the Economic and Social Committee and of a resolution by the European Parliament embodying an opinion on the proposal, in 1983 the Council decided to ask the Commission to submit a further report on the welfare of laying hens.

At the meeting of the Committee of Permanent Representatives on 5 December 1985, at which the Commission's proposal was considered, four delegations expressed the view that the directive should be based on both Article 43 and Article 100 of the EEC Treaty.

On 18 December 1985, the Committee of Permanent Representatives adopted a final text of a directive laying down minimum standards for the protection of laying hens kept in battery cages. The Danish delegation maintained a general reservation on the entire text and a specific reservation on the lack of a reference to Article 100 in the preamble to the directive. It was supported on this last point by the United Kingdom delegation.

On 25 March 1986 the Council voted by a qualified majority to adopt the draft directive, on the basis of Article 43; Denmark and the United Kingdom voted against the adoption of the draft.

Article 3 of the directive establishes minimum requirements applicable to all cages for laying hens newly built or brought into use for the first time. Article 10 of the directive authorizes national aid intended for the functional extension of buildings housing the battery cages necessary for rearing the same number of hens.

On 15 April 1986 the final version of the directive, corresponding to the version published in the Official Journal, was notified to the United Kingdom. The preamble to this version, which was drawn up by the General Secretariat of the Council, differs in several respects from the version on which the Council voted on 25 March 1986.

First of all, in the preamble to the revised version a reference to Article 42 of the EEC Treaty has been added. Furthermore, the first three recitals in the preamble were altered as follows:

Version put to the vote in the Council on 25 March 1986:

'Whereas most Member States have ratified the European Convention for the Protection of Animals kept for Farming Purposes, whereas the Community has also approved this Convention by Decision 78/923/EEC; whereas the keeping of laying hens in battery cages is the most widely used means of egg production in the Community and makes a very large contribution to the high productivity of this sector; whereas, however, this means of housing may, in certain cases, lead to unnecessary and excessive suffering on the part of the animal;

Whereas, however, the national laws at present in force in the field of the protection of animals kept for farming purposes

present differences which may distort conditions of competition and in consequence interfere with the smooth running of the organization of the common market in eggs and poultry;

Whereas there is therefore a need to establish priority parameters and to define common minimum requirements applicable in all intensive housing systems, in order to enable the market to operate satisfactorily in comparison, in particular, with Article 39 of the Treaty, while bearing in mind the need to protect animals; whereas it is necessary for this purpose, as a first step, to establish Community measures for laying hens in battery cages;'

Version notified to the United Kingdom and published in the Official Journal:

'Whereas eggs are covered by a common organization of the market; whereas the rules on the conditions under which egg production takes place, in particular with regard to the keeping of hens, are of major importance as far as the operation of the market organization is concerned; whereas differences between the rules applied by Member States may lead to distortion of competition which may interfere with the smooth running of the market organization concerned;

Whereas the keeping of laying hens in battery cages is the most widely used means of egg production in the Community and makes a very large contribution to the high productivity of this sector; whereas the fact that this means of housing may, in certain cases, lead to unnecessary and excessive suffering on the part of the animals has led Member States to introduce differing rules with regard to certain aspects of the type of production concerned, in particular the size of the cages;

Whereas there is therefore a need to establish priority parameters and to define common minimum requirements applicable in order to overcome existing problems and enable the market organization to operate more satisfactorily, in particular with regard to Article 39 of the Treaty, while bearing in mind the need to protect animals;'.

II — Written procedure and conclusions of the parties

1. The application of the United Kingdom was lodged at the Court Registry on 29 May 1986.

2. By an order of 15 October 1986 the Court granted leave to the Commission of the European Communities to intervene in support of the conclusions of the defendant.

3. The United Kingdom claims that the Court should:

Annul Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens in battery cages; and

Order the Council to pay the costs.

4. The Council contends that the Court should:

Dismiss the application as unfounded; and

Order the applicant to pay the costs of the action.

5. The Commission, intervening, contends that the Court should:

Dismiss the application as unfounded; and

Order the applicant to pay the costs of the intervention.

6. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

III — Submissions and arguments of the parties

1. *The applicant's interest in bringing proceedings*

(a) The Council questions the applicant's interest in bringing proceedings for the annulment of the directive on the ground of a formal defect. In its application the United Kingdom itself admits that it supports the aims of the objective and is sure that the Council will adopt a new directive in the event of its annulment. It refers in that regard to the judgment of 6 July 1983 in Case 117/81 *Geist* v *Commission* [1983] ECR 2191, in which the Court held that an applicant has no legitimate interest in securing the annulment of a measure where such annulment 'could only give rise to another decision substantially identical to the decision annulled'.

(b) The United Kingdom takes the view that Article 173 of the EEC Treaty does not require that the contested measure should adversely affect the applicant State; that State as such has an interest in securing the observance of the law by the Council. In this case, the United Kingdom has an interest in obtaining a declaration by the Court that the Council has violated the principle that where a measure is designed for two different purposes each governed by a different article of the Treaty, it must be based on both articles. Furthermore, the staff of the Council's Secretariat must not alter the text of a measure after the Council's deliberation and vote.

2. *The legal basis of the directive*

(a) The United Kingdom argues in the first place that in so far as the contested directive is based on Article 43 of the EEC Treaty and not on Article 100, there is no sufficient statement of reasons for the purposes of Article 190 of the EEC Treaty.

The directive is designed for two different purposes, one in the area of agricultural policy and the other concerning the harmonization of national legislation on the protection of animals. Consequently, it should have been based on both the abovementioned provisions of the EEC Treaty. That defect is particularly serious inasmuch as Article 100 requires unanimity whereas Article 43 provides for the adoption of measures by a qualified majority.

The United Kingdom admits that a measure adopted on the basis of one article of the Treaty may have a bearing upon a policy regulated by a different article, but it denies that the 'primary purpose' test can be used in order to establish a single legal basis for a Council measure. Such a test is impractical since many measures have two substantial objectives and it is by no means easy to identify the primary purpose. Furthermore, if such a test were applied it would be a simple matter to disregard the guarantees contained in the Treaties, which provide a special procedure for certain measures.

Since the contested directive is plainly designed for the purpose, *inter alia*, of approximating the legislation of the Member States, it should have been based in part on Article 100 of the EEC Treaty and have satisfied the procedural requirements of that article. It is clear from the preamble and from the text of the directive that it is intended to lay down minimum standards for battery cages in the interests of animal welfare.

A measure is not governed by Article 43 simply because it concerns an agricultural product; it falls under that article only if it is designed for 'working out and implementing the common agricultural policy' the objectives of which are set out in Article 39 (1) of the EEC Treaty. The contested directive does not, however, pursue the objectives set out in that article.

The essential purpose of the directive is animal welfare. That is clear from the preparatory documents relating to the directive, which derive their inspiration from the Convention for the Protection of Animals kept for Farming Purposes, the objectives of which are clearly different from those of Article 43 of the EEC Treaty. The alterations made to the final version of the directive by the General Secretariat of the Council were calculated to disguise that background.

Moreover, it is stated in the preamble to Decision No 78/923/EEC that the protection of animals is not in itself one of the objectives of the Community, but that disparities between existing national laws may have an indirect effect on the proper functioning of the common market. Consequently, that decision was based on both Article 43 and Article 100; that conclusion is confirmed by the judgment of the Court in Joined Cases 141 to 143/81 *Holdijk* [1982] ECR 1299, where the Court held that the protection of animals kept for farming purposes is a matter falling outside Article 40 of the EEC Treaty.

The Council Resolution of 22 July 1980, the opinion of the Economic and Social Committee and the resolution of the European Parliament also show that a real purpose of the directive is the prevention of excessive or unnecessary suffering on the part of poultry.

Finally, the United Kingdom argues that the Council's action in this case constitutes a departure from its practice prior to December 1985; in such cases it was the Council's practice to base directives on both Article 43 and Article 100 of the EEC Treaty even when the Commission had in its proposal relied on Article 43 alone. The United Kingdom refers in that regard to a number of directives on phytosanitary, feed and veterinary matters which were based on both Article 43 and Article 100.

(b) The Council, supported by the Commission, argues that Article 43 of the EEC Treaty is an appropriate and sufficient basis for the contested directive. It admits that the directive is in part a measure of approximation, but argues that each common policy generally leads to an approximation of laws.

Article 100 of the EEC Treaty is a residual and subsidiary provision, and applies only in the absence of a specific provision allowing for the adoption of directives. In this case, Article 43 permits the adoption of all the measures necessary for the implementation of the common agricultural policy. Consequently, a measure which pursues an agri-

cultural objective or has such an objective as its principal purpose must necessarily and exclusively be based on Article 43 even where the means employed is the approximation of laws.

In this case, the product mainly concerned falls under the provisions of Articles 39 to 46 of the EEC Treaty inasmuch as it is listed in Annex II. Moreover, it is clear from the preamble to and the actual text of the directive that it seeks to pursue the objectives set out in Article 39 of the Treaty. In that regard the Council refers in particular to the improvement of agricultural productivity and the stabilization of the market by virtue of the fact that conditions of supply will be largely identical.

The Council also emphasizes the connection between the contested measure and the common organization of the market in question. It appears from the preamble to the directive, in both the version notified and the version in Document 11489/85, that the directive was adopted with a view to facilitating the satisfactory operation of the common organization of the market in eggs, set up by Regulation No 2771/75 of 29 October 1975 (Official Journal 1975, L 282, p. 49). More specifically, reference was made to distortions in the conditions of competition which might interfere with the smooth running of the organization of the market.

The Council recognizes that animal welfare is not an objective of either Article 39 or Article 100 of the EEC Treaty. That aspect must, however, be regarded as corollary to the directive's principal objectives, referred to above. Contrary to what the applicant asserts, it appears from the judgment of the Court in Joined Cases 141 to 143/81 (*Holdijk*) that animal welfare aspects cannot be dealt with independently of the general rules on the free movement of goods and the common organization of the market.

It also appears from the preparatory documents that the directive seeks to achieve the objectives of Article 39. Its political impulse was derived from the Council Resolution of 22 July 1980 which emphasized that national laws may 'distort conditions of competition'.

The reference, in the preamble to the Commission's proposal and the version in Document 11489/85, to the European Convention on the Protection of Animals kept for Farming Purposes is purely declaratory in nature, and it cannot be argued that the directive was inspired by the Convention.

In any event, each Community act must be considered purely on its own merits in the light of the objectives which it pursues, without reference to other instruments.

With regard to the alleged change of practice, the Council submits that the directives referred to by the applicant were based on both Article 43 and Article 100 as a result of a unanimous decision to amend the legal basis proposed by the Commission (Article 43 alone). That practice originated in a political compromise reached within the Council in 1964 because of differing political conceptions as to the appropriate legal basis for certain provisions. However, it is clear from the relevant declaration (which is attached as Annex II to the rejoinder) that that was without prejudice to the future action of the Council.

Such a compromise was not reached on this occasion, and the Council, acting by qualified majority, decided to adopt the

legal basis proposed by the Commission.

(c) The Commission supports the Council with regard to the appropriate legal basis and puts forward essentially similar arguments. The directive in question pursues the objectives set out in Article 39 of the EEC Treaty, in particular the prevention of distortions of competition on the market for poultry and eggs. Such distortions would result where, because of differences in the conditions in which animals were kept in different Member States, production costs were lower for producers using narrow cages. Although animal welfare is not in itself a Community objective, the Community institutions must take it into account in adopting measures to complete the common organization of the agricultural markets and to ensure the free movement of goods in fair conditions of competition.

Furthermore, Article 100 of the EEC Treaty is not the only provision which envisages the free circulation of goods. In the agricultural field, Article 43 is the appropriate legal basis for any measure relating to the common organization of the market. In that regard the Commission cites several examples of directives based only on Article 43 which concern objectives similar to those in question.

3. *Procedural irregularities*

(a) The United Kingdom asserts that the directive in question may be annulled on the ground that it differs from the text considered by the Council.

The staff of the Council's Secretariat has no power to amend a text on which the Council has voted, except in the case of simple typographical or syntactical corrections. In this case the differences between the draft discussed by the Council and the text notified to the Member States are too extensive and significant to be regarded as simple rectifications of that kind.

According to the United Kingdom, the Council admits that the staff of its Secretariat added a reference to Article 42 of the Treaty, which was not discussed by the Council, and to the common organization of the market for eggs. It also admits that its staff deleted the reference to the European Convention for the Protection of Animals kept for Farming Purposes and the clause to the effect that the directive was to be 'the first step in the establishment of common minimum requirements applicable to all intensive housing systems'. It seems clear that those alterations were intended to disguise the fact that the Council had adopted the contested directive as the first step in the establishment of standards which would conform with the Convention.

The alterations in question are not permissible simply because they were made to the preamble rather than to the actual text of the directive. The Council itself has emphasized that the preamble has an effect on the interpretation and the understanding of the directive and that the validity of the directive depends in part on its preamble. It is contradictory to assert at the same time that the alterations were purely formal in nature.

(b) The Council denies that there is any formal defect in the directive, in so far as the drafting of the preamble is concerned. It is true that the text notified to the United Kingdom and published in the Official Journal includes an additional reference to

Article 42 and minor redrafting of certain recitals. However, the Council's staff enjoys a certain discretion in ensuring that the intentions of the author are respected, and the limits to that discretion were observed in this case.

The alterations in question do not affect the substance of the directive but are purely formal in nature and are intended to express more clearly and accurately the intentions of the author, in order that the instrument as notified is legally sound and coherent.

The addition of Article 42 was justified in the light of the insertion, by a unanimous decision, of Article 10 of the directive, which authorizes national aid measures. The reference to Article 42 is merely declaratory in nature and thus does not affect the procedural requirements for the adoption of the contested measure. Article 43 remains the sole constitutive legal foundation for the contested measure.

With regard to the alteration of certain recitals, the Council refers to the judgment of 30 September 1982 in Case 114/81 *Tunnel Refineries* v *Council* [1982] ECR 3189 in which the Court held that the statement of the reasons on which a measure is based 'must be adapted to the nature of the measure in question' and 'must enable the reasoning of the Community institution . . . to emerge clearly and unequivocally'. It was precisely in order to take account of that test that certain of the recitals were slightly redrafted.

Furthermore, the impression which the applicant may have that the directive was enacted with a view to implementing the common agricultural policy was created not by the Council's General Secretariat but by the Ministers meeting on 25 March 1986 who considered it appropriate to adopt the directive on the basis of Article 43 of the Treaty alone. That is why the Council itself, in the exercise of its political discretion, considered that the provisions of the directive primarily pursued an agricultural objective.

Moreover, it is not the first but the third recital in the preamble which is fundamental to an understanding of the directive as a whole. Only minor corrections were made to that recital. The deletion of the reference to the fact that the directive was to be 'the first step in the establishment of common minimum requirements applicable to all intensive housing systems' deleted nothing of substance and constituted merely a declaration of intention.

U. Everling
Judge-Rapporteur