# OPINION OF ADVOCATE GENERAL MISCHO

delivered on 30 January 2003 [1]

## I — Introduction and relevant provisions

1. Once again, the Court has been called on to rule on a problem linked to bovine spongiform encephalopathy ('BSE') and to the measures taken by the Community to meet the serious human and animal health problems engendered by that disease. I have already had occasion to set out to the Court the factual and scientific background, [2] with which it is now certainly well acquainted.

2. The present case is an action brought by the French Republic for annulment of Commission Decision 2001/577/EC of 25 July 2001 setting the date on which dispatch from Portugal of bovine products under the Date-Based Export Scheme may commence by virtue of Article 22(2) of Decision 2001/376/EC [3] ('the contested decision').

3. On the basis of the criteria of the OIE (International Office of Epizootics), which are taken up by the Community legislation, Portugal has a high incidence of BSE. That is why the Commission, on 18 November 1998, adopted Decision 98/653/EC concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal, [4] Article 4 of which provided:

'Portugal shall ensure that until 1 August 1999 the following are not dispatched from its territory to other Member States or to third countries, when derived from bovine animals slaughtered in Portugal:

(a) meat;

(b) products which are liable to enter the human food or animal feed chains;

1 — Original language: French.

2 — See the Opinion delivered by me in Case C-1/00 *Commission* v *France* [2001] ECR I-9989, points 1 to 4.

3 — OJ 2001 L 203, p. 27.

4 — OJ 1998 L 311, p. 23.

(c) materials which are destined for use in cosmetic or medicinal products or medical devices.'

4. Under Article 14 of that decision, the Portuguese Republic was required to send to the Commission every four weeks a report on the application of the protective measures taken against TSEs (transmissible spongiform encephalopathies) in accordance with Community and national provisions and on the results of the programmes referred to in Article 13.

5. Article 15 provided:

'The Commission shall carry out Community inspections on-the-spot in Portugal to:

(a) verify the application of the provisions of this Decision, in particular in relation to the implementation of official controls;

(b) to examine the development of the incidence of the disease, the effective enforcement of the relevant national measures and to conduct a risk assessment demonstrating whether appropriate measures to manage any risk have been taken.'

6. The ban was extended until 1 February 2000 by Commission Decision 99/517/EC of 28 July 1999 amending Decision 98/653. [5] The Portuguese Republic brought an action for annulment of that decision, which was dismissed by the Court. [6]

7. The ban was then extended for an indefinite period by Commission Decision 2000/104/EC of 31 January 2000 amending Decision 98/653. [7]

8. The conditions for lifting the ban were laid down by Commission Decision 2001/376/EC of 18 April 2001 concerning measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal and implementing a date-based export scheme. [8]

9. The background to that decision and the mechanism which it introduces are amply

5 — OJ 1999 L 197, p. 45.

6 — Judgment in Case C-365/99 *Portugal* v *Commission* [2001] ECR I-5645.

7 — OJ 2000 L 29, p. 36.

8 — OJ 2001 L 132, p. 17.

explained in its preamble, which states inter alia as follows:

'(6) A mission carried out in Portugal by the Food and Veterinary Office from 14 to 18 June 1999 concluded that the recall of existing stocks was completed and that the controls on the effectiveness of the feed ban were applied properly.

(7) A ban on the use of specified risk materials in human food or animal feed was introduced in Portugal on 4 December 1998. The ban has been extended in accordance with Commission Decision 2000/418/EC of 29 June 2000 regulating the use of material presenting risks as regards transmissible spongiform encephalopathies, [9] as amended by Decision 2001/2/EC. [10]

(8) According to the national BSE eradication plan in place in Portugal, birth cohorts and offspring of BSE cases shall be slaughtered and destroyed.

(9) A new centralised national system for identification and registration of bovine animals (SNIRB) was introduced in Portugal as of 1 July 1999.

(10) Portugal presented its first request for a date-based export scheme with a view to permitting, subject to certain conditions, the dispatch of products from animals born after a certain date to the Commission on 3 December 1999. These technical proposals were subsequently amended and supplemented on 18 February, 24 March, 27 July and 22 September. The amended and supplemented proposals provide a suitable framework for allowing the dispatch and export of products derived from bovine animals slaughtered in Portugal.

(11) *The measures for implementation of the export scheme and the offspring cull* [11] will be examined by the Food and Veterinary Office of the Commission before the dispatch of meat and meat products may commence. If that examination is satisfactory the Commission will set the date on which dispatch may commence.'

10. Article 6 of Decision 2001/376 renews the ban on the export of deboned fresh

9 — OJ 2000 L 158, p. 76.

10 — OJ 2001 L 1, p. 21.

11 — Emphasis added.

meat, products which are liable to enter the human food or animal feed chains and materials which are destined for use in cosmetic or medicinal products or medical devices.

11. Article 7 of Decision 2001/376 provides, however, that Portugal may authorise the dispatch from its territory to other Member States or non-member countries of amino acids, peptides and tallow, produced in establishments under veterinary supervision.

12. Article 11(1) of Decision 2001/376 provides in addition that, by way of derogation from Article 6, Portugal may authorise the dispatch of meat and certain other products to other Member States or to non-member countries under the conditions set out in various articles of the decision and in Annex IV thereto, headed 'Date-Based Export Scheme (DBES)'.

13. Article 11(1) to (4) of Decision 2001/376 lays down specific conditions relating to slaughterhouses, cutting plants, storage and transport of meat.

14. Article 12 of Decision 2001/376 provides that meat and products exported under the DBES must be identified by an additional distinct mark.

15. Annex IV to Decision 2001/376 sets out the general conditions of the DBES and determines which animals are eligible under that scheme. It lays down various specific measures such as controls prior to slaughter, the slaughter of eligible animals only in slaughterhouses which are not used for the slaughter of ineligible animals, control of the cutting of meat, and conditions concerning traceability and the identification of eligible carcases.

16. Article 20 of Decision 2001/376 repeats the obligation on the Portuguese authorities to submit regular reports to the Commission, which was already included in Decision 98/653.

17. Article 21 of Decision 2001/376 states:

'The Commission shall carry out Community inspections on-the-spot:

(a) in Portugal to verify the implementation of official controls in respect of

each of the products referred to in Articles 7 and 8 before the dispatch of these products may commence or recommence;

(b) in Portugal to verify the [application] of the provisions in Articles 11 and 12 and Annex IV before the dispatch of the products referred to in Article 11 may commence;

(c) in Portugal to verify the application of the provisions of this Decision, in particular in relation to the implementation of official controls;

(d) in Portugal to examine the development of the incidence of the disease, the effective enforcement of the relevant national measures and to conduct a risk assessment demonstrating whether appropriate measures to manage any risk have been taken;

(e) in the Member State of destination to verify the application, as appropriate, of the provisions in Article 5 and Annex II before the dispatch of the material referred to in Article 5 may commence.'

18. Article 22(2) of Decision 2001/376 reads as follows:

'The dates on which the dispatch of material and products may commence or recommence pursuant to Articles 5, 7 and 11 shall be determined by the Commission taking account of the inspections referred to in Article 21 and after having informed the Member States.'

## II — The contested decision

19. It was on 25 July 2001 that the Commission adopted the contested decision, which sets 1 August 2001 as the date on which the dispatch from Portugal of bovine products may commence.

20. The contested decision followed a number of Community inspections considered positive by the Commission. The second and third recitals in the preamble to the decision thus state:

'(2) Inspections carried out by the Commission services in Portugal from 14 to 18 May and 25 to 27 June 2001, in particular to assess the system of veterinary checks pursuant to Articles 11

and 12 and Annex IV to Decision 2001/376/EC, have shown that the conditions are complied with satisfactorily.

(3) The Commission has presented the results of the inspections and the consequences it draws from them to the Member States convened in the Standing Veterinary Committee. The Commission has received from Portugal guarantees on the full application and effective enforcement of Community legislation on surveillance for and eradication of TSEs, in addition to those guarantees requested by the report of the Food and Veterinary Office'.

**III — Forms of order sought and interventions**

21. Since the French Republic took the view that the conditions for lifting the ban on Portuguese beef and veal were not met, it brought an action for annulment of the contested decision.

22. It claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

23. The defendant contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

24. By order of the President of the Court of 1 March 2002, the Portuguese Republic was granted leave to intervene in the case in support of the Commission.

25. By order of the President of the Court of 8 March 2002, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in the case in support of the Commission. However, in light of the pleadings lodged by the parties, the United Kingdom Government informed the Court that it had nothing to add to the arguments put forward by the Commission and that it waived the right to lodge a pleading itself.

## IV — Arguments of the parties and appraisal

### A — *Burden of proof*

26. The French Government explains that it does not contest the principle that the ban be lifted, but the date set therefor. It points out that the lifting of the ban is a derogation from the ban for certain products and maintains that it is for the Commission, which considered that the conditions for that derogation were met, to prove that they in fact were.

27. The Commission argues that adoption of a decision of that kind requires balancing of the precautionary principle and the principle of proportionality. The assertion that it is for the Commission to establish that the conditions for lifting the ban were in fact met must therefore be qualified. Furthermore, the presumption of legality applies to the contested decision, as it does to any other Community measure. The procedural principle according to which the burden of proof rests with the applicant, in the present case the French Government, should therefore be applied.

28. Suffice it to state in relation to those submissions that the French Government has devoted itself to proving, in the present case, that the Portuguese Republic had not achieved compliance with the conditions laid down by Decision 2001/376 on the date when the contested decision was adopted. The French Government therefore does not contest the applicability of the principle 'actori incumbit probatio'. I must accordingly analyse the pleas in law relied on by the French Government in order to determine whether it has succeeded in proving its case.

### B — *First plea: infringement of Articles 21 and 22 of Decision 2001/376 and manifest error of assessment*

#### 1. Arguments of the parties

##### (a) Arguments of the French Government

29. The French Government contends that the Commission manifestly erred in its assessment by taking the view that the inspections carried out in Portugal had established that the conditions in Decision 2001/376 were met.

30. In the French Government's submission, the words 'taking account of the inspections referred to in Article 21', which

appear in Article 22(2) of Decision 2001/376, should be interpreted as making removal of the ban dependent on the carrying out and the outcome of the inspections listed in Article 21.

31. The French Government considers that the Commission adopted the contested decision without having carried out all the inspections provided for in Article 21.

32. Under Article 21, those inspections were required in order to:

— verify application of the provisions in Articles 11 and 12 of Decision 2001/376 and Annex IV thereto;

— verify application of the provisions of Decision 2001/376, in particular in relation to the implementation of official controls; and

— investigate the development of the incidence of the disease and the effective enforcement of the relevant national measures and conduct a risk assessment demonstrating whether appropriate measures to manage any risk had been taken.

33. According to the French Government, the final inspection report of the Food and Veterinary Office ('the FVO') sent to it before the contested decision was the report of 25 to 27 June 2001 (Mission Report 3345/2001), which relates to the general conditions for export laid down under the DBES in particular the approval of establishments, eligible herds, eligible animals, controls in slaughterhouses and cutting plants, certification and transport. It states that, on the other hand, the report does not examine the incidence of the disease and enforcement of the relevant national measures, and does not include a risk assessment demonstrating whether appropriate measures to manage any risk had been taken.

34. In the French Government's submission, the inspections relating to the implementation of official controls (Article 21(c)) and those relating to development of the disease and to assessment of risk and of the measures adopted (Article 21(d)), to be carried out in Portugal, are applicable alongside the inspections specific to the DBES. That is borne out by Article 22(2), which does not draw a distinction according to the categories of inspections that the Commission must take into account and by the content and linking of the recitals in the preamble to Decision 2001/376. The eighth and ninth recitals refer to two prequisites for the DBES: the Portuguese national BSE eradication plan and the new system for identification and registration of bovine animals. The 11th

recital requires the FVO to examine both the measures for implementation of the export scheme and the offspring cull measures. Only if all those examinations prove satisfactory is the Commission entitled to set the date on which dispatch may commence.

35. In addition, the French Government's representative stated at the hearing that it is desirable in the present instance that control of the DBES go hand in hand with a more general assessment of the situation, enabling in particular it to be determined whether in good faith a suspect animal would not have been able to qualify under the DBES.

36. In the French Government's view, when the mission report was submitted, the rules and the circular relating to the DBES implementation manual were not in force, certain FVO inspections were still awaited and therefore Article 21(c) of Decision 2001/376 had not been complied with as regards 'the implementation of official controls'.

37. The French Government adds that the period between adoption of the Portuguese legislation and the lifting of the ban simply did not leave businesses time to familiarise themselves with DBES practices and procedures. The effectiveness of the procedure which had been established therefore could not be determined at the time when the contested decision was adopted or on the date set for lifting the ban.

38. As regards the findings made by the Commission relating to Article 21(b) of Decision 2001/376, that is to say verification of the application of the provisions in Articles 11 and 12 of that decision and Annex IV thereto, the French Government points out the following matters in particular:

— a letter sent on 11 June 2001 by the Commission to the Portuguese authorities clearly shows that the DBES was not yet applied as at that date and reveals numerous weaknesses in the mechanism to ensure traceability before and after slaughter and the mechanism for keeping separate the channels for eligible and ineligible products, and the absence of any alarm plan should an animal associated with risk be identified;

— the report of the FVO mission from 25 to 27 June 2001 simply recalls the conditions of the DBES which had to be formalised in the draft decree and the DBES manual, without containing anything to show that the points of non-compliance noted in the letter of

11 June 2001 resulted in specific corrective measures (in particular the rules on backwards and forwards traceability).

39. The French Government also points out that the Commission did not send copies of the legislation adopted by the Portuguese authorities enabling the dates of publication and circulation to be checked. Nor was it possible, given that the Commission did not send any subsequent inspection report or any monthly report, to assess the knowledge of the rules possessed by the Portuguese authorities entrusted with the controls.

40. The French Government maintains that the contested decision is also invalid inasmuch as the Commission did not take into account whether or not traceability measures existed in the other Member States before setting the date for the removal of the ban.

41. When it examines the findings made by the Commission relating to Article 21(c) of Decision 2001/376 and, in particular, the implementation of official controls, the French Government points out the importance of those controls given that the risks can be eliminated only if the DBES is strictly observed.

42. It states in particular that the report of the mission from 14 to 18 May 2001 expressed criticism with regard to animal meal and specified risk material and formulated recommendations. The report sets out undertakings in this regard on the part of the Portuguese authorities, but it is not apparent from any other document that measures were in fact taken to remedy the defects which had been pointed out.

43. As for Article 21(d) of Decision 2001/376, that is to say tests and epidemiological monitoring, the French Government states that the report of the mission from 14 to 18 May 2001 contained numerous criticisms in that regard. Nevertheless, the Commission did not check the action taken in response to the recommendations formulated by the experts, thus infringing Article 21(d).

44. Furthermore, because of the small number of tests carried out and the lack of distance from the relevant procedures set up (strategy of eliminating the cohorts of animals affected by BSE and their direct issue, procedure for the removal/destruction of animals over 30 months old), the effectiveness of the cattle-testing programme in Portugal could not have been verified before the contested decision was adopted and brought into force. The Commission could not therefore have conducted a risk assessment complying with Article 21(d) of Decision 2001/376, since

the effectiveness of the tracing could not be verified and the quality of the programme of tests could be called into question.

45. The French Government concludes that the Commission adopted the contested decision in breach of Article 21 of Decision 2001/376, in conjunction with Article 22 thereof, by not ensuring, before the date for lifting the ban was set, that the system for preventing BSE in Portugal laid down by Decision 2001/376 had actually been implemented.

(b) The Commission's response

46. What is the Commission's response to that analysis?

47. The Commission observes that the various decisions are founded on Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market [12] and Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market [13] and that they require checks of a complex nature, taking account of the factual and legal circumstances and mechanisms which are themselves complex. It therefore has a wide discretion in making its findings.

48. The Commission criticises the French Government for its literal interpretation of Article 22(2) of Decision 2001/376. In the Commission's submission, it interprets Article 22(2), which refers to Article 21, without specifying on each occasion which of the paragraphs of Article 21 is applicable to each of the three schemes referred to in Article 22(2), namely the scheme under Article 5 (dispatch for the purpose of incineration), the scheme under Article 7 (tallow and products derived therefrom) and the scheme under Article 11 (the DBES).

49. The Commission contends that the matters referred to in Article 21 of Decision 2001/376 had to be taken into account by it to varying degrees. It had to take account of all the inspections carried out since Decision 98/653 and to check rigorously that the inspections referred to in Article 21(b) had been carried out and supported the conclusion that the Portuguese Republic provided all the necessary safeguards. It considers that it had met those two requirements, which do not bind it with the same force, when it decided to set a date for the recommencement of dispatch under the DBES.

12 — OJ 1989 L 395, p. 13.

13 — OJ 1990 L 224, p. 29.

50. According to the Commission, the effect of linking determination of the date for recommencing exports of the material and products covered by Articles 5, 7 and 11 of Decision 2001/376 to the carrying out of each and every inspection referred to in Article 21 is to merge together three export schemes which are however distinct and independent, having three corresponding systems of prior control. The wording of Article 22(2) supports the Commission's interpretation, since it refers in the plural to 'dates' (for the recommencement of exports).

51. The Commission contends that the literal interpretation advanced by the French Government could well result in breach of the principle of proportionality because the three channels are separate. For example, it is not possible to justify a refusal in respect of the dispatch of risk material for the purpose of incineration in another Member State on the ground that there are shortcomings in the DBES channel. It can easily be seen that the inspections referred to in Article 21(d) extend far beyond the context of the recommencement of exports and must be carried out regardless of their recommencement.

52. The Commission contests, finally, the French Government's use of the recitals in the preamble to Decision 2001/376 to support the literal interpretation of Article 22(2). Those recitals come within the framework of Articles 11 and 12 and Annex IV, which are the provisions directly concerning the DBES and consequently falling fully within the framework of the inspections referred to in Article 21(b).

53. In the Commission's submission, only Article 21(b) is truly connected with the DBES. That provision relates to checking the conditions set out in points 11 (the setting up of a system for recording checks on compliance) and 12 (approval of establishments having implemented a system providing full traceability) of Annex IV.

54. Article 21(c) and (d) are couched in very general terms and contain no specific reference to the DBES; they are to be seen in correlation with Article 4 of Directive 89/662 and Article 10(4) of Directive 90/425, which require the Commission to monitor the situation in the context of the protective clause and to adapt the measures taken if appropriate. The wording of Article 21(c) and (d) repeats that of Article 15 of Decision 98/653 which introduced the ban, and there is continuity between Article 15 of Decision 98/653 and Article 21(c) and (d) of Decision 2001/376. The Commission infers therefrom that an inspection visit or an assessment under Article 15 of Decision 98/653 is equivalent to an inspection visit under Decision 2001/376, unless, of course, the conclusions in question are overtaken by events.

55. The Commission accepts that this does not mean that the inspections called for by Article 21(c) and (d) should not be taken into account when deciding to set a date for the partial recommencement of exports, because those inspection visits apply to the whole of the decision. However, their field of application is not directly concerned with establishing the DBES.

56. I will now summarise the more specific observations made by the Commission concerning the various types of inspection.

(i) Observations of the Commission regarding the inspections required pursuant to Article 21(b) of Decision 2001/376

57. The Commission submits with regard to Article 21(b) of Decision 2001/376 that it is apparent from point 6.1 of the conclusions in the report of the mission carried out from 25 to 27 June 2001 that implementation of the DBES in Portugal was in accordance with the requirements of Decision 2001/376. The FVO mentioned only the absence of legal provisions and of written instructions. The Decree-Law of 31 July 2001 (the date of its publication) was approved by the Portuguese Council of Ministers on 12 July 2001, promulgated by the President of the Republic on 29 July 2001 and countersigned by the Prime Minister on 23 July 2001; it entered into force on 1 August 2001. The DBES manual was approved by the Secretary of State for Agriculture on 13 July 2001. The Portuguese system was thus in place, albeit not completely formalised, on the date when the contested decision was adopted, and the Commission considers that it met all the supervisory obligations imposed on it by Community law.

58. To put matters in their context, the Commission points out that no DBES meat has been dispatched since the date specified in the contested decision.

59. The letter of 11 June 2001 merely pointed out certain residual problems. The mission in June confirms that, on the basis of that letter, the Portuguese authorities found solutions to each of the points raised. In particular, the Portuguese Government responded to the problems of traceability raised by the Commission and that response was assessed by the FVO well before the date for the recommencement of exports was set.

60. The Commission states that the report of the FVO mission which took place from 25 to 27 June 2001 contains conclusions favourable, as a whole, to the lifting of the ban, in particular so far as concerns the effectiveness of implementation of the procedures.

61. The only recommendations addressed to the Commission contained in that report were as follows:

'The Commission services should set the date on which dispatch under DBES may commence, on the basis of the action taken by the Portuguese authorities addressing the recommendations and in any case after written confirmation by the Portuguese authorities has been received that:

— legislation has come into effect and staff instructions have been issued officially; and

— no establishment of a category other than slaughterhouses and cutting plants processing only DBES beef will be approved before inspection by the FVO of the proposed arrangements.'

62. The Commission then initiated an exchange of correspondence with the Portuguese authorities and, it states, satisfied itself that the manual was amended in accordance with the observations of the Commission inspectors. The Commission concentrated its efforts on that matter and, the very day after the mission ended, a copy of the new DBES manual was sent to the FVO. As the report reveals no problem concerning controls in the slaughterhouse and the cutting plant, it was with a clear conscience that the Commission decided to set 1 August 2001 as the date for the lifting of the ban. As regards the future, the addendum to Mission Report 3345/2001 states: 'The Manual has been changed as follows: any new plants intending to operate under the scheme have to be visited by the FVO. After a favourable outcome of

such a visit, the Minister of Agriculture will decide on the approval.'

63. The Commission accepts that the FVO did not observe how the DBES actually operated, but it points out that such verification was, in practice, impossible at a time when authorisation to recommence exports had not yet been granted and the system could not be at the stage of functioning correctly.

64. As regards the monthly reports referred to in Article 20 of Decision 2001/376, the Commission points out that it is not obliged by that provision to forward them to the other Member States.

65. The Commission observes with regard to controls in relation to labelling and traceability in the other Member States that the applicable directives already ensured traceability based on the identification numbers of establishments where products are handled and that 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 [14] and its implementing regulation, which have been applicable since 1 August 2000, that is to say before the Portuguese DBES was set up, ensure that there is a system for tracing beef throughout the Community.

66. The Commission concludes therefrom that it has scrupulously observed the condition relating to the inspection required under Article 21(b) of Decision 2001/376.

67. It contests the French Government's argument that Portuguese officials did not have time to familiarise themselves with DBES procedures. It acknowledges that, in the formal sense, the period was short, but points out that the DBES had been discussed intensively with the Portuguese authorities, that Community inspections had enabled the approach to be refined and that the DBES was already known because of the United Kingdom precedent.

68. With regard to controls relating to the eligibility of animals and to product tra-

14 — OJ 2000 L 204, p. 1.

ceability, the Commission refers to the report of the mission carried out by the FVO from 25 to 27 June 2001. It also observes that establishment of the DBES was never conditional on the establishment of rapid tests. The latter constitute one of the instruments available under the system for monitoring TSEs. It adds that while the number of rapid tests in Portugal was on the low side, account had to be taken of the policy of systematic slaughter pursued by the authorities and of the fact that the authorities had given guarantees concerning the carrying out of those tests. Finally, since DBES-eligible animals must be born after 1 July 1999, the date upon which the ban on animal meal in fact entered into force, and given the very long incubation period of the disease, it is highly improbable that tests carried out on eligible animals, even infected animals, could have given positive results at the time when the ban was lifted.

(ii) Observations of the Commission regarding the inspections and assessments required pursuant to Article 21(c) and (d) of Decision 2001/376 (identical to those required by Article 15 of Decision 98/653)

69. The Commission points out that the decision setting the date for the lifting of the ban was the outcome of intensive cooperation between it and the Portuguese Republic, in the course of which a large number of missions took place, the reports of which are on its website and are referred to by it. It submits that the checks referred to in Article 21(c) and (d) were in fact carried out throughout the period of the ban and that they were certainly taken into account when deciding the date for lifting the ban.

70. The Commission further submits that the French Government is wrong in its assertion that all those inspections and assessments should necessarily have been carried out after Decision 2001/376 entered into force.

71. The Commission refers to various points of the report of the FVO mission in June 2001 with regard to controls relating to product traceability. It explains that scrutiny of the DBES was not the only objective of the mission in May 2001, a fact which explains why the report mentions shortcomings in the implementation of other Community decisions that are independent of implementation of the DBES. As regards the removal of specified risk material, the May report mentions only minor problems and concludes that its removal was, as a whole, satisfactory.

72. The Commission concludes therefrom that Article 21 of Decision 2001/376, taken in conjunction with Article 22 thereof, was not infringed by the contested decision.

(c) Arguments of the Portuguese Government

73. The Portuguese Government points out that implementation of a date-based export scheme has been studied since 1999. Examinations as to the eligibility of cattle under the DBES were carried out (BSE mission of March 2000). Subsequently, the principles for the selection of holdings and animals were harmonised. The Community mission in May 2001 was essentially intended to evaluate all the procedures governing the eligibility of holdings and animals under the DBES. Those procedures were considered satisfactory and, in certain cases, were improved.

74. In this connection, the Portuguese Government observes that the French Government's comments relating to the traceability problems pointed out in that report make no sense since those problems relate to animals born before 1998, whereas only cattle born after July 1999 are eligible under the DBES.

75. The Portuguese Government then sought approval of a slaughterhouse with a view to implementing the DBES and a fresh mission was organised in order to check the DBES process in operation. The Portuguese Government undertook to apply the DBES at a slaughterhouse where carcases are destroyed and to provide assurances in respect of other matters broached at the FVO meeting. The mission from 25 to 27 June 2001 was thus carried out solely in order to evaluate the application of the DBES. The recommendations set out at the FVO meeting were taken into account. The DBES was assessed in full operation in the only slaughterhouse selected and approved by the Portuguese authorities for its implementation.

76. The mission report concluded that the DBES procedures manual fulfilled the requirements of Decision 2001/376 which is applicable here. It also concluded that the programme for the tracing and destruction of the offspring of BSE cases was effective. In order for the Commission to set the date for the lifting of the ban, however, the Portuguese authorities had to confirm in writing both that the final version of the procedures manual (which, at this stage, took account of all the recommendations made) had been issued and that the applicable legislation had been published. The report in question also recommended that no premises at which animals were slaughtered and destroyed falling within the DBES should be approved by the Portuguese authorities without the FVO having checked the conditions under which exports could be permitted.

77. The report's conclusions were presented by the Commission and the FVO to the Standing Veterinary Committee on 11 July 2001. The inspectors presented in detail the measures adopted by the Por-

tuguese authorities, without the slightest reaction on the part of the Member States. The committee was not given the specific date on which the decision was to take effect since the Commission had not yet come to the end of the internal procedure for adoption of the decision. However, after the committee's consent had been obtained, 1 August 2001 was the date initially given. The Portuguese Government states that all the required guarantees had been provided, both by its national official at the Permanent Representation and by the Portuguese Directorate-General for Veterinary Affairs, and that the data and the content of the documents required were known to all the parties. The process which led to adoption of the contested decision took place in close collaboration with the competent bodies, the Commission and the sole establishment authorised to apply the DBES.

78. The Portuguese Government states that it therefore does not understand the position adopted by the French Government. In particular, the proposition that a copy of the legislation as published had to be produced is unfounded.

(d) The French Government's response

79. In its reply to the Portuguese Government's statement in intervention, the French Government exprby the Portuguese Government are not convincing with regard to either compliance with the conditions of the DBES *stricto sensu* or proper application of the various measures to combat BSE that are separate from the DBES but expressly covered or recalled by Decision 2001/376.

80. The French Government submits that the Portuguese control mechanism was neither legally effective nor being implemented in practice by the Portuguese authorities on the date when the Commission adopted its decision. Accordingly, the Portuguese Government is all the more unable to assert that that mechanism was in force when the Standing Veterinary Committee met, that is to say on 11 July 2001.

81. It is therefore not possible to maintain that at that meeting the FVO inspectors presented in detail the measures adopted by the Portuguese authorities, when draft measures were in fact involved.

82. The French Government also maintains that the Portuguese Government is wrong in stating that that presentation was made 'without the slightest reaction on the part of the Member States' and 'France was represented', when, within the Standing Veterinary Committee, France voted against the proposal.

83. As the Portuguese decree-law was published after the date of the Commission decision, it would have been appropriate for the Commission to satisfy itself rapidly, through a fresh FVO inspection, that the dispatch that had thus recommenced was in fact in conformity with the conditions laid down by the DBES.

84. However, the first FVO inspection mission to Portugal subsequent to 25 July 2001 did not take place until 28 January to 8 February 2002. It related to 'the traceability of fresh meat and of bovine products from the farm to placing on the market' and Decision 2001/376 is not included in the list of legislation whose application was to be checked by that mission.

85. The French Government refers to the reports of the inspection missions carried out in 1999 and to the serious shortcomings pointed out before the Court in the course of *Portugal* v *Commission* [15] as regards compliance with the Community rules on BSE and fresh meat. In addition it observes that by Decision 2000/104 the Commission removed the restriction that limited the duration of the export ban to 1 February 2000. It concludes that in the period prior to that referred to by the Portuguese Government's statement in intervention, the Commission based its decisions on checks as to the effectiveness of all the measures to combat BSE, in particular concerning the traceability of animals and meat and measures governing hygiene, slaughter and cutting.

86. As regards the period from September 2000 to July 2001 in particular, the French Government observes that the Portuguese Government acknowledges, as is apparent from its statement in intervention (paragraphs 18 and 19), that the actions rendering the procedures compliant concerned only the DBES, and that they occurred progressively and after the meeting of the Standing Veterinary Committee and the contested decision.

87. The French Government also analyses the 43rd report drawn up by the Portuguese authorities in accordance with Decision 98/653. This report reveals the following in particular:

— there was one case of an animal at risk aged over 24 months not falling within the DBES, a fact which could justify tests being envisaged between 24 and 30 months for animals which satisfy the DBES conditions;

— animals born after the ban on animal meal provide the majority of cases, a fact which means that there is a lingering doubt as to whether the ban on meal has been implemented effectively;

15 — Cited above.

— there is delay in reestablishing the traceability of a large number of animals from livestock farms where cases of BSE have been confirmed;

— there are cases of non-compliance with the rules relating to animal proteins and to feed.

88. The French Government concludes that those monthly reports show that all the rules to combat BSE should have been complied with by the Portuguese authorities before the contested decision was adopted.

2. Appraisal

89. I will examine in turn:

— the role to be played in the Commission decision to lift the ban by the inspections prescribed in Article 21 of Decision 2001/376;

— the conclusions that it was possible to draw from the inspection carried out pursuant to Article 21(b) of Decision 2001/376 in June 2001;

— the importance that should be attached to the inspections prescribed in Article 21(c) and (d) of Decision 2001/376.

(a) The role of the inspections to which Articles 21 and 22 of Decision 2001/376 refer

90. According to Article 22(2), 'the dates on which the dispatch of material and products may commence or recommence pursuant to Articles 5, 7 and 11 shall be determined by the Commission taking account of the inspections referred to in Article 21 and after having informed the Member States'.

91. There can be no doubt, in my view, that the Commission cannot determine the dates in question until all the conditions laid down by Decision 2001/376 for lifting the ban on a given category of products are met.

92. In addition to the written guarantees which appear to have been provided to the Commission by the Portuguese Republic

(see the third recital in the preamble to the contested decision), the Commission must therefore take its decision 'taking account of the inspections'.

93. It clearly cannot be sufficient, for the Commission, to find that the inspections have taken place: the Commission must assess the findings made in the course of the inspections in order to determine whether dispatch may commence or recommence without a resulting risk to human health in the countries of destination.

94. In this connection, it must proceed on the basis of the inspections' objective as defined in Article 21.

95. That provision requires it:

'(a) ... to verify the implementation of... controls...;

(b) ... to verify the [application] of the provisions in Articles...;

(c) ... to verify the application of the provisions...;

(d) ... to examine the development of the incidence of the disease, the effective enforcement of the relevant national measures...;

(e) ... to verify the application... of the provisions...'.

96. Thus, subject to a slight difference so far as concerns Article 21(d), those inspections do not merely have the objective of ascertaining whether the necessary legislation or rules have been adopted or whether they are sufficient, but must also all relate to the manner in which the relevant provisions have been *applied* or *enforced*.

97. This is perfectly understandable since an extremely serious epidemic is at issue that is probably such as to put human lives at risk.

98. Given that inspections of the types (a), (b) and (e) must take place before the dispatch of products may commence, the words 'taking account' must therefore be interpreted as meaning that the Commission cannot authorise dispatch of the products concerned if one of the inspections prescribed reveals that part of the mechanism for combating BSE is not applied with the necessary rigour.

99. It should, however, be noted at this point that the contested decision concerns only the products referred to in Article 11 of Decision 2001/376, that is to say fresh meat, minced meat and meat preparations, meat products, and food which is destined for domestic carnivores. We need not therefore examine whether inspections under Article 21(a), which concern amino acids, peptides, tallow, products containing tallow and products derived from tallow, or those referred to in Article 21(e), which concern meat meal, bone meal, meat-and-bone meal and so forth dispatched to another Member State for the purpose of incineration, were performed correctly and whether their results were convincing.

100. My examination will relate solely to the results of the inspection of type (b) which was carried out and which concerns fresh meat, minced meat, meat preparations and meat products.

101. There is thus no risk of creating, between the three channels, the confusion of which the Commission has warned.

102. I will, however, have the task, in a second section, of looking into the significance which the inspections in categories (c) and (d) may or must have in relation to those in category (b) when the Commission adopts its decision lifting the ban, because they do not relate to a specific category of products.

(b) Was the inspection prescribed in Article 21(b) of Decision 2001/376 carried out properly?

103. The question which arises is whether the Commission in fact '*verified the application*' of the provisions in Articles 11 and 12 of Decision 2001/376 and in Annex IV thereto before permitting the dispatch of beef and veal to recommence.

104. This can be taken to be extremely unlikely given that the domestic rules intended to oblige or help all the bodies and all the persons concerned to comply with the provisions of the DBES were finalised, with the aid of the FVO experts, only in the course of the inspection mission which took place from 25 to 27 June 2001, that is to say one month before the Commission decision to lift the ban.

105. The report relating to that mission contained the following 'recommendation' addressed to the Commission:

'The Commission services should set the date on which dispatch under DBES may

commence, on the basis of the action taken by the Portuguese authorities addressing the recommendations and in any case after written confirmation by the Portuguese authorities *has been received* that:

— legislation has *come into effect* and staff instructions *have been issued* [16] officially, and...'.

106. However, the decree-law incorporating those rules was not published until 31 July 2001, that is to say after the contested decision and on the eve of the lifting of the ban. The 'manual' does seem to have been approved by the Portuguese Secretary of State and the authorities in the Ministry of Agriculture on 13 July 2001, but we have no information regarding when it was actually distributed. Even when the hearing took place, the Commission did not appear to possess the final version of this 'manual'.

107. These findings alone already prompt me to conclude that the Commission experts were not really in a position, in the course of the final inspection mission before the ban was lifted, to 'verify the application', that is to say the observance, in practice, of the provisions governing the DBES.

108. The Commission has itself confirmed this because it has stated in essence, both in one of its pleadings and at the hearing, that it was in practice impossible to verify the operation of the DBES at a time when authorisation to recommence exports had not yet been granted and the system could not be at the stage of functioning correctly.

109. If I have understood the Commission correctly, this therefore means that it denies the very possibility of 'verifying the application' of the provisions constituting the DBES before exports recommenced.

110. However, that interpretation is contrary to the wording of Article 21(b) of Decision 2001/376.

16 — Emphasis added.

111. Moreover, it would, in my view, have been possible to have the system operating without any exports, that is to say by selling the meat on the Portuguese market for the time being.

112. I consider, therefore, that the aforementioned statement by the Commission would in itself be sufficient to find that the Commission infringed Articles 21 and 22 of Decision 2001/376 and consequently to justify annulment of the contested decision.

113. The Commission is admittedly right to point out that successive inspections were carried out over several years and that the contacts between the Commission and the Portuguese authorities enabled gradual improvements to be made in the system for herd monitoring and identification and traceability of animals and in the operation of the slaughterhouse finally approved and of cutting plants, cold stores and so forth.

114. The fact remains, however, that the 'rules of the game' were not set out in writing until very shortly before the ban was lifted so that, as the French Government points out, businesses simply did not have the time to familiarise themselves with the final version of the DBES procedures.

115. I am unable to agree with the Portuguese Government when it states that 'the DBES was assessed in full operation in the slaughterhouse approved'.

116. The mission in June 2001 admittedly included a visit to the slaughterhouse and cutting plant which were candidates for approval under the DBES.

117. I consider, however, that it is not possible to conclude that the inspectors could have witnessed the operation of the DBES in its final form.

118. As the French Government has pointed out, a good part of the report relating to that mission merely sets out the instructions which appeared or were to appear in the 'manual' and the report makes frequent use of the future tense.

119. The following passages may be cited by way of example:

Point 5.1.3.3. 'Each holding applying for the scheme *will be* subject to two sets of controls prior to approval:...

After approval, the holding *will be* subject to further on-farm inspections once every four months.'

Point 5.1.4.3. '... animals on the list *will be subject* to a set of pre-slaughter checks'.

Point 5.1.5.6. '... Once the animal has passed the 24-hour post-slaughter check, the carcass *will be* labelled...'

120. This wording thus appears to imply that all those rules were not yet being applied at the time of the inspection.

121. It follows that that final inspection before the ban was lifted could not truly have achieved its objective which, according to point 2 of the report, was 'to evaluate the *implementation* of the DBES, in particular the implementation of official controls related to the scheme in the framework of Article 11 of the Commission Decision 2001/376/EC'. [17]

122. The inevitable conclusion is, therefore, that the inspection carried out pursuant to Article 21(b) of Decision 2001/376

17 — This footnote is not relevant to the English translation of the Opinion.

did not provide sufficient justification for lifting the ban.

123. It remains for me to examine now the French Government's argument that the inspections prescribed in Article 21(c) and (d) of Decision 2001/376 were not duly carried out.

(c) The significance that should be attributed to the results of inspections carried out pursuant to Article 21(c) and (d) of Decision 2001/376

124. The French Government submits that the inspections prescribed in Article 21(c) and (d) of Decision 2001/376 must be applicable alongside those prescribed in Article 21(b). The Commission failed, however, to take sufficient account of the negative findings made in carrying out the former.

125. The Commission does not dispute that it is required to take account also of the inspections prescribed in Article 21(c) and (d) of Decision 2001/376. However, as the field of application of those inspections is not directly concerned with establishing the DBES, their results do not bind it with the same force when it decides to set the date for the recommencement of exports. The Commission adds that those checks were in fact carried out throughout the period of the ban and that they were taken into account when deciding to lift it.

126. As to those submissions, it is to be noted first of all that the inspections referred to in Article 21(c) and (d) of Decision 2001/376 are identical to those which had already been imposed by Article 15 of Decision 98/653.

127. According to the 18th recital in the preamble to Decision 98/653, those inspections are designed 'to verify the application of the measures provided for in this Decision'. Decision 98/653, just like Decision 2001/376, concerned 'emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal', while the new decision related in addition to implementation of a date-based export scheme.

128. It is, however, interesting to note that Article 5 of Decision 98/653 had already authorised the Portuguese Republic to pro-

duce and export, subject to certain conditions:

(a) amino acids, peptides and tallow produced in establishments under official veterinary supervision which have been shown to be operating in accordance with the conditions set out in the annex;

(b) tallow products and products derived from tallow by saponification, transesterification or hydrolysis.

129. Decision 2001/376 instructs the Commission, in Article 21(a), to 'verify the implementation of official controls in respect of each of the products referred to in Articles 7 and 8 before the dispatch of these products may commence or recommence'.

130. Articles 7 and 8 refer to more or less the same products as those just mentioned.

131. Dispatch of those products thus seems not to have commenced following Decision 98/653. Articles 7, 8 and 21(a) of Decision 2001/376 and Annex II thereto made their dispatch subject to stricter conditions than the previous decision.

132. The fact that the controls of a more general type which were already included in Decision 98/653 were retained in Decision 2001/376, while at the same time more specific inspections 'before the recommencement of dispatch' were introduced, suggests that all those inspections must take place alongside one another.

133. It follows that deficiencies recorded when carrying out the more general checks under Article 21(c) and (d) of Decision 2001/376 must be taken into consideration by the Commission at the same time as the findings made in carrying out the specific inspections under Article 21(a) and (b).

134. It is true that the rules which apply in the context of the inspections of type (b), that is to say principally those set out in Annex IV to Decision 2001/376, are so exacting as regards slaughter of the offspring of diseased animals, the monitoring of herds and the identification and traceability of animals intended for export that all the shortcomings in the systems should normally be discovered in the course of those inspections.

135. The fact remains, however, that it is not possible to go everywhere on one inspection mission and that other controls may reveal deficiencies in the system that are of importance in the context of the DBES.

136. Thus, point 13 of Annex IV requires traceability both forwards and backwards. What does backwards traceability mean if not maximum certainty, or at least an entirely reasonable degree of certainty, on the basis of scientific guarantees resulting from a reliable livestock-control system, that there is no suspicion as regards an animal's being diseased? General controls admittedly do not interest us here in so far as they concern products outside the DBES or abattoirs and cutting plants outside the DBES, but they interest us in so far as they concern the state of the livestock population from which an animal entering the DBES-approved slaughterhouse comes. At that point the national databases will be checked. Previous inspections (in particular those of May 2001) revealed that the level of reliability of those databases was, to say the least, poor and the June inspections provided no positive evidence to the contrary.

137. It is also to be noted that, in contrast to the position when the date for lifting the ban on United Kingdom meat was set (see the second recital in the preamble to Commission Decision 1999/514/EC of 23 July 1999 setting the date on which dispatch from the United Kingdom of bovine products under the date-based export scheme may commence by virtue of Article 6(5) of Council Decision 98/256/EC), a follow-up inspection was not even announced in the contested decision. [18]

138. On the other hand, on an inspection which took place from 28 January to 8 February 2002 and was devoted not to analysing the operation of the DBES but to evaluating implementation of all the Community regulations and directives relating to the identification and registration of cattle and to intra-Community trade in animals and meat, the inspectors stated as follows in their summary of the final report:

'Depending on which part of the production chain was involved, the controls established by the competent authority gave a contrasting picture: the measures in place for registering holdings, identifying animals and controlling their movement were not satisfactory, either qualitatively or quantitatively, mainly because all the risk factors were not properly taken into account and also because, in several cases, there was insufficient manpower to carry out adequate controls. As far as slaughterhouses were concerned, the situation was generally satisfactory, except for one

18 — OJ 1999 L 195, p. 42.

slaughterhouse where control measures for the ante-mortem identification of animals were not carried out. As regards cutting plants and/or minced-meat production plants, the situation, except for one large minced-meat establishment, was not satisfactory: the competent authority had not discovered that the traceability of the meat was partly or wholly lost in several instances. The situation in relation to control of the distribution and retail trade sector was satisfactory, except in the case of one hypermarket.

Evaluation of the system in place for registration of holdings, identification of animals and control of movements revealed a series of deficiencies — some of them significant — leading to partial or total loss of traceability of production.'

139. Even at the beginning of 2002, problems thus remained concerning the traceability of animals and meat.

140. This confirms that all the conditions for lifting the ban were not met on the date when the Commission adopted its decision.

141. The French Republic's first plea, alleging infringement of Articles 21 and 22 of Decision 2001/376, must accordingly be upheld.

C — *Second plea: infringement of the precautionary principle*

1. Arguments of the parties

142. The French Government submits that, in failing to make sure, before adopting the contested decision, that the strict and precise conditions laid down by Decision 2001/376 were met, the Commission infringed the precautionary principle which is embodied inter alia in Article 174 EC.

143. The Commission claims that this plea should be dismissed as unfounded because Decision 2001/376 falls within the scope of, and incorporates, the precautionary principle and thus the grounds of challenge put forward by the French Government are necessarily indissociable from those relating to infringement of Decision 2001/376, which are the subject of the first plea.

144. In the alternative, the Commission denies that there has been any infringement of the precautionary principle.

145. It observes that the precautionary principle is not an absolute objective that would exclude any possibility of appraisal on the part of the competent authority which must implement the policy. Both Article 174 EC, which is cited by the applicant and relates to the environment, and Article 152 EC, which relates to public health, in fact seek a high level of protection. The Commission refers to Communication COM(2000) 0001 final which it has adopted on the precautionary principle, in which it has endeavoured to establish a number of criteria, and to the Court's case-law.

146. According to the Commission, the precautionary principle does not have the effect of obliging it to follow every scientific opinion without any power of appraisal. The same is true of the opinion of a national agency such as the Agence française de sécurité sanitaire des aliments (French Food Safety Agency), which, the Commission observes, is subsequent to the contested decision.

147. The Commission points out that it had the power to adopt the contested decision under Article 9 of Directive 89/662 and that it was therefore for it to determine the level of health protection that it considered appropriate.

148. In its submission, Decisions 98/653 and 2001/376 were founded on precautionary logic. Decision 98/653 imposing the ban was never conceived of as a definitive measure. Once the appropriate measures had been taken by the Portuguese Republic and duly evaluated and checked by the Commission, that transitional measure was to be repealed.

149. The Commission contends, finally, that the precautionary principle is a reasoned approach founded not on the pursuit of absolutely no risk, which would paralyse trade completely, but on the constant pursuit of proportionality. In this context, it recalls that it has a discretion under Article 9(4) of Directive 89/662 and Article 10(4) of Directive 90/425 and that judicial review is limited to ascertaining whether it has manifestly erred in the exercise of that discretion.

150. The Commission submits that the contested decision complies with the principle of proportionality. The main objective of Directives 89/662 and 90/425 is pursuit of the objectives of the common agricultural policy, the protection of health con-

tributing to those objectives. A measure seeking to protect health must be taken into account, but it must not exceed what is necessary in order to attain that objective without endangering the other objectives of the common agricultural policy. After the Portuguese Republic had provided the requisite guarantees, it was normal, given the high level of protection ensured, to replace the regime imposing a ban with a regime, laying down a framework and providing for monitoring, that was less restrictive as regards the principle of the free movement of goods.

151. The Commission observes that, while the precautionary principle entails an approach to assessment in terms of benefits and burdens, it is impossible to arrive at a level of risk equal to zero. It stresses, in this connection, that the decisions adopted followed the opinions of the various scientific committees and that it attentively monitors developments in scientific research.

152. In its reply, the French Government contests the proposition set out by the Commission as its main claim and contends that the plea relating to the precautionary principle is an independent plea. By its adoption of the contested decision without checking compliance with the conditions laid down by Decision 2001/376, the Commission is not ensuring the level of public health protection that it is supposed to and is infringing the precautionary principle.

153. The French Government recalls the uncertainty as to the risks and the fact that the DBES is founded on scientific assumptions.

154. It submits that the contested decision infringes the precautionary principle because it was adopted without any guarantee as to the results of the checks regarding application of the Portuguese DBES mechanism and the related traceability rules, and in the absence of results for controls in respect of the other measures to combat BSE (meal, specified risk material, tests and so forth) that were supposed to be put in place in Portugal.

155. In its statement in intervention, the Portuguese Government submits that the precautionary principle has been fully observed. It acknowledges that the principle applies in fields such as human, animal or plant health and points out that the conditions for its application include perception or identification of a potential risk and the carrying out of a scientific study whose results are uncertain or doubtful.

156. It points out that it was in response to new scientific data that the possibility was envisaged of authorising exports under certain conditions enabling a high level of health protection to continue to be maintained. It recalls the collaboration of the Portuguese authorities with the experts and the efforts made since 2000.

157. It submits that the conditions imposed by Decision 2001/376 were rigorously observed by the Portuguese Republic and the Commission and that the contested decision not only confirms this but meets in full the level of protection established by the Commission as the basis for the precautionary principle.

158. In its reply to the Portuguese Government's statement in intervention, the French Government contends that the Portuguese Government has a restrictive view of the precautionary principle in that it would apply only at the stage of assessing the risk. According to the French Government, the precautionary principle also applies at the stage of management of the risk, when determining and implementing management measures, at least as much as the principle of proportionality. Thus, authorities which take a measure to manage the risk must be concerned equally with its effectiveness and with its proportionality.

159. The French Government contests, in the present instance, the effectiveness of the control measures prescribed and disputes therefore that they comply with the precautionary principle from the point of view of risk management. It refers in this regard to the final FVO report received, relating to a mission carried out in Portugal between 28 January and 2 February 2002. It is apparent from this report that identification of animals and the following of their movements and traceability of meat were not guaranteed, whereas the entire DBES mechanism rests on those matters.

2. Appraisal

160. It need only be stated that the French Government, as it itself acknowledges, [19] merely complains that the Commission did not adequately check compliance with the conditions for lifting the ban that were laid down by Decision 2001/376 and thus infringed the precautionary principle.

161. In this sense, as the Commission rightly observes, the second plea put forward by the French Government is indissociable from its first plea, whose very subject was the question whether, when the contested decision was adopted, the conditions, as laid down by Decision 2001/376, for lifting the ban were met.

162. Accordingly, as the French Government has not demonstrated the existence of an infringement of the precautionary principle independent of an infringement of Decision 2001/376, this second plea must be regarded as immaterial.

19 — See above, point 151.

## V — Conclusion

163. For all the reasons set out above, I propose that the Court should:

— annul Commission Decision 2001/577/EC of 25 July 2001 setting the date on which dispatch from Portugal of bovine products under the Date-Based Export Scheme may commence by virtue of Article 22(2) of Decision 2001/376/EC;

— order the Commission to pay the costs.