OPINION OF ADVOCATE GENERAL MISCHO

delivered on 20 September 2001 [1]

1. First detected in the United Kingdom in 1986, bovine spongiform encephalopathy ('BSE') is one of a group of diseases — transmissible spongiform encephalopathies — affecting both various animal species, including sheep in the form of scrapie, and humans, mainly in the form of Creutzfeldt-Jakob disease. It remains until today mysterious from many angles, particularly as regards the manner in which it is transmitted, and fearsome inasmuch as it cannot be cured by any treatment.

2. The first measures to combat this disease were naturally adopted in the United Kingdom, in 1988. They were supplemented by Community measures from 1990 when the magnitude of the epidemic and the risks it entailed were apprehended.

3. Guided by the precautionary principle, those Community measures became stricter over the years as alarming findings were made by the competent scientific bodies, culminating in Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy [2] which temporarily prohibited the export of bovine animals, beef and veal and derived products from the United Kingdom to the other Member States or third countries.

4. That decision was based on: (i) 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, [3] as last amended by Council Directive 92/118/EEC of 17 December 1992 laying down animal health and public health requirements governing trade in and imports into the Community of products not subject to the said requirements laid down in specific Community rules referred to in Annex A (I) to Directive 89/662/EEC and, as regards pathogens, to Directive 90/425/EEC; [4] and (ii) Council Directive 89/662/EEC of

1 — Original language: French.

2 — OJ 1996 L 78, p. 47.
3 — OJ 1990 L 224, p. 29.
4 — OJ 1993 L 62, p. 49.

11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market, as last amended by Directive 92/118. [5] It was adopted after the United Kingdom authorities, to be more precise the Spongiform Encephalopathy Advisory Committee, had revealed that there was probably a link between a new form of Creutzfeldt-Jakob disease and the consumption of meat from cattle which had contracted BSE.

5. The United Kingdom challenged Decision 96/239, but its action for annulment was dismissed by judgment of the Court of Justice of 5 May 1998 in Case C-180/96. [6]

6. As the scientific investigation of BSE progressed, it appeared possible to the Commission to make some adjustments to the total ban established by Decision 96/239 with regard to United Kingdom cattle-farming production.

7. Thus, by Council Decision 98/256/EC of 16 March 1998 concerning emergency measures to protect against bovine spongiform encephalopathy, amending Decision 94/474/EC and repealing Decision 96/239/EC, [7] the ban was lifted, subject to very strict conditions, for certain meat and meat products from bovine animals slaughtered in Northern Ireland, within the framework of a scheme for the certification of herds for export (the Export Certified Herds Scheme; 'the ECHS').

8. After carrying out the inspections prescribed by Article 6 of that decision, the Commission, by Decision 98/351/EC, [8] set 1 June 1998 as the date on which exports could commence.

9. A few months later, in the light of new scientific opinions and the results of inspections carried out by its staff in the United Kingdom, the Commission initiated a fresh stage in the process of lifting the ban on beef and veal from the United Kingdom.

10. For that purpose it drew up a proposal to amend Decision 98/256, so as to authorise in addition the export from the United Kingdom of meat and meat products from bovine animals which were born after

5 — OJ 1989 L 395, p. 13.

6 — Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265.

7 — OJ 1998 L 113, p. 32.

8 — Decision of 29 May 1998 setting the date on which dispatch from Northern Ireland of bovine products under the Export Certified Herds Scheme may commence by virtue of Article 6(5) of Decision 98/256 (OJ 1998 L 157, p. 110).

1 August 1996 and eligible under the Date-Based Export Scheme ('the DBES').

11. However, its proposal did not receive a favourable opinion from the Standing Veterinary Committee. It was therefore submitted to the Council, as laid down by Article 17 of Directive 89/662.

12. The Council did not act within the time-limit set, but did not decide against the proposed measures by a simple majority either, and so the Commission adopted the measures itself, by Decision 98/692/EC of 25 November 1998 amending Decision 98/256.[9]

13. The DBES, which was thus added to the ECHS, is set out in detail in the new Annex III to Decision 98/256 inserted by Decision 98/692.

14. Animals eligible under the DBES are defined in point 3 of that annex, which states:

'A bovine animal is DBES-eligible if it has been born and reared in the United Kingdom and at the time of slaughter the following conditions are shown to have been met:

(a) the animal has been clearly identifiable throughout its life, enabling it to be traced back to the dam and herd of origin; its unique eartag number, date and holding of birth and all movements after birth are recorded either in the animal's official passport or on an official computerised identification and tracing system; the identity of its dam is known;

(b) the animal is more than six months but less than 30 months of age, determined by reference to an official computer record of its date of birth, and in the case of animals from Great Britain, the animal's official passport;

(c) the competent authority has obtained and verified positive official evidence that the dam of the animal has lived for at least six months after the birth of the eligible animal;

(d) the dam of the animal has not developed BSE and is not suspected of having contracted BSE.'

9 — OJ 1998 L 328, p. 28.

15. As regards controls, it is laid down that the slaughter of eligible animals must be carried out in specialised slaughterhouses not dealing with animals which are ineligible. Also, traceability must be absolutely guaranteed:

'Meat must be traceable back to the DBES-eligible animal, or after cutting, to the animals cut in the same batch, by means of an official tracing system until the time of slaughter. After slaughter, labels must be capable of tracing fresh meat and products referred to in Article 6(1)(b) and (c) back to the eligible animal to enable the consignment concerned to be recalled. Food for domestic carnivores must be traceable by means of accompanying documents and records.' [10]

16. Furthermore, the United Kingdom must 'have detailed protocols in place covering:

(a) tracing and controls prior to slaughter;

(b) controls during slaughter;

(c) controls during processing of food for domestic carnivores;

(d) all labelling and certification requirements after slaughter to the point of sale'. [11]

17. After carrying out the checks required by Article 6(5) of Decision 98/256 as amended by Decision 98/692, adjudging them satisfactory and informing the Member States, on 23 July 1999 the Commission adopted Decision 1999/514/EC 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. [12] The date set was 1 August 1999.

18. It was the refusal of the French Republic to adopt the measures necessary to comply with Decision 98/256, as amended by Decision 98/692, and Decision

10 — Annex III to Decision 98/256, as inserted by Decision 98/692, point 7.

11 — Point 9 of Annex III.

12 — OJ 1999 L 195, p. 42.

1999/514 that led the Commission to bring against that State the action for failure to fulfil obligations under consideration, registered as Case C-1/00. First, I will set out how the case has arisen.

19. Following a period during which the import of beef and veal from the United Kingdom was totally prohibited, in 1999, under the ministerial order of 28 October 1998 establishing specific measures applicable to certain products of bovine origin dispatched from the United Kingdom, [13] a regime applied in France of prohibition in principle coupled with an exception covering products from Northern Ireland, as required by Decision 98/256 as originally drafted.

20. Authorisation to import DBES products thus presupposed amendment of that ministerial order. The French Government accordingly submitted a draft order to that effect to the Agence française de sécurité sanitaire des aliments (French Food Safety Agency; 'the AFSSA'), a body which it was obliged to consult under French law. [14]

21. On 30 September 1999 the AFSSA, relying on the report of a group of experts on transmissible sub-acute spongiform encephalopathies, which stated that 'having regard to current scientific knowledge and the epidemiological data now available to it, the group of experts expresses the opinion that the risk of Great Britain exporting infected beef and veal cannot be regarded as totally overcome', issued a negative opinion on the draft order.

22. On 1 October 1999 the French authorities, immediately after being notified of that opinion, forwarded it to the Commission, which had reminded them on 10 September of their obligation to comply with Decisions 98/256 and 1999/514.

23. In their covering note they stated as follows:

'The French authorities consider that the scientific data upon which this opinion is based need to be brought to the attention of the Community's scientific community. They therefore request the Commission to submit it rapidly to the Scientific Steering Committee (SSC).

The opinion delivered by the AFSSA leads the French authorities to postpone application of the Commission decisions referred to above, pending the assessment of the opinion which the SSC will be able to carry out.

The French authorities propose to make available to the Commission all of France's

13 — JORF of 2 December 1998, p. 18169.

14 — Article 11 of Law No 98535 of 1 July 1998 (JORF of 2 July 1998, p. 10056).

scientific expertise necessary for the Community assessment of these scientific data.'

24. Deferring to the request of the French authorities, the Commission submitted the AFSSA's opinion to the SSC which, after considering a report of its TSE/BSE ad hoc group which had met on 14 and 25 October 1999, unanimously decided at the end of October 1999 that the AFSSA's opinion contained no new information such as to justify revising the overall conclusions of its previous opinions which had constituted the scientific basis relied upon by the Commission when authorising the United Kingdom to dispatch beef and veal and derived products under the DBES.

25. The SSC emphasised that its analysis of the risk from BSE depended on the Commission and the Member States ensuring that proposed measures to eliminate or limit the risk were followed meticulously. It noted that the assurance from the United Kingdom DBES was very dependent on maintenance of the feed ban, compliance with the 30-month rule and clear evidence that the risk from maternal transmission was minimised. Given those conditions and bearing in mind the SSC's previous analyses of the risk to public health within the European Union, the SSC considered that the measures taken by the United Kingdom made any risk to human health from the United Kingdom DBES at least comparable to that in other Member States.

26. During the first two weeks of November, the Commission organised various meetings, in which the French and United Kingdom authorities took part, in an attempt to reach a solution that was consistent with Community law and satisfied all concerned parties.

27. Since the Commission found, however, that its efforts were slow to produce positive results, on 17 November 1999 it sent a letter of formal notice to the French Republic, allowing it a period of 15 days to submit its observations.

28. The Commission thus initiated the procedure under Article 226 EC. On 1 December 1999 the French authorities requested a one-week extension to enable them to obtain a fresh opinion from the AFSSA on the terms of a protocol of understanding which had been drawn up in the meantime, on 24 November 1999, following three technical meetings held on 5, 12 and 15 November between the French and United Kingdom authorities and the Commission.

29. That fresh opinion, delivered on 6 December 1999 and described by the

Commission itself as carefully shaded, stated that if the French authorities intended to lift the ban as requested by the Commission their decision would have to take into account:

'— the elements of risk, which are plausible but not currently quantifiable, linked to the absence of certainty, first, as to the distribution of BSE infectivity in the body of bovine animals over time and, secondly, as to all the modes of transmission of the infectious agent in animals;

— the fact that steps to strengthen controls and monitor the machinery, such as to ensure that the measures adopted are actually complied with, do not, however, have any direct and immediate impact on those elements of risk;

— the need to provide that the measures taken may be reversed in order to stop immediately any exposure of consumers to a risk which is confirmed subsequently.'

30. On 8 December 1999 the Prime Minister's press office issued a press release announcing that 'France is not currently able to lift the ban on British beef and veal'.

31. The press release stated that, in the light of the AFSSA's findings, that refusal was justified by the absence of sufficient guarantees as to the establishment and implementation of programmes of tests, which had to be improved and widened, and as to the adoption of Community legislation which would provide a basis for ensuring traceability and mandatory labelling in Europe of United Kingdom beef and veal and derived products.

32. It was not until the following day that the French authorities replied to the letter of formal notice, repeating the arguments put forward in the previous day's press release and concluding, in terms almost identical to those used in the press release, that 'driven by the sole concern of public health and consumer safety for the benefit of the whole of the European Union, the French Government wishes to continue actively, with the Commission and its partners, the search for a comprehensive solution on the basis of the matters established in the past weeks which must be supplemented and clarified...'.

33. Since the Commission took the view that it could not be satisfied with that reply, it sent a reasoned opinion to the French Republic on 14 December 1999 allowing it five working days to comply with its obligations flowing from Decisions 98/256 and 1999/514.

34. That reasoned opinion was replaced by a second one, dated 16 December 1999,

which also set a time-limit of five working days. The time-limit was subsequently extended at the request of the French authorities to 30 December.

35. The reply to the reasoned opinion was sent to the Commission on 29 December 1999. The French authorities noted in the reply the serious doubts which remained, according to the AFSSA, as regards the risks linked to United Kingdom meat covered by the DBES and which made an immediate lifting of the ban appear premature.

36. They also stated that the Commission had not taken account of the minority opinions expressed within the TSE/BSE ad hoc group, a failure which, in their eyes, revealed a breach of the precautionary principle, and pointed out that they had always contested the date for the resumption of exports set by the Commission.

37. In their view, the protocol of understanding drawn up on 24 November 1999 had become entirely irrelevant, having regard to the refusal of a majority of Member States to endorse the Commission's interpretation concerning traceability requirements set out in Annex II thereto and to the Commission's decision to propose deferring implementation of mandatory labelling of beef and veal.

38. After reiterating, finally, the importance attached by it to the carrying out of detection tests both in the United Kingdom and in the rest of the Community, the French Government turned from defence to attack, since it announced that it was bringing an action before the Court of Justice 'in order to ask the Court whether the decision by the Commission not to revise its decision despite the new information which the French Government had submitted to it was compatible with Community law (and in particular the precautionary principle)'.

39. In fact, on the same day, that is to say 29 December 1999, the French Republic brought an action for annulment, registered as Case C-514/99, against 'the decision by which the Commission is alleged to have refused to amend or repeal its 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'. The Court dismissed that action as manifestly inadmissible by order of 21 June 2000. [15] It held that there was no decision by the Commission and that the French Republic should have brought an action for failure to act, a step which it had not taken.

40. Since the Commission established that the French Republic had not complied with

15 — *France* v *Commission* [2000] ECR I-4705.

the reasoned opinion within the time-limit laid down, on 4 January 2000 it brought an action for failure to fulfil obligations, registered as Case C-1/00, claiming that the Court should:

'(1) declare that, by refusing to adopt the measures necessary in order to comply with Council Decision 98/256/EC of 16 March 1998 concerning emergency measures to protect against bovine spongiform encephalopathy, amending Decision 94/474/EC and repealing Decision 96/239/EC, as amended by Commission Decision 98/692/EC, in particular with Article 6 thereof and Annex III thereto, and with 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, in particular with Article 1 thereof, and, especially, by refusing to permit the marketing within its territory of products eligible under that scheme ("the DBES"), which are covered by Article 6 and Annex III referred to above, after 1 August 1999, the French Republic has infringed those two decisions, in particular the provisions referred to above, and the EC Treaty, in particular Articles 28 and 10;

(2) order the French Republic to pay the costs.'

41. The United Kingdom was granted leave to intervene in support of the Commission. The French Republic raised an objection that the action was inadmissible. That objection, which the Court has reserved for final judgment, should be considered first.

The objection of inadmissibility put forward by the French Republic

42. The French Government puts forward two pleas in support of its objection of inadmissibility, the first alleging defects in the pre-litigation procedure and the procedure before the Court, the second alleging infringement by the Commission of the principle of collegiality. The first plea divides into four complaints, which I will consider in turn.

The plea alleging procedural defects

43. In the French Government's submission, by sending the letter of formal notice before the AFSSA issued its second opinion, the Commission infringed the principle that the subject-matter of the dispute must be clearly defined and failed to have regard to the objective of the pre-litigation procedure, which is to give the Member State concerned the opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself. Those

criticisms do not appear to me to be well founded.

44. The subject-matter of the dispute was perfectly clear inasmuch as the French authorities could not sincerely have been unaware, on the date on which the letter of formal notice was sent to them, first, that the Commission was expecting them to adopt measures of national law necessary for the lifting of the ban as regards beef and veal which met the requirements of the DBES and, second, that the objections expressed by the AFSSA, which they had adopted, had not been considered justified by the Commission, in view of the opinion of the SSC. Nor can the French Government claim that it was caught unawares by the letter of formal notice. The chronological sequence of events which I have recounted above proves, quite to the contrary, that the respective positions of the protagonists in the dispute and the arguments which they were putting forward were fully known to all the parties concerned.

45. The French Government was perfectly free, if it considered it appropriate having regard to the discussions which had taken place during November 1999, to consult the AFSSA a second time before deciding whether or not it was going to comply with the requirements flowing from Decision 1999/514, but the Commission was just as free to decide that, having regard to the persistent refusal of the French Republic to comply with a decision which had been in effect since 1 August, the moment had come to carry out the first step in the procedure laid down by Article 226 EC.

46. In my view, there can be no question of allowing whichever Member State the possibility of delaying, as it pleases, the commencement of an action for failure to fulfil obligations by informing the Commission that its refusal to comply with its obligations is not final in nature and that, in the light of the outcome of consultations at national level, its position could evolve.

47. The French Government submits next that, in maintaining in the letter of formal notice and then in the reasoned opinion that the French Government had not set out legal arguments to show that it was not possible to apply Decision 1999/514, the Commission deliberately ignored the arguments put forward in the communications which had been addressed to it, enabling it to free itself from the obligation to prove the alleged infringement.

48. I must confess that I do not see how this complaint could affect the admissibility of the action.

49. It is true that the Commission did maintain that the French Government had failed to put forward legal arguments but, even if, in so doing, it was mistaken as to the nature of the arguments raised against it, wrongly regarding them as political, I do not see how that would render the pre-litigation procedure defective.

50. The question whether, notwithstanding the existence of a Commission decision requiring it to lift the ban, the French Republic was entitled not to do so appears to me to be precisely a substantive legal question, which is for the Court to decide once the action has been brought.

51. To claim, as the French Government does, that, because the Commission did not acknowledge the relevance of the arguments put forward in response to its letter of formal notice and reasoned opinion, or if you like, because the pre-litigation procedure came to resemble a dialogue of the deaf, the action is inadmissible appears to me to be founded on an approach to actions for failure to fulfil obligations under which it would not be permissible for the Commission to stick resolutely to its position during the pre-litigation stage despite the justifications put forward by the Member State concerned.

52. It is indeed because each party sticks to its position, for whatever reason, that this stage of seeking a 'friendly' settlement is followed by a contentious stage, during which both parties' positions are assessed by the Court in the light of the requirements of the rule of law.

53. If it becomes apparent that the Commission was mistaken, either as to the nature of the arguments raised against it by the Member State or as to their merits, it will be for the Court to penalise that mistake, with the consequence that the action could be dismissed, but that cannot affect the action's admissibility.

54. Still under the first plea, the French Republic then complains that, when sending both the letter of formal notice and the two successive reasoned opinions, the Commission 'adopted urgent time-limits which, in the present case, cannot be justified'.

55. According to the French Government, in order to set such time-limits reasons had to be given balancing the economic interests involved in lifting the ban and the risks to human health thereby created.

56. It is to be observed that Article 226 EC draws no distinction between a normal time-limit and one presupposing an urgent situation, having to be explained by specific reasoning.

57. In fact, the Commission is master of the time-limits which it sets, subject only to their not being unrealistic and rights of the defence not being undermined.

58. In the present instance, the time-limits were indeed very short, but not too short, in my view.

59. When the letter of formal notice was sent, the Commission had been endeavouring for weeks to persuade the French Republic to comply with Decision 1999/514 and finally lift the ban which should have been lifted from 1 August 1999. The French Government cannot therefore maintain that it could have been caught unawares, particularly as it had already prepared the draft ministerial order for lifting the ban, which had been considered by the AFSSA in September. It was also fully aware that the Commission attached great importance to that question and that it was determined to achieve the lifting of the ban, even if this meant having to bring an action for failure to fulfil obligations, should the French Government not soften its position.

60. In such a context, where all the parties concerned know precisely where they stand with regard to the positions of the other parties to the discussions and the situation appears blocked, it does not seem to me that the very short time-limits imposed on the French Republic for taking action if it wished to avoid the commencement of proceedings before the Court can be criticised.

61. Furthermore, when the French Government requested an extension of the time-limit for replying to the reasoned opinion, the Commission granted it, for the exact period sought, a fact which proves that, in setting short time-limits, the Commission, while needing the French Government to define its position clearly and definitively in order to be able to plan the continuation of the procedure, did not mean to corner that government.

62. As to the assertion that the setting of very short time-limits reveals a misuse of powers, the Commission seeking thereby to achieve the same result as through the initiation of proceedings for interim relief, whose outcome would, according to the French Government, have been open to doubt, I am of the view that, in the absence of any evidence, that assertion is pure supposition.

63. In any event, a pre-litigation procedure circumscribed by very tight time-limits is not in any way capable of producing the same effect as an application for interim relief.

64. An application for interim relief results in a judicial decision within a very short period, whereas the commencement of an action for a declaration of failure to fulfil obligations, given the incompressible periods connected with the exchange of pleadings and delivery of the Advocate General's Opinion, cannot lead to a judgment until many months later, irrespective of the duration of the pre-litigation procedure.

65. Finally, as regards the complaint alleging that the Commission did not display the same conscientiousness in inducing the Federal Republic of Germany to lift the ban, which it too had maintained beyond 1 August 1999, suffice it to state that the Commission has considerable discretion when carrying out the task conferred on it by Article 211 EC of ensuring that the Treaty and secondary legislation are applied, and that it is therefore not for the French Government to criticise the method adopted by the Commission to reach the outcome which it intended to achieve, namely the lifting of the ban by all the Member States.

66. Slightly mischievously, it could indeed be pointed out that it appears after the event that the approach followed with regard to the Federal Republic of Germany proved to be judicious, because that Member State has in fact lifted the ban whereas the French Republic persists in its refusal and that, if the French Government considered it unacceptable for the Commission to tolerate the German Government's maintenance of the ban, Article 227 EC offered the possibility of circumventing that inertia.

67. Since none of the four complaints seeking to establish that the pre-litigation procedure was carried out in a defective manner appears to me to be well founded, I must discount the first plea.

The plea alleging infringement of the principle of collegiality

68. I thus come to the second plea, alleging that the principle of collegiality was infringed.

69. In the French Government's submission, it was unlawful to bring the action on the basis of an authorisation given by the college to Commissioner Byrne and President Prodi on 22 December 1999 when the Commission was not yet acquainted with the reply of the French Republic to the reasoned opinion.

70. The French Government states that that reply contained at least two new matters, namely express reliance on the precautionary principle and the announcement that an action was being brought for annulment of the Commission's refusal to go back on its decision to lift the ban on British beef and veal, which, had they been brought to the attention of the college and discussed by it, could have led it to adopt a decision different from that taken on 22 December 1999.

71. The Commission rightly counters that criticism with the Court's case-law resulting

from the judgment in Case C-191/95 [16] and confirmed in Cases C-272/97 [17] and C-198/97. [18]

72. It follows from that case-law that, while the Commission's decision to bring an action for failure to fulfil obligations must be the subject of collective deliberation by the college, and while the information on which that decision is based must therefore be available to the members of the college, it is not, however, necessary for the college itself formally to decide on the wording of the act which gives effect to that decision and put it in final form.

73. Here, it appears to me difficult to take the view that on 22 December 1999 the college did not have full information on the case of the French refusal to lift the ban, enabling it to take its decision with full knowledge of the facts.

74. The college was not unaware that, from the French point of view, the refusal was justified by the existence of 'plausible but unquantifiable risks', to repeat the words of one of the AFSSA's reports, that is to say it was claimed to be authorised by the requirements of the precautionary principle.

75. It is true that the college was unaware that the French Republic would go as far as to take legal proceedings relating to the obligation to lift the ban, but it understood perfectly that the French Republic did not consider itself bound by Decision 1999/514, whose validity it denied.

76. The fact that this denial, which the college regarded as unjustified, took the form of legal proceedings was not such as to alter the data in the light of which the college, observing a procedure whose validity is demonstrated by the documents produced by the Commission, had granted authorisation to two of its members.

77. I therefore propose that the Court should also reject the second plea put forward in support of the objection of inadmissibility and that it should examine the substance of the action.

Substance of the case

78. In its application, the Commission's main submission is that the French Republic cannot unilaterally avoid applying decisions formulated in clear, precise and unconditional terms which, under Article 249 EC, are binding on it. However, it also concerns itself with rejecting the

16 — Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449.

17 — Case C-272/97 *Commission* v *Germany* [1999] ECR I-2175.

18 — Case C-198/97 *Commission* v *Germany* [1999] ECR I-3257.

justifications put forward by the French Government in its reply to the reasoned opinion. As regards the AFSSA's opinions, it contends, first, that 'a Member State cannot, by relying on the scientific opinion of a national body, substitute its own assessment of the risks for that carried out by the Commission in accordance with its powers' and, secondly, that the AFSSA's opinions are contradicted by those of the SSC.

79. Relying on the SSC's opinions, it maintains that it is incorrect to claim that the measures which it adopted are insufficient with regard to the protection of public health.

80. In its submission, the precautionary principle cannot be interpreted as obliging it to abandon the adoption of a decision when it is not approved unanimously by all the scientific bodies which have come to a view on it, because 'necessary scientific freedom and the complexity of specific situations necessarily mean that there may be minority scientific opinions on practically any question'.

81. In any event, inasmuch as the conditions laid down by Annex III to Decision 98/256, as amended by Decision 98/692, were materially fulfilled, it was required to set the date for the resumption of exports and could not hide behind considerations of expediency in order to escape that obligation.

82. The Commission contends, finally, that the French refusal also infringes Article 10 EC, since the French Republic is failing to cooperate in the achievement of the tasks of the European Union, and Article 28 EC, since the free movement of goods is being impeded and Article 30 EC cannot be relied on as 'the veterinary and health requirements applying to products covered by the DBES and to their dispatch outside the United Kingdom (like most of the veterinary field) are subject to Community harmonisation constituting a coherent and exhaustive system whose very purpose is to ensure that human and animal health are protected'.

83. In its defence, the French Government organises its arguments around three issues: traceability and labelling, the duty to cooperate in good faith and the free movement of goods.

84. The French Government notes that, on the Commission's own admission both in its application and in the 13th recital in the preamble to Decision 98/692, traceability and labelling constitute an essential ele-

ment of the DBES, inasmuch as they must make it possible to prevent the dispatch of all or part of an animal or the marketing of all or part of that animal, if it becomes apparent subsequently that the animal was ineligible. It seeks to raise in defence the Commission's own interpretation of Annex III to Decision 98/256, as amended by Decision 98/692, given in Annex II to the protocol of understanding drawn up on 24 November 1999. That document states as follows:

'The Commission declares that, in accordance with its obligations as regards traceability and recall, and following Decision 98/256/EC as amended by Decision 98/692/EC, *each Member State*, in order to guarantee the effectiveness of this measure based on the precautionary principle, shall take *binding measures* with a view to maintaining *maximum traceability* by ensuring that all meat and all products dispatched from the United Kingdom in accordance with Annex II and III of that Decision:

— are marked or labelled upon their arrival on its territory with a distinct mark which cannot be confused with the Community health mark;

— remain marked or labelled as above where the meat or products are cut, transformed or rewrapped on its territory.

Each Member State is invited to notify to the Commission and the other Member States the model of the distinct mark which has been chosen. In the light of the experience gained, the Commission will endeavour to clarify and complete if needed the existing Community legislation, for instance based on the system of mutual assistance and/or by adopting a decision based on Article 6(1)(f) of Directive 64/433/EEC and/or Article 17 of Directive 77/99/EEC and/or Article 7(5) of Directive 94/65.

Furthermore the Commission confirms that where traceability cannot be established, *a Member State is in a position to refuse*, in conformity with Community law and in particular, with Article 7 of Directive 89/662/EEC, *meat or products containing such meat* [19] which do not clearly comply with this obligation.

This declaration will be addressed to all the Member States.'

85. The French Government finds confirmation of the fundamental role of traceability as an instrument of risk management in the judgment in *United Kingdom* v *Commission*, cited above, where the Court held that the extension of the ban on the export of United Kingdom cattle to animals aged under six months appeared justified,

19 — Emphasis added here and elsewhere in this quotation.

even having regard to the principle of proportionality, because 'the scientific uncertainty concerning the manner in which BSE [was] transmitted... [was] coupled with the lack of a system for tagging animals and controlling their movements, [which] meant that there [could] be no certainty that the mother of a calf [was] completely free from BSE or, even if she [was], that the calf itself [was] completely unaffected by the disease'. [20]

86. It also points out that Council Directive 92/59/EEC of 29 June 1992 on general product safety [21] makes traceability one of the preferred techniques of preventive action.

87. The French Government contrasts this consensus on the usefulness and necessity of traceability with the deficiencies which it considers it has identified in relation to the legislation governing the movement of bovine products covered by the DBES that are exported from the United Kingdom.

88. It states that, when, in November 1999, it became apparent within the Standing Veterinary Committee that a majority of Member States did not see the benefit of having recourse, for United Kingdom bovine products covered by the ECHS and DBES, to a distinct mark or label accompanying the product at every stage of its marketing, the Commission purely and simply abandoned the idea of requiring application of the provisions of Decision 98/256, as amended by Decision 98/692, concerning traceability, at least as it had interpreted them in Annex II to the protocol of understanding.

89. Finally, the French Government finds confirmation of that abandonment in the report of the inspection mission to the United Kingdom with regard to implementation of Decision 98/256, as amended by Decision 98/692, carried out from 20 to 24 March 2000 by the Food and Veterinary Office, noting that the section of the report on inspections covers only traceability from the farm to final packaging in the cutting plant, leaving outside the scope of its investigation traceability after the cutting plant, in particular at the time of dispatch or later.

90. That report also appears to the French Government to be revealing for another reason, inasmuch as it draws attention to the fact that, in the absence of full implementation in the United Kingdom of Commission Regulation (EC) No 494/98 of 27 February 1998 laying down detailed rules for the implementation of Council Regulation (EC) No 820/97 as regards the application of minimum administrative

20 — See paragraph 102.
21 — OJ 1992 L 228, p. 24.

sanctions in the framework of the system for the identification and registration of bovine animals, [22] animals which are correctly registered, but from holdings in which more than 20% of the animals are not, can enter the DBES.

91. This leads the French Government to contest the ability of the Commission to complain that it has not implemented a decision which, contrary to Article 249 EC, is not in fact binding in its entirety, since the whole of the traceability/labelling aspect of Decision 98/256, as amended by Decision 98/692, has been abandoned.

92. It is surprised, furthermore, that the Commission could have adopted Decision 1999/514, when Article 6(5) of Decision 98/256, as amended by Decision 98/692, required it to verify 'the application of all the provisions of this Decision' before setting the date for the lifting of the ban.

93. The French Government submits that, even if it was only after adopting Decision 1999/514 that the Commission discovered that the conditions for lifting the ban were not all met, it was for the Commission to exercise its power under Article 6(6) of Decision 98/256, as amended by Decision 98/692, [23] to take appropriate measures, a step which it took care to avoid, preferring to bring an action for failure to fulfil obligations against the French Republic.

94. As regards Article 10 EC, the French Government contends that it is the Commission which has failed to cooperate in good faith, stating that the French Government 'requested and sustained the debate concerning application of the rules on traceability at the meetings of the Standing Veterinary Committee on 23 and 24 November 1999 and 6 December 1999', while the Commission purely and simply abandoned the idea of requiring application of the provisions of Decision 98/256, as amended by Decision 98/692, concerning traceability and labelling and did not, in interpreting and applying Decision 98/256, as amended by Decision 98/692, take sufficient account of public health considerations despite being required to do so by Article 152 EC and the Court's case-law, in particular the judgment in *United Kingdom* v *Commission*, cited above.

95. As regards Article 28 EC, the French Government takes the view that, since the risk of animals and humans being infected with BSE is a serious public-health problem, it is entitled, under Article 30 EC, to endeavour to ensure a high level of protec-

22 — OJ 1998 L 60, p. 78.

23 — Article 6(5) provides that 'the Commission shall review the provisions of this Article at least every three months and shall take appropriate measures in accordance with the procedure laid down in Article 17 of Directive 89/662/EEC'.

tion of human and animal health, until the epidemiological data, developments in scientific knowledge and the content of monitoring reports provide evidence capable of amending or supplementing the existing preventive mechanism.

96. Given the doubts which the detection of BSE in a cow born after 1 August 1996 was able to create with regard to the assurance that the DBES is supposed to provide, the French Government considers that its attitude is fully justified by considerations of public health as referred to in Article 30 EC. It also states that it has had regard to the principle of proportionality, since an order of 11 October 1999[24] has authorised the transit of DBES products across French territory to other Member States which have lifted the ban despite the traceability and labelling problems.

97. How sound are those various arguments? It should be stated first of all that, while the Commission expected the French Republic to take up the arguments which it had put forward in its reply to the reasoned opinion and, consequently, sought to counter those arguments when drafting its application, the French Republic, in its defence, unveiled a different defence strategy.

98. If the aim was to surprise the Commission, it succeeded, since, in its reply, the Commission considered it appropriate to 'note that, apart from most of the arguments in its defence being new compared with the pre-litigation stage, the French Government no longer mentions the opinion of the AFSSA around which its arguments at that stage and, in particular, its reply to the reasoned opinion were centred'.

99. In view of the Court's judgment in Case C-414/97,[25] referred to by the French Government in its rejoinder, proceeding in that way may, however, be allowed by the freedom to exercise rights of defence. Faced with this situation, in which the arguments of one party do not truly respond to those of the other, one might be tempted to examine the arguments set out by the Commission in its application only in so far as they are contested by the French Republic and to examine directly the arguments of the French Government in the light of the arguments set out in the reply.

100. However, I will not proceed in that way because it has appeared to me that a thorough examination of the arguments set out in the application could prove very useful for subsequently distinguishing those of the various points of disagreement between the parties where there are con-

24 — JORF of 12 October 1999, p. 15520.

25 — Case C-414/97 *Commission* v *Spain* [1999] ECR I-5585.

flicting legal analyses and those where the disagreement lies in a different assessment of a factual situation or a different reading of documents purporting to give an account of such a situation. Clarification of that kind is absolutely essential in a case like the present one where a host of arguments of very uneven value, under cover of contributing to the debate, have come and clouded the real issues.

101. The Commission is undoubtedly right when it states that, under Article 249 EC, a decision is binding upon those to whom it is addressed. However, the correctness of that statement far from concludes the discussion as to whether the French Republic has infringed its obligations under the Treaty, because the mere finding that a Member State has not complied with secondary legislation imposing obligations on it does not lead, in itself, to the conclusion that obligations imposed by the Treaty have been infringed.

102. It is also necessary to have ascertained first that the Member State was not able to rely on another provision of Community law of a higher, or at least equivalent, order or on a general principle of law permitting it, in so far as a certain number of conditions are met, not to apply, even if only temporarily or subject to complying with certain procedural requirements, the decision addressed to it.

103. On the other hand, a Member State to which a decision is addressed cannot be permitted, when the Commission has brought an action against it for failure to fulfil obligations, to plead before the Court, as a ground of defence, that the decision is unlawful if it has not brought an action for annulment, observing the procedural requirements set out in Article 230 EC.

104. That is stated to be impossible by settled case-law which I consider entirely well founded. It appears to me that, where a Member State is notified of a decision, with which it is obliged to comply by Article 249 EC, it can be required to examine that decision with a view to forming an opinion on its legality and, if that examination reveals a problem as to its legality, to bring an action for annulment within the time-limit laid down by Article 230 EC.

105. For that reason, in my view, the French Government could not properly base its defence on a plea that Decision 98/256, as amended by Decision 98/692, and Decision 1999/514 were unlawful. If it had objections to put forward against the DBES as such, for example because that scheme did not appear to it to be capable of reducing the risk of infection to a level such that public-health requirements were genuinely protected, it was for it to bring an

action for annulment against Decision 98/692, which had amended Decision 98/256 specifically in order to allow exports to be resumed under the DBES.

106. I am all the more surprised that it did not do so because the Commission's proposal had received a negative opinion when it was considered by the Standing Veterinary Committee and had been unable to gather the majority necessary for its adoption when it was considered by the Council. Thus the DBES, to say the least, had not been a self-evident step when the Commission proposed it and one or other of the Member States which opposed its adoption by the Council could have been expected to react when the Commission, exercising its powers under Directive 89/662 in such a case, decided to impose it none the less, relying on the fact that the Council had not decided against the proposed measures by a simple majority. [26]

107. The documents in the case do not reveal why the French Government did not react at the time. The fact that it did not initiate proceedings is perhaps explained by the fact that Decision 98/692 did not have the effect of allowing British exports to be resumed immediately, since it left the Commission to check that all the conditions which combine to form the DBES were satisfied and, once that had been established, to set the date for the resumption of exports.

108. In other words, when Decision 98/692 was adopted, the lifting of the ban could be seen merely as a medium or long term prospect, which it did not appear expedient to rule out by initiating proceedings immediately. Be that as it may, it is unnecessary to express a view on the reasons, whatever they may have been, for which the French Government did not believe that it had to bring proceedings for the annulment of Decision 98/692.

109. The only finding that can be made is that the French Government did not contest, at the proper time, the establishment of the DBES. Nor did it bring an action for the annulment of Decision 1999/514 within the time-limit laid down by Article 230 EC. That inaction, both when the DBES was adopted as a means of lifting the ban and when the date was set for the resumption of exports under that scheme, made it extremely problematical to bring an action for annulment subsequently, that is to say after the time-limit had expired, short of obtaining an extension of time, for which Article 230 EC makes no provision. To that end, the French Republic would have had to argue convincingly, first, that it was only after the expiry of the time-limits for bringing proceedings that the French Government came into possession of the infor-

26 — See the final recital in the preamble to Decision 98/692 and Article 18 of Directive 89/662.

mation leading to the conviction that Decisions 98/692 and 1999/514 were unlawful, and second, that, for reasons entirely extraneous to the French Government, it could not have been aware of that information earlier.

110. That appears very doubtful in respect of Decision 98/692. None of the matters which the French Government mentioned in the various exchanges of notes with the Commission and in the reply to the reasoned opinion seems necessarily to result in an assessment of the residual risks linked to the DBES which is new compared with the assessment that could be made when Decision 98/692 was adopted.

111. It is true that in the final quarter of 1999 it became apparent that it would soon be possible to have recourse to BSE detection tests, whose use may have appeared far off in 1998. However, that prospect did not doom the DBES. It merely opened up the prospect of making it even safer.

112. As regards Decision 1999/514, the arguments put forward by the French Government appear more convincing. Given that Decision 98/256, as amended by Decision 98/692, provided that the Commission would set the date for the commencement of exports under the DBES 'after having verified the application of all the provisions of this Decision', it seems difficult to criticise the French Government for having taken for granted, when the Commission adopted Decision 1999/514, that those checks had well and truly been carried out and had enabled it to be established that the conditions were fulfilled and, consequently, for not having brought an action for annulment, when it did not have hard evidence enabling it to sustain the arguments needed when commencing such an action.

113. However, supposing that the Commission was not in fact entitled, having regard to the terms in which Decision 98/256, as amended by Decision 98/692, is couched, to adopt Decision 1999/514 in July 1999, a question to which I will return later in my reasoning, and that the French Government could have become aware of that only after the time-limit for bring an action expired, its expiry did not deprive the French Government of all means of action as regards judicial review.

114. While the approach of seeking to obtain an extension of time from the Court could appear extremely risky in the absence of support from any judicial precedent, it was open to the French Government, without coming up against the slightest procedural problem, to trigger off a review of Decision 1999/514, and doubtless of Decision 98/256, as amended by Decision 98/692, by means of an action for failure to act. It needed only to call on the

Commission to amend that decision, in view of the new information which it claimed to have, and, in the event of an express refusal, to bring an action for the annulment of the refusal or, in the absence of a reaction from the Commission, to bring an action under Article 232 EC.

115. It could have effectively put forward in support of either of those actions all the objections engendered, in its view, by the DBES as regards Decision 98/692 and by the date of 1 August as regards Decision 1999/514. If those objections genuinely affected the validity of one of the decisions, it is difficult to imagine that the Court would have refused to regard the Commission's refusal to repeal or amend them as a failure to act.

116. The Commission cannot take refuge behind the fact that an action for annulment was not brought against a decision within the time-limit laid down by Article 230 EC in order to seek to confer a form of permanence on the decision when requested to amend or repeal it.

117. However, the French Government did not follow that path, instead commencing an action for annulment which the Court held inadmissible. As the Court states in its order in *France* v *Commission*, cited above, the Commission 'had not previously received an express request for the amendment of Decision 1999/514, but had merely received some allegedly new evidence which might alter the legal and factual context taken into consideration.

If the applicant considered that the information in question gave rise to an obligation for the Commission to adopt a fresh decision, it was for the applicant to have recourse to the procedure for failure to act for which provision is made by the Treaty' (paragraphs 47 and 48).

118. It is to be noted, finally, that the action for failure to act could have been coupled with an application for interim relief seeking, in one form or another, to paralyse the application of Decision 1999/514, on the ground that the importance of the public-health interests at stake made it unacceptable for the decision to be applied pending delivery of the judgment deciding whether there was an obligation on the Commission to amend it.

119. Having reached this point in the reasoning, it is clear that Decision 98/256, as amended by Decision 98/692, and Decision 1999/514 were endowed, as against the French Republic, with the authority provided for by Article 249 EC and that, contrary to the submissions in its rejoinder,

the French Government could not, in the present action for failure to fulfil obligations, justify its refusal to apply them by disputing their validity.

120. There is a second point in the arguments put forward by the Commission in its application upon which I must side with it. It is the point concerning the authority of the SSC's opinions. I fully agree with the Commission that, where a decision by it may be justified by the authority of the SSC's opinion, a Member State cannot take refuge behind the opinion issued by a national scientific body in order to oppose it, at least where, as was the case here, the national body's objections subsequent to the SSC's opinion relied upon by the Commission when taking its decision have been submitted to the SSC for consideration and held unfounded by it.

121. While it can be accepted that an aspect of a tricky case may possibly have eluded the SSC initially, equally it cannot be accepted that, once the SSC has been informed of that matter, examined it and found it to lack pertinence, the Member State in question may challenge the scientific authority attaching to the SSC's opinions, unless it proves a malfunction at the level of that body, a situation which, it is to be hoped, will never materialise, so dramatic would the effect be as regards the legitimacy of the action of the Community bodies.

122. That authority of the SSC's opinions obviously does not extend beyond the matters which have in fact been covered by its work. It seems to me, however, that the Commission does not restrict itself to countering the AFSSA's views on the possibility that animals eligible under the DBES have none the less contracted BSE with the SSC's rather reassuring analysis concerning the materialisation of such a possibility, which it is certainly entitled to do because that divergence is in the epidemiological, that is to say scientific, domain. It also claims to rely on the SSC's opinions in asserting that the DBES and the conditions for its implementation provide all the guarantees which can be demanded with regard to the requirement to protect public health, which appears questionable to me.

123. In the opinion which it issued after examining the AFSSA's opinion of 30 September 1999, the SSC, while standing by its previous scientific analysis, displayed the utmost caution with regard to the guarantees actually provided by the implementation of the DBES.

124. The opinion records in particular that 'the SSC agreed that the existence of an effective and safe system for the identification and tracing particularly of meat products is of crucial importance. However,

this is a control or risk management and not a scientific issue'.[27] Further on, the opinion states: 'The SSC emphasises that its analyses of the risk from BSE depend on the Commission and Member States ensuring that proposed measures to exclude or limit the risk are followed meticulously'.[28] It cannot be stated more clearly that nothing may be derived from the SSC's opinions as regards the traceability and labelling measures actually implemented, while the SSC's favourable opinion on the DBES is based on the assumption that those measures are in fact implemented with the utmost vigour.

125. This leads me to examine another statement by the Commission in its application, namely that, in order not to infringe Decision 98/256, as amended by Decision 98/692, it 'was required to set the date for the resumption of the dispatch of DBES products inasmuch as [dès lors que] the conditions laid down by Article 6 of, and Annex III to, Decision 98/256/EC, as amended by Decision 98/692/EC, were materially fulfilled'.

126. That statement is somewhat ambiguous. Either it seeks to describe a legal position, in the sense that it is intended merely to recall that, once the Commission establishes that the conditions laid down by Decision 98/256, as amended by Decision 98/692, are in fact all fulfilled, it cannot defer setting the date for the resumption of exports, in which case the statement is perfectly correct. Or it seeks to describe a factual situation, in the sense that it is to be read as meaning that the Commission had, before adopting Decision 1999/514, in fact established that all the necessary conditions were fulfilled, in which case the statement is not only formally challenged by the French Government as to its correctness but also gives rise to several questions when compared with the Commission's interpretative declaration forming Annex II to the document entitled 'protocol of understanding' referred to above.

127. In that declaration, dated 24 November 1999, the Commission, while presenting the specific marking and labelling of DBES products as resulting from the obligations regarding traceability and recall laid down by Decision 98/256, as amended by Decision 98/692, states that each Member State is invited to notify to it and the other Member States the model of the distinctive mark which has been chosen[29] and that, in the light of the experience gained, the Commission 'will endeavour to clarify and complete if needed the existing Community legislation'.

27 — Paragraph 3.5 of the opinion.

28 — Paragraph 4.3 of the opinion.

29 — All meat and all products must remain marked or labelled in that way after they are cut, transformed or rewrapped in any Member State; see point 84 above.

128. There is, in my view, no need to read between the lines to understand, on reading that declaration, that in November 1999 the Commission had not yet received notification from the Member States of the choices made with regard to the specific marking and that it in no way ruled out the possibility that supplementary legislative measures might be necessary in order to ensure complete traceability and appropriate labelling.

129. Furthermore, the protocol of understanding states that 'the existing Community legislation already provides for traceability but not in a very transparent or rapid manner'. In my view, the value of traceability which does not provide for transparency may be questioned.

130. Those few observations show that, if the French Government had put itself in a position where it could contest the legality of Decision 1999/514, it would probably have had solid arguments for contending that the Commission was not entitled, having regard to the requirements laid down by Decision 98/256, as amended by Decision 98/692, to take that decision on the date upon which it was adopted. However, I have established above that, since the French Government did not follow the appropriate procedural path, it is not entitled to advance arguments founded on the invalidity of the decisions with which it has not complied.

131. A quite different reaction is called for, on the other hand, by the assertion, contained in the Commission's application, that the French Republic cannot invoke Article 30 EC in order to justify the impediment to the free movement of goods, contrary to Article 28 EC, which resulted from its refusal to comply with Decision 98/256, as amended by Decision 98/692, and Decision 1999/514. The Commission asserts in this connection that, 'since, moreover, the veterinary and health requirements applying to products covered by the DBES and to their dispatch outside the United Kingdom (like most of the veterinary field) are subject to Community harmonisation constituting a coherent and exhaustive system whose very purpose is to ensure that human and animal health are protected, the ban cannot, according to the settled case-law of the Court of Justice, be justified by France by reference to Article 30 of the EC Treaty'.

132. It is difficult to see how that assertion is reconcilable with the acknowledgment, in Annex II to the protocol of understanding, that it could be necessary to clarify and complete the existing Community legislation. It is only possible, if words have a meaning, to complete that which is incomplete.

133. However, apart from the doubts to which comparison of those texts, both from the Commission, may give rise concerning the existence of complete harmonisation which, in accordance with the Court's settled case-law, would indeed preclude a

Member State from having recourse to Article 30 EC, it appears to me that the question must be raised of the level from which it is necessary to assess the degree of harmonisation actually achieved.

134. Is it necessary to look from the level of the conditions under which beef and veal from the United Kingdom may enter the markets of the other Member States, as the Commission claims, or from that of the fight against BSE?

135. The latter approach may be permitted by the fact that the DBES is, as such, only a derogation from the prohibition on the export of beef and veal from the United Kingdom laid down, as a protective measure, by Decision 96/239, which itself constitutes only one of the numerous measures adopted by the Community institutions to ward off the danger of BSE which had appeared in the Community cattle population.

136. There was thus a series of specific measures in the case of BSE and it is by no means certain that, placed together, they achieved full harmonisation within the meaning of the Court's case-law.

137. It may even be doubted that that was the case on noting that, in Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies, [30] which may claim to achieve full harmonisation even though it expressly leaves certain issues outside its field of application, the DBES, which the regulation retains without substantial amendment, is placed in Chapter C of Annex VIII and thus constitutes only a small fragment of the legislation as a whole.

138. Having reached this point in my examination of the very many complex factors in the light of which the merits of the action brought by the Commission against the French Republic must be assessed, it appears to me necessary to take stock of the reflections which have been inspired by the arguments set out in the application.

139. I have established that the French Republic did not comply with decisions which, when it could still do so, it neither challenged as to their validity nor sought to have repealed or amended so as to be able to contest the legality of the Commission's refusal so to do.

140. I have established, however, that while the principle itself of having recourse

30 — OJ 2001 L 147, p. 1.

to the DBES as a means of partially lifting the ban could, whatever the reservations of the AFSSA, claim justification from the authority of the opinions of the SSC, the Commission's statement that it was required to adopt Decision 1999/514 on the date upon which it did so may leave room for certain doubts.

141. Finally and above all, I have established that it is difficult to argue that there was obviously full Community harmonisation, precluding absolutely recourse to Article 30 EC to justify the French Republic's refusal to authorise imports of products covered by the DBES.

142. The arguments put forward by the French Government in its defence add little to that critical reading of the Commission's application.

143. It admittedly endeavours to rebut the Commission's allegation of breach of the duty to cooperate, but I do not believe that it is necessary to dwell on that debate inasmuch as an action for failure to fulfil obligations is under consideration, that is to say an action limited to the question of whether or not a Member State could, without infringing Community law, not give effect to a Commission decision and in which, consequently, allegations of a lack of sincere cooperation do not seem to me really to have a place and are, in any event, without practical consequence.

144. The French Government also puts forward, in that pleading, arguments casting doubt on the very substance of the DBES but, in addition to being founded on facts subsequent to the date upon which the action was brought, those arguments are of interest only in so far as recourse to Article 30 EC is permissible in the present case, a question which, at this stage in my reflections, remains open.

145. On the other hand, it is possible to disregard from the outset the French Government's argument that the Commission has not proved the existence of the breach of obligations since it is unable to refer to a single case where United Kingdom meat presented as covered by the DBES has been turned back at the French border.

146. After informing the whole world that it would not authorise the import of United Kingdom beef and veal covered by the DBES, the French Government is in absolutely no position to claim that the fact that its officers have not recorded any breach of that prohibition prevents the Commission from claiming that it has failed to fulfil its obligations by refusing to lift the ban partially, as Decision 98/256, as amended by Decision 98/692, and Decision 1999/514 required it to do.

147. I will therefore pass immediately to consideration of the arguments exchanged in the reply and rejoinder, where the lines of argument could be refined.

148. In its reply, the Commission, after pleading the inadmissibility of the arguments of the French Government seeking to call into question the validity of Decision 98/256, as amended by Decision 98/692, and Decision 1999/514 which it is alleged to have refused to apply, a submission which, as set out above, I consider to be correct, also contests, in a subsidiary submission, the ability of the French Government to rely on facts and evidence subsequent to the adoption of those decisions.

149. I can but agree with the Commission so far as concerns reliance on such facts and evidence in order to find fault with the legality of the decisions at issue. On the other hand, I cannot see what there is to prevent the French Government, where its reasoning is not in terms of legality, from justifying its conduct by recourse to documents subsequent to the adoption of the decisions or even to the commencement of the action, but casting light on the actual position at the time when the Commission thought that it had to adopt the decision which partially lifted the ban, or confirming, in its view, the validity of its refusal to apply that decision.

150. The Commission also disputes that the French Republic is entitled to justify its refusal by bringing protective clauses into play. In its submission, in order for recourse to be had to a protective clause, the procedure laid down by the provision establishing the possibility of applying such a clause must be followed, and it cannot therefore be accepted that a Member State, after acting entirely unilaterally, without indicating that it intended to rely on the possibility offered by a given provision and without having sent to the Commission the notifications prescribed by that provision, may, when its conduct is criticised, plead that its action fell within the framework of recourse to a protective measure.

151. In other words, dressing up after the event is impermissible. The Commission refers, in support of its objection, to Case C-112/97 *Commission* v *Italy*. [31]

152. The French Government contends in its rejoinder that that judgment is irrelevant inasmuch as it was not until the stage of the pre-litigation procedure that the Italian Republic pleaded the protective clause.

153. In its submission, the French Republic did not act in such a manner, since it was before the commencement of any pre-

31 — [1999] ECR I-1821.

litigation procedure and, *a fortiori*, any proceedings before the Court, that it 'officially sent to the Commission, through its representative to the Communities, the text of the opinion of the committee on transmissible sub-acute spongiform encephalopathies set out in the AFSSA's opinion of 30 September 1999, which seemed to it to constitute an item of fresh scientific evidence of such a kind as to result in amendment of Decisions 98/692 and 1999/514'.

154. The French Government is surprised that the Commission refuses to regard that communication as tantamount to notification of the intention to adopt a protective measure when the Court's judgment in *Eurostock* [32] shows that, after the United Kingdom notified a protective measure forming part of the fight against BSE to the Commission under an irrelevant directive, the Commission informed it that the notification did not meet the requirements of the relevant directive, enabling it to send a fresh notification in accordance with those requirements.

155. In the French Government's view, the Commission has failed to comply with its obligation to cooperate with it in good faith.

156. It seems to me, however, that the action taken by the French Government in the present case and that of the United Kingdom Government in *Eurostock* are very different, since the former merely sent a copy of an AFSSA opinion which, in its view, had to be taken into account, without indicating unambiguously that it proposed to adopt a protective measure, while the latter indicated such an intention, but in reliance upon an irrelevant directive. That difference in the actions of the two Member States explains fully, to my mind, the different reactions of the Commission in the two instances.

157. The Commission is thus right in raising the judgment in *Commission* v *Italy*, cited above, against the French Government. It may be noted in passing that the lack of due notification also precludes the French Government from bringing its refusal to lift the ban for DBES products within the framework of Council Directive 92/59, as it seeks to do in its defence and rejoinder.

158. Either the DBES amounts to full harmonisation, in which case Directive 92/59 is inapplicable, or it does not, in which case it was indeed open to the French Government to seek to act under Article 6 of that directive, but under Article 7 thereof it was mandatory for it to give notification, at least pursuant to Directive 89/662, since Directive 92/59 does not require specific notification where that is also prescribed under specific Community legislation.

32 — Case C-477/98 *Eurostock* [2000] ECR I-10695.

159. Nor can I agree with the French Government when it asserts that the present case displays striking similarities with *Eurostock*, cited above, in that both involve a Member State adopting protective measures because there is as yet no applicable Community measure.

160. While that was indeed the case in *Eurostock*, it cannot be maintained that Decision 98/256, as amended by Decision 98/692, and Decision 1999/514 were not applicable in the autumn of 1999. As I have pointed out above, it is possible to question whether the conditions laid down by Decision 98/256, as amended by Decision 98/692, were met when Decision 1999/514 was adopted, but that is another question and does not in any way allow it to be claimed that Decision 1999/514, which, like any Community measure, benefited from the presumption of validity, was not applicable.

161. Even if the French Government had intended, by sending a copy of the AFSSA's opinion, to bring itself within the legal framework of the adoption of a protective measure under the fourth subparagraph of Article 9(1) of Directive 89/662 and had expressly informed the Commission of that fact, I do not think that it would have been entitled to classify its refusal to lift the ban as a protective measure permitted by that directive.

162. It is open to the Member States to adopt protective measures only pending the adoption of measures by the Community authorities. That therefore presupposes that Community measures have not yet been adopted.

163. In the present case, however, Decisions 98/256 and 1999/514 were nothing other than Community measures, partially lifting the ban and modifying Decision 96/239 which, precisely pursuant to Article 9(4) of Directive 89/662, had introduced a complete ban on beef and veal from the United Kingdom.

164. The French Government's position thus consists in maintaining that a Member State may rely on the fourth subparagraph of Article 9(1) of Directive 89/662 to adopt a national protective measure strengthening a Community measure adopted as a protective measure pursuant to Article 9(4) of that directive. That is not acceptable in my view. If a Member State is not satisfied with a Community protective measure, it must bring its objection before the Court for decision. It is not for it to act unilaterally.

165. On the other hand, the problem presents itself in a different manner when

the Member State relies on Article 30 EC. The Commission returns to this question in its reply but the arguments which it puts forward are not persuasive. It simply states that the Community legislation applicable to the DBES is exhaustive in nature, 'given that it sets out in detail and very strictly, in Article 6 of Decision 98/256/EC, as amended by Decision 98/692, and in Annex III thereto, *inter alia* the conditions under which animals are eligible for the DBES, the rules applicable in slaughterhouses, cutting plants and cold-stores and on transportation, the tissues to be removed and the applicable rules on controls and tracing'.

166. However, as we have seen, if the assessment is conducted from the standpoint of the establishment of a comprehensive regime for combating BSE, only Regulation No 999/2001 can be regarded as achieving that. Even from the standpoint of the DBES regime, it would be found that, while Annex III to Decision 98/256, as amended by Decision 98/692, admittedly establishes the principle of traceability and labelling, it does not lay down the rules which Member States other than the United Kingdom should adopt for that purpose, a situation which it is difficult to regard as amounting to Community harmonisation. The Commission none the less puts forward the contrary view, since it relies on the judgment in *Hedley Lomas*, [33] in which the Court held that, where there is Community harmonisation, a Member State cannot invoke Article 36 of the EC Treaty (now, after amendment, Article 30 EC) on the ground that the rules which brought about that harmonisation are not observed in another Member State.

167. In that case, the Court stated that a Member State cannot prohibit, pursuant to Article 36 of the EC Treaty, the dispatch of livestock to a Member State suspected by it of not ensuring that a directive relating to animal slaughter methods is applied correctly. However, the context of the present case is entirely different. A Member State is being asked to stop prohibiting imports of beef and veal originating from another Member State seriously affected by BSE even though it is not in dispute that, despite the fact that exports of beef and veal from that Member State are conditional upon there being an effective traceability and labelling system, the detailed rules for which Community legislation does not however define, a majority of the Member States refuse to put in place national legislation ensuring such traceability and labelling.

168. Even apart from the fact that it is difficult to put animal welfare and the protection of human health on the same plane, can it seriously be considered that Community provisions which do not lay down the rules to be observed by the Member States other than the United Kingdom, whose existence and observance are essential in order for human health not to be jeopardised, achieve full harmonisation, preventing a Member State which establishes that nothing has been done to that end from restricting the free movement of goods on public-health grounds?

169. I think not, and therefore take the view that, as regards beef and veal from the

33 — Case C-5/94 *Hedley Lomas* [1996] ECR I-2553.

United Kingdom covered by the DBES, the Community harmonisation was not such as to deny a Member State the possibility of taking national measures to protect public health in compliance with Article 30 EC.

170. *A fortiori*, that could be the only conclusion if the assessment is conducted from the standpoint of the overall fight against BSE, and not from that of DBES products, because in 1999 the Community had dealt with the problem only by means of a series of protective measures which it is difficult to regard as resulting from a comprehensive approach.

171. It therefore remains to determine whether the French refusal to lift the ban complies with the conditions laid down by the Court's case-law regarding recourse to Article 30 EC. The fact that the refusal is intended to protect public health is not open to debate. It is necessary, however, to establish the precise nature of the risk to public health which existed in the present case.

172. It will be recalled that the SSC considered that products complying with the DBES were no more dangerous than beef and veal produced in the other Member States. I will therefore not enter into the discussion between the Commission and the French Republic concerning the defective implementation in the United Kingdom of Regulation No 494/98 and the conclusions to be drawn from the appearance in the United Kingdom of a BARB (born after reinforced feed ban) case in the spring of 2000. Is it to be concluded from the fact that DBES meat was not particularly dangerous that the French Republic dealt with beef and veal from the United Kingdom in a discriminatory manner, which would prevent it from relying on Article 30 EC?

173. It is to be remembered that the SSC's conclusion was based on faultless traceability and labelling. In circumstances where that condition was not met, United Kingdom beef and veal could actually be regarded as presenting particular risks.

174. Notwithstanding the Commission's assertions in its reply, the French position thus appears consistent as regards meat covered by the ECHS. While the French Government accepted a partial lifting of the ban in respect of those products, although traceability and labelling were no better ensured than in the case of DBES products if the Commission is to be believed, that is because the certified herds scheme offered many more guarantees as to the state of health of the animals from which the meat came.

175. While the allegation of discrimination can therefore be dismissed, in order for the

French refusal to be capable of being founded on Article 30 EC the measure must also be appropriate and proportionate. As regards appropriateness, the French Government's position is sounder on indirect imports than on direct imports.

176. The French Government has acknowledged that the United Kingdom ensured appropriate traceability and labelling in its own territory. The protocol of understanding of November 1999, referred to above, states with regard to traceability of products in the United Kingdom that 'the clarifications provided by the British delegation satisfied the questions raised by France' and, with regard to on-the-spot controls in the United Kingdom, that 'the clarifications provided satisfied the questions raised by France'.

177. If, therefore, DBES products do not pose a traceability and labelling problem at the time of their export, it is not evident, as the Commission rightly observes in its reply, why their import into France should be prohibited because of a lack of appropriate traceability and labelling.

178. It was entirely up to the French Government to enact national rules requiring such traceability and labelling in France, from the border up until the stage of sale to the ultimate consumer.

179. Of course, if the French Government's criticisms directed at traceability and labelling were merely a pretext for challenging the export of DBES products, which in its view were unsafe, so long as rapid detection tests were unavailable, the import ban would appear to be the only appropriate measure.

180. However, as I have argued above, if the French Government was in fact challenging the very principle of exports of United Kingdom beef and veal under the DBES, it had to attack that problem head-on, that is to say either by bringing an action for the annulment of Decision 98/692, amending Decision 98/256, or by calling on the Commission to revise that scheme.

181. Since it did not do so, it could, in my view, adopt national measures only in order to remedy the deficiencies found in the application of the DBES at the level of traceability and labelling.

182. The fact that a Member State may legitimately exercise the powers accorded

to it by Article 30 EC does not mean that it is entitled to call the existing Community measures into question. It may only make good the deficiencies which they still contain.

183. A Member State which has recourse to Article 30 EC in a context where there are already Community measures designed to ward off the danger against which it seeks to act does not have the same scope for action as it does where no Community measure exists in the field in question.

184. Therefore, the French Republic went beyond the limits set by Article 30 EC in prohibiting direct imports of DBES products, a transgression which quite obviously cannot be remedied by the fact that it authorised the transit of those products.

185. As regards indirect imports, the French refusal to lift the ban appears, by contrast, to be an appropriate measure.

186. If the effect of the products in question passing through the market of another Member State is to introduce a break in the traceability process which is ensured until the products leave the United Kingdom, the French authorities are quite clearly unable to adopt national measures restoring traceability and enabling a consignment of products which prove to be contaminated to be recalled, and the import ban then appears to be a perfectly appropriate measure, given the fundamental importance of traceability under the DBES.

187. It is true that that ban could be criticised with regard to observance of the principle of proportionality, inasmuch as it is possible for DBES products to pass in transit through another Member State but to remain traceable and correctly labelled none the less.

188. However, I accept that, in the absence of precise Community regulations relating to the method for ensuring traceability and to the labelling particulars to be included, so far as concerns DBES products, the French Government could resort to a general ban not drawing a distinction, which might be difficult to apply in practice given the complexity of the distribution chains, between the Member States of origin.

189. In my view, therefore, the Commission's action is only partially founded, and each party should thus bear its own costs.

Conclusion

190. I consequently propose that the Court should:

— declare that, by prohibiting the direct import from the United Kingdom of products eligible under the date-based export scheme, the French Republic has failed to fulfil its obligations under Council Decision 98/256/EC of 16 March 1998 concerning emergency measures to protect against bovine spongiform encephalopathy, amending Decision 94/474/EC and repealing Decision 96/239/EC, as amended by Commission Decision 98/692/EC of 25 November 1998, in particular under Article 6 thereof and Annex III thereto, and under 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, in particular under Article 1 thereof;

— dismiss the action as to the remainder;

— order each party to bear its own costs.