OPINION OF ADVOCATE GENERAL TESAURO

delivered on 30 September 1997 *

1. This Opinion relates to two distinct cases: a reference for a preliminary ruling from the High Court of Justice, Queen's Bench Division (Case C-157/96) and an action brought by the United Kingdom against the Commission (Case C-180/96).

In both cases, doubts have been cast on the validity of Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy [1] (hereinafter 'the Decision'), which was notified to all the Member States on the same date. By that Decision, the Commission prohibited the United Kingdom from exporting to other Member States or third countries live bovine animals, meat of bovine animals and certain products obtained or derived therefrom.

Facts and legal background to the Decision

2. The first point to bear in mind is that bovine spongiform encephalopathy (hereinafter 'BSE'), better known as 'mad cow disease', forms part of a family of degenerative brain diseases characterized by the microscopic appearance of sponge-like formations in brain tissue and by the presence in that tissue, and sometimes in other tissues, of an abnormal form of a protein — prion protein. These diseases affect various animal species, in particular sheep (scrapie), cattle, domestic cats and farmed mink, but they also affect humans (for instance, kuru, in New Guinea, or Creutzfeldt-Jacob disease, which mainly afflicts older people).

The exact nature of the infectious agents causing transmissible BSE is still unknown. According to the information currently available, BSE would appear to have its origin in the use, as cattle feed, of improperly treated sheep or bovine meat and bone-meal containing the infectious agent. The question whether the disease is transmitted by other pathways is under discussion. At present, vertical transmissibility, through the mother, or horizontal transmissibility, in particular by mere contact, has been established only in relation to certain types of transmissible spongiform encephalopathies, such as scrapie. Moreover, experiments have enabled the transmissibility of some spongiform encephalopathies from one animal species to another in certain specific cases to be established.

* Original language: Italian.

1 — OJ 1996 L 78, p. 47.

3. The possibility that the agent responsible for the bovine disease is transmissible to humans was considered only following identification of the first case of BSE in the United Kingdom, back in 1986. A number of preventive measures were therefore introduced by that country. In particular, the Ruminant Feed Ban, contained in the Bovine Spongiform Encephalopathy Order 1988, [2] has since July 1988 prohibited the use of ruminant protein, suspected of being the source of the contamination, in ruminant feed. Subsequent amendments of those rules have made it obligatory to notify any suspected case and to slaughter any suspect cattle; moreover, they have imposed restrictions on the movement of such cattle and provided for controls on the destruction of their carcasses and an obligation to disinfect slaughter houses. In addition, the Bovine Offal (Prohibition) Regulations 1989 [3] have since November 1989 prohibited the sale or use in foods intended for human consumption of certain specified bovine offal (brains, spinal cord, spleen, thymus, tonsils and intestines) which may contain the infecting agent. That prohibition was extended to the head of bovine animals, except the tongue, by the Specified Bovine Material Order 1996. [4]

4. The Commission also adopted a number of preventive measures against BSE, including, in particular, Commission Decision 94/474/EC of 27 July 1994 concerning certain protection measures relating to bovine spongiform encephalopathy and repealing Decisions 89/469/EEC and 90/200/EEC. [5] By that decision the Commission imposed the following measures: a ban on the exportation from the United Kingdom to the other Member States of live cattle aged more than six months and of live cattle which are the offspring of cows in which BSE is suspected or confirmed; a ban on the exportation from the United Kingdom to the other Member States of fresh meat derived from bovine animals unless it comes from animals aged less than two and a half years at slaughter or from animals which, while in the United Kingdom, have resided only on holdings on which no case of BSE has been confirmed during the previous six years or, finally, unless it consists of freshly boned bovine meat in the form of muscle from which the adherent tissues, including obvious nervous and lymphatic tissues, have been removed; implementation of a proper identification system (freeze band or tattoo) and a certification system guaranteeing conformity of animals with the abovementioned requirements.

Furthermore, by Decision 92/290/EEC of 14 May 1992 concerning certain protection measures relating to bovine embryos in respect of bovine spongiform encephalopathy in the United Kingdom, [6] the Commission had already prohibited the exportation from the United Kingdom to other Member States of bovine embryos coming from donors born before 1988 or descended from females in which BSE is suspected.

2 — SI 1988 No 1039, amended by SI 1991 No 2246 and SI 1996 No 962.

3 — SI 1989 No 2061.

4 — SI 1996, No 963.

5 — OJ 1994 L 194, p. 96. That decision was most recently amended by Commission Decision 95/287/EC of 18 July 1995 (OJ 1995 L 181, p. 40).

6 — OJ 1992 L 152, p. 37.

5. New information relating to BSE and the possibility of transmission to humans was disclosed on 20 March 1996 in a statement from the Spongiform Encephalopathy Advisory Committee (hereinafter 'the SEAC'), an independent scientific body which advises the United Kingdom Government. In particular, the SEAC stated that 10 cases of a strain of Creutzfeldt-Jacob disease had been identified by the CJD Surveillance Unit in Edinburgh in persons aged under 42 exhibiting atypical clinical and neurological signs. According to the SEAC, 'although there is no direct evidence of a link, on current data and in the absence of any credible alternative, the most likely explanation at present is that these cases are linked to exposure to BSE before the introduction of the specific bovine offal ban in 1989. This is cause for great concern.' The SEAC accordingly emphasized, whilst pointing out that it was too early to predict the number of cases likely to arise in the future, that it was imperative that the measures in force for protecting public health should be properly applied and it recommended constant supervision to ensure the complete removal of spinal cord tissue. It further recommended that the carcasses of cattle aged more than 30 months should be deboned in approved establishments monitored by the Meat Hygiene Service and that trimmings should be classified as specific bovine offal, together with a prohibition on the use of mammalian meat and bone-meal in feed for all farm animals. It concluded that if those recommendations were carried out, the risk from eating beef was likely to be extremely small.

The SEAC confirmed those initial recommendations in a second statement issued on 24 March 1996, in which it stated that a precise measure of the risk was impossible because of a number of 'interacting uncertainties, including: the magnitude of the species barrier between cattle and man; lack of data on levels of infectivity in a range of important cattle tissues, which are below the level of detectability by current assays; the uneven distribution of infectivity in any tissue; the time course for the appearance of infectivity over the duration of the incubation period; whether there is a dose below which there is no risk of infection.' It repeated the recommendation concerning the prohibition on the use of mammalian meat and bone-meal in feed and on its use as fertilizer on land to which ruminants had access.

6. Following the statement issued on the same date by the SEAC, the United Kingdom informed the Commission that additional measures had been adopted providing, first, for the deboning of bovine carcasses aged more than 30 months in approved establishments and a ban on the sale or use of trimmings for human consumption, and second, a ban on the use of mammalian meat and bone-meal in feed for all reared animals.

Practically at the same time, however, a number of Member States and non-member countries decided to ban imports of live cattle or beef and veal from the United

Kingdom. Some non-member countries, moreover, banned all imports from the European Union.

7. On receiving that information, the Commission, for its part, consulted the Scientific Veterinary Committee, which concluded that at that time there was no evidence that BSE was transmissible to man. However, recalling that the possibility of such transmissibility could not be ruled out, the Committee recognized the need to review the adequacy of the current Community measures in the light of the new information adding, in particular, that, having regard to the importance of the disease, any measure taken by the Community to address the incidence of disease and risk of transmission was to be welcomed. Attached to that opinion is a statement by Dr Ring, one of the members of the Committee, to the effect that 'we cannot be confident indeed that muscle meat from cattle does not constitute a danger for transmission of BSE infection'. [7]

Those were the circumstances in which the Commission adopted the Decision which is the subject-matter of the two sets of proceedings now before the Court.

7 — Opinion of the Scientific Veterinary Committee of 22 March 1996.

The Decision

8. Article 1 of the Decision provides as follows:

'Pending an overall examination of the situation and Community provisions adopted to protect against bovine spongiform encephalopathy notwithstanding, the United Kingdom shall not export from its territory to the other Member States or third countries:

— live bovine animals, their semen and embryos,

— meat of bovine animals slaughtered in the United Kingdom,

— products obtained from bovine animals slaughtered in the United Kingdom which are liable to enter the animal feed or human food chain, and materials destined for use in medicinal products, cosmetics or pharmaceutical products,

— mammalian derived meat and bone-meal.'

The decision also requires the United Kingdom to send the Commission every two weeks a report on the application of the protective measures taken against BSE (Article 3) and invites the United Kingdom to present further proposals to control BSE within its territory (Article 4).

9. The Decision is based on the Treaty, 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 [8] and on 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, [9] as subsequently amended and supplemented.

Both of those directives were adopted on the basis of Article 43 of the Treaty and 'with a view to the completion of the internal market'. Directive 89/662/EEC regulates in general terms the veterinary checks that may be carried out at frontiers in intra-Community trade: the aim is to ensure that such checks are carried out at the place of dispatch only, which also involves harmonization of the basic requirements relating to the safeguarding of public health and animal health. One of the requirements which it imposes on Member States is to notify the Commission of any diseases likely to constitute a serious hazard to animals or to human health, and of the measures taken (Article 9(1)). In those circumstances, the Commission is required to adopt any measures which may be necessary, after the situation has been reviewed in the Standing Veterinary Committee at the earliest opportunity, in accordance with the procedure laid down in Article 17. The Commission is also required to monitor the situation and, by the same procedure under Article 17, to amend or repeal the decisions taken, depending on how the situation develops (Article 9(4)). The Article 17 procedure provides for consultation of the Standing Veterinary Committee, which delivers its opinion by the majority laid down in Article 148(2) of the Treaty in the case of decisions adopted by the Council. The Commission is to adopt the measures envisaged if they are in accordance with the opinion of the Committee, otherwise it submits them to the Council which adopts them by qualified majority or decides against them by a simple majority. If the Council has taken no action within 15 days, the measures are adopted by the Commission.

Directive 90/425/EEC concerns, in particular, trade in certain live animals and animal products and lays down in Article 10, so far as is relevant here, the same rules as those set out in Directive 89/662/EEC.

8 — OJ 1989 L 395, p. 13.
9 — OJ 1990 L 224, p. 29.

10. The preamble to the Decision refers to the new scientific information published, the announcement of additional measures taken by the United Kingdom Government, the measures banning imports adopted by various Member States and the opinion of the Scientific Veterinary Committee. More specifically, the fifth, sixth and seventh recitals read as follows:

'Whereas, under current circumstances, a definitive stance on the transmissibility of BSE to humans is not possible; whereas a risk of transmission cannot be excluded; whereas the resulting uncertainty has created serious concern among consumers; whereas under the circumstances and as an emergency measure, the transport of all bovine animals and all beef and veal or derived products from the United Kingdom to the other Member States should be temporarily banned; whereas the same prohibitions should also apply to exports to non-member countries so as to prevent deflections of trade;

whereas the Commission will carry out in the coming weeks a Community inspection in the United Kingdom to evaluate the application of the measures taken; whereas the significance of the new information and the measures to be taken must be subjected to detailed scientific study;

whereas this Decision must therefore be reviewed once all the above elements have been examined.'

11. The Decision therefore comes in the wake of several measures adopted in recent years to combat BSE, not only by the United Kingdom but also by the Commission (listed in the first recital), in particular with a view to safeguarding animal and human health in the Community. The Decision was adopted 'pending an overall examination of the situation', in keeping with the obligation, laid down by the aforesaid directives, to monitor the situation constantly and adjust the measures depending on how the situation develops.

That obligation led the Commission to adopt Decision 96/362/EC of 11 June 1996 [10] amending and relaxing the preventive measures imposed by the Decision, always 'pending an overall examination of the situation'. The Commission reached that conclusion after consulting the Scientific Veterinary Committee, the Scientific Committee on Cosmetology, the Scientific Committee for Food and the Committee for Proprietary Medicinal Products.

10 — OJ 1996 L 139, p. 17.

12. On the basis of the additional information provided, [11] Decision 96/362/EC lifted the export ban with regard to bovine semen, which the Scientific Veterinary Committee had considered in its opinion of 26 April 1996 presented 'no risk of transmission of BSE'. As regards other products, such as gelatin, di-calcium phosphate, amino acids and peptides, tallow, tallow products and products derived from tallow, the decision made the lifting of the ban subject to application of certain manufacturing methods and implementation of official controls by the United Kingdom (Article 1(2)). Furthermore, the United Kingdom was banned from exporting meat or meat products or meat preparations either for human consumption or for domestic carnivores, obtained from bovine animals which were not slaughtered in the United Kingdom, unless they come from establishments in the United Kingdom under strict veterinary control (Article 1(a)). Finally, that decision requires the Commission to carry out Community inspections, in particular as regards implementation of those official controls and thus, after consulting the Member States in the framework of the Standing Veterinary Committee, to set the date on which dispatch of the products in question may recommence (Article 1(c)).

Essentially, the scope of the Decision has been diminished, in that sperm and, subject to certain conditions, gelatin, di-calcium phosphate, amino acids and peptides, tallow, tallow products and products derived from tallow have been exempted from the export ban.

11 — For a detailed account of the views sought before steps were taken to amend the Decision, and of the overall development of the situation, see paragraphs 23 to 31 of the order of 12 July 1996 in Case C-180/96 R *United Kingdom* v *Commission* [1996] ECR I-3903.

The two sets of proceedings

Case C-157/96

13. The applicants in the main proceedings are the National Farmers' Union, a trade association which represents the majority of farmers in England and Wales, and nine undertakings engaged in the raising for sale, feeding, lairage, transport and export of livestock, bovine semen and embryos and the processing and export of beef and beef-related products. They have applied to the High Court of Justice, Queen's Bench Division, for judicial review of various national measures adopted by the Ministry of Agriculture, Fisheries and Food and by the Commissioners of Customs and Excise pursuant to Article 1 of the Decision. In addition, 11 meat exporters and an association of sheep exporters have intervened in support of the applicants in the proceedings before the national court.

The applicants' argument is that the contested national measures are vitiated on account of the invalidity of the Decision. [12] To that end, they claim first of all that the Commission lacked competence to adopt the Decision since Directives 89/662 and 90/425 authorized it only to adopt measures that were intended to guarantee protection against a serious hazard to the health of humans and/or animals and, at the same time, were necessary for that purpose. Nor do those directives authorize the Commission to impose a ban on exports from a Member State to third countries. Secondly, the Decision is vitiated by a misuse of powers inasmuch as, in contrast to the aims pursued by the directives on which it is based, its main purpose is to reassure consumers and not to ensure protection against a serious health risk. Finally, the Decision is contrary to the principle of proportionality since it is neither necessary nor sufficient to allay concern among consumers or to safeguard human health, always assuming that health protection was in fact the objective pursued, which they dispute.

14. Taking the view that the only point at issue in the national proceedings is the legality, in the light of Community law, of the prohibition referred to in Article 1 of the Decision, the High Court decided that, in order to resolve the dispute pending before it, it was necessary to submit a reference to the Court of Justice for a preliminary ruling on the following question:

'Is Article 1 of Commission Decision 96/239/EC of 27 March 1996 invalid in whole or in part, in particular because the Commission lacked the power or else misused the power to adopt the Commission Decision or because it infringes the principle of proportionality?'

The national court is therefore asking this Court whether Article 1 of the Decision is invalid on account of lack of competence and/or misuse of power by the Commission, or for breach of the principle of proportionality.

Case C-180/96

15. The Decision is also the subject of a direct action brought by the United Kingdom under Article 173 of the Treaty. [13] In its action the United Kingdom seeks the

12 — It is worth noting that the National Farmers' Union and certain other undertakings operating in the beef products sector also challenged the Decision by instituting proceedings under Article 173 of the Treaty before the Court of First Instance (T-76/96), seeking suspension of the operation of that Decision pursuant to Article 185 of the Treaty. That application was dismissed by the President of the Court of First Instance by order of 13 July 1996 in Case T-76/96 R *The National Farmers' Union and Others* v *Commission* [1996] ECR II-815.

13 — In the same case the United Kingdom sought suspension of the operation of the Decision pursuant to Article 185 of the Treaty and/or the adoption of interim measures under Article 186 of the Treaty. That application was dismissed by order of 12 July 1996 (cited in footnote 11).

annulment of the Decision or, alternatively, annulment of Article 1 of the Decision, in so far as it applies to live bovine animals permitted to be exported by Decision 94/474; the semen and embryos of live bovine animals; meat of bovine animals less than 30 months old slaughtered in the United Kingdom or meat from bovine animals certified to come from herds that have not experienced any case of BSE and have not been exposed to any actual or potential source of contaminated feed; products obtained from bovine animals slaughtered in the United Kingdom which are liable to enter the animal feed or human food chains and materials destined for use in medicinal products, cosmetics or pharmaceutical products; gelatin and tallow; and exports to third countries (save to the extent that there is a real risk of deflection of trade, where appropriate).

The United Kingdom has also challenged, in the same action, the various statements by the Commission of its position following the adoption of the Decision, inasmuch as they did not diminish the scope of the latter, contrary to the wishes of the United Kingdom. Essentially, the United Kingdom also seeks the annulment of those 'acts' which confirmed the export ban imposed by the Decision. [14]

16. Starting from the premiss that the Decision and the other contested acts, far from being justified on grounds of the protection of health, were adopted in order to dispel or at least allay concern among consumers and thereby protect this sector of the market — and were thus based on economic grounds — the United Kingdom claims in the first place that their adoption was not within the scope of the Commission's powers or its margin of discretion. On that point, moreover, containment, having regard to the other measures already adopted in the United Kingdom and in the Community to deal with BSE, is in fact counterproductive, constituting an unlawful impediment to trade as a result of a misuse of powers. Second, the Decision does not state the reasons on which it is based. Third, it is in breach of the principle of proportionality. Fourth, it gives rise to discrimination, contrary to Articles 6 and 40(3) of the EC Treaty, between producers and consumers in the United Kingdom and between producers and consumers in other Member States and is not justified by any of the objectives referred to in Article 39(1) of the Treaty. Fifth, the third indent of Article 1 of the Decision is invalid inasmuch as it is contrary to the principle of legal certainty, fails to state the reasons for its adoption and covers products that fall outside the scope of the Commission's powers. Finally, the United Kingdom claims that Directives 89/662 and 90/425 should be considered unlawful if construed as permitting an extension of the export ban to the products in question, inasmuch as they are not mentioned in Annex II to the EC Treaty and are not therefore covered by the directives concerned.

14 — More specifically, the United Kingdom Government has referred to a statement made by the Member of the Commission responsible for agriculture and to the proposal for the amendment of the Decision, which had not yet been adopted at the time when proceedings were instituted. The United Kingdom Government has pointed out, however, in its reply, that it had no interest in the annulment of the statements of position which led to the adoption of Decision 96/362.

The Commission, for its part, disputes the validity of the United Kingdom's allegations and contends that the Court should dismiss the application in its entirety and order the United Kingdom to pay the costs.

17. In the light of the foregoing, it is abundantly clear that the pleas relied on by the United Kingdom also encompass the grounds of invalidity referred to by the High Court in the question submitted by it for a preliminary ruling in Case C-157/96. Since, moreover, the arguments raised before the Court relating to the defects relied upon in both cases are substantially the same, I consider it appropriate to focus on Case C-180/96 (*United Kingdom* v *Commission*) and then use that as a basis on which to answer the question submitted by the national court in Case C-157/96 (*National Farmers' Union and Others*).

Substance

Competence of the Commission

18. As stated earlier, in this plea the United Kingdom (as well as the applicant undertakings in Case C-157/96) claims that the adoption of the Decision does not fall within the scope of the powers or within the margin of discretion of the Commission. More specifically, it argues that the directives which constitute the legal basis of the Decision do not authorize the adoption of measures, such as those imposed by the Decision, aimed at reassuring consumers, but only measures aimed at safeguarding human and/or animal health. Far from promoting the completion of the internal market, the Decision therefore amounts to an unjustified impediment to trade. Furthermore, precisely because it was adopted in order to restore confidence among consumers in the beef sector and not to protect their health, the Decision is the result of a misuse of powers. Finally, in the view of the United Kingdom Government, there is no power under the directives in question to adopt measures imposing a ban on exports to third countries.

In its rejoinder to those arguments, the Commission contends that: (a) the directives on which the Decision is based allow it to adopt measures for the protection of health in a case such as this; (b) the objective of the Decision is the protection of health and, therefore, as such, it does not constitute an unjustified impediment to trade; (c) since the Decision was not adopted on grounds other than protection against a serious hazard to health, it is not vitiated in any way by a misuse of powers; (d) the extension of the export ban to third countries as well was essential in order to ensure containment of the affected area, so as to guarantee the total eradication of the disease and, at the same time, reduce any possible risk of fraud or deflection of trade.

19. To begin with, let me say that the plea in question is based essentially on the allegation

that the aim of the Decision was not the protection of health but, as expressly stated in the fifth recital in the preamble thereto, to dispel serious concern among consumers and, therefore, to restore consumer confidence in the beef sector. Hence the Decision was adopted to prevent the collapse of the beef market in the other Member States, which is to say for entirely economic reasons. The Commission is accordingly alleged to have exceeded the limits of its powers, not because Directives 90/425 and 89/662 do not constitute the proper legal basis for the adoption of health protection measures, at any rate in the context of intra-Community trade, but because in this case the conditions for the adoption of measures of that kind are not satisfied.

That being so, I consider it necessary to establish first of all whether the objective pursued by the Decision is in fact the protection of health or, instead, whether it is aimed at reassuring consumers. The next stage is to ascertain whether the information available to the Commission was such as to justify the adoption of the Decision and, finally, whether the directives in question constitute a proper legal basis *also* for the ban on exports to third countries.

20. Since, therefore, it is undisputed — and cannot in any event be disputed — that the Commission is competent on the basis of Directives 90/425 and 89/662 to adopt measures aimed at dealing with outbreaks of diseases or events likely to constitute a serious hazard to animals and/or to human health, let me say at once that the Decision must be regarded as being consistent with the objectives pursued by the two directives that constitute its legal basis. Those directives require each Member State to notify the Commission and the other Member States of any diseases, zoonoses or other cause likely to constitute a hazard to the health of persons and/or animals and empower the Commission to adopt 'the necessary measures for the animals ... and, if the situation so requires, for the products derived from those animals'. [15] The Commission therefore enjoys a broad discretion with regard to the adoption of measures considered necessary for the protection of health, but to regard it merely as a means for the completion of the internal market would be an excessively narrow approach. The protection of health is not only a fundamental requirement in connection with the rules on freedom of movement and in relation to the aims pursued by the common agricultural policy, [16] but also constitutes a priority objective which the Treaty itself endows with an autonomous, ultimately higher degree of validity. [17]

15 — See Article 10(4) of Directive 90/425 and Article 9(4) of Directive 89/662. On that point, see also point 9, above.

16 — In that regard, the Court has had occasion to state that 'efforts to achieve objectives of the common agricultural policy, in particular under common organizations of the markets, cannot disregard requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals, requirements which the Community institutions must take into account in exercising their powers' (Case 131/86 *United Kingdom* v *Council* [1988] ECR 905, paragraph 17).

17 — It is worth noting that, according to Article 129(1) of the Treaty, 'the Community shall contribute towards ensuring a high level of human health protection by encouraging cooperation between Member States and, if necessary, lending support to their action' (first subparagraph) and that 'health protection requirements shall form a constituent part of the Community's other policies' (third subparagraph).

21. That said, the fifth recital in the preamble to the Decision clearly and unequivocally states that 'under current circumstances, a definitive stance on the transmissibility of BSE to humans is not possible' and that 'a risk of transmission cannot be excluded'. As the Court has already stated in its order dismissing the United Kingdom's application for the adoption of interim measures, it would not be right to isolate those statements 'and refer only to the phrase relating to concern among consumers'; [18] instead, the text at issue must be appraised in its entirety. Such an appraisal makes it abundantly clear that the objective of the Decision, as stated in its preamble viewed as a whole, is in fact the prevention of risk to human and animal health and the attendant concern.

Nor it seems to me is it possible to claim, as the United Kingdom Government has done, that the existence of BSE, which has been known about for years, does not constitute a new development, with the further consequence that the Decision is not justified at all and that, in particular, the conditions which Directives 90/425 and 89/662 lay down for the Commission to act are not satisfied. On that point, suffice it to note that in order for the Commission to be able to intervene, the directives in question do not require the disease in question to have broken out for the first time, but simply require it to be a disease capable of constituting a serious hazard to health. Clearly, the spread of a particular disease or a change in the scientific information concerning it constitute new factors which entitle the Community to take action.

22. Against that background, and without there being any need to embark on scientific assessments as to the gravity of BSE and its transmissibility to man in the form of Creutzfeldt-Jacob disease, I would point out that there is a real risk to human health which, moreover, in the proceedings now before the Court, no one has been able to rule out. Indeed, it was the United Kingdom Government itself which disclosed the first data relating to the probable connection between BSE and certain cases of Creutzfeldt-Jacob disease. [19] Furthermore, the Decision merely tightened — precisely on account of the new information which came to light — measures (which had not been challenged in any way) previously adopted by the Commission and by the United Kingdom itself; at the same time it harmonized the scope for the Community as a whole of the measures which certain Member States had adopted unilaterally following the latest developments in this area.

In my view, that may (and should) be sufficient to conclude that the Commission has not committed any misuse of power in adopting the Decision and that the latter falls within the scope of the powers conferred on

18 — Order of 12 July 1996 (cited in footnote 11), paragraph 58.

19 — See, in particular, the SEAC report of 20 March 1996.

that institution by the aforesaid directives. Indeed, in view of the extent to which BSE has spread amongst cattle and of the likelihood of its transmission to humans, it must follow that the aim of the Decision is to ensure protection of health against a serious risk to animals and/or humans, an objective that the Commission was entitled to pursue by means of the protective measures deemed necessary and in accordance with the procedures laid down by the relevant provisions of the directives on which that objective is based. The United Kingdom Government, however, disputes the competence of the Commission not on the ground that there is no serious risk connected with that disease but on the ground that the risk is not new and that the Commission has already adopted (appropriate) preventive measures in the past to deal with it. On closer scrutiny, however, that argument relates not to the competence of the Commission to adopt measures such as the Decision now under consideration but, more to the point, to the proportionality of the measures adopted. I shall therefore consider that argument in the context of the alleged breach of the principle of proportionality.

23. Finally, I consider that the Decision could indeed cover exports to third countries as well. Starting from the premiss that the United Kingdom's argument, to the effect that the measure is based on economic grounds alone, should also be rejected in that regard, and for the same reasons as those referred to earlier, I would point out in the first place that Directives 90/425 and 89/662 do not preclude the Commission, at least not expressly, from being empowered to ban exports of certain animals and/or products to third countries as well. Nor, in my view, could such a restriction be elicited from the fact that the directives in question refer, even in their title, to veterinary checks 'applicable in intra-Community trade'. While the directives may have been adopted with a view to the completion of the internal market, it is also true that the powers of the Commission are linked, so far as is relevant here, only to the need for the measures adopted in order to ensure the protection of health in a single market. [20]

Furthermore, to recognize that the directives in question confer on the Commission the power to close off the territory affected by a particular disease also in relation to non-member countries may in certain cases constitute the only effective method of preventing its spread and, at the same time, achieving its eradication. Essentially, it seems to me that a Commission decision can indeed provide, on the basis of the directives in question, for the containment of a particular geographical area or, as in this case, of the territory of an entire Member State, where this proves necessary in order to prevent the ban on exports to other Member States from being thwarted by 'transit' through one or more non-member countries, and thus to

20 — See the order of the President of the Court of First Instance of 13 July 1996 (cited in footnote 12), paragraph 77.

ensure the effectiveness of the ban and of the requirements relating to the protection of health in a single market.

24. Nor, proceeding along the same lines, do I attach any significance to the fact — even if relevant for the purposes of the Commission's competence and not, as I am inclined to think, for the purposes of examining the proportionality of the measures adopted — that the Member States of the Community may import meat only from 45 non-member countries and subject to the strictest controls. The controls on imports from the United Kingdom are equally strict and yet, according to the Commission, they were not sufficient — at the time of adoption and in view of the information received on the risk of transmissibility to man [21] — to ensure adequate protection against risks to human and animal health, in contrast to the view taken on other occasions in the past. Moreover, events subsequent to the adoption of the Decision have merely confirmed that, notwithstanding the total embargo, the controls imposed have proved to be inadequate and capable of being circumvented by exports both to other Member States and to non-member countries.

In particular, it should be emphasized here, apart from the risk of fraud singled out by the Commission in its pleadings and then regrettably borne out by the facts, the possibility cannot be ruled out that meat-based products prepared in non-member countries which do not export to the Community may enter the territory of the Community even after a considerable length of time. Effective control of the disease in question cannot be divorced from 'containment' of the infected geographical area and therefore from a total ban on exports. That is required, or at any rate permitted, by the need to give effect to the relevant provisions of the directives and to the measures adopted on that basis.

25. In view of the fact that the measures in force at the time of the adoption of the Decision had proved inadequate or, in any event, had not been properly implemented, and that, as matters stand, the transmissibility of BSE and thus the possibility that it may constitute a serious hazard to health cannot be ruled out, it must follow that the Commission remained within the scope of the powers conferred on it by the two directives serving as a basis for the Decision. The first plea in law raised by the United Kingdom must therefore be rejected.

Failure to state reasons

26. The United Kingdom submits that if the Decision was purportedly adopted for the

21 — See the Commission's observations on the application for the adoption of interim measures (Case C-180/96 R, cited in footnote 11), paragraph 68 et seq.

protection of human or animal health, then it fails to give proper reasons. The Commission omitted, in breach of Article 190 of the Treaty, to set out the reasons why it considered that the measures previously adopted were inadequate.

On that point, the Commission's rejoinder is that the fifth recital in the preamble to the Decision constitutes a clear and adequate statement of reasons.

27. Let me begin by recalling that, as the Court has consistently held, the extent of the duty to state reasons, laid down by Article 190 of the Treaty, depends on the nature of the act in question and on the context in which it was adopted. [22] In particular, 'it must disclose in a clear and unequivocal fashion the reasoning followed by the Community institution which adopted the measure in question in such a way as to make the persons concerned aware of the justification for the measure and enable the Court to exercise its power of review'. [23] This shows, should the need arise, that failure to state reasons, which is a formal defect, must be distinguished from any allegations as to the cogency of the statement of reasons. [24]

Suffice it to note here that the fifth recital in the preamble to the Decision is abundantly clear in stating that its adoption was necessary — under the circumstances and subject to constant verification — since a definitive stance on the transmissibility of BSE to humans is not possible and the existence of that risk cannot be excluded, and because the resulting uncertainty has created serious concern among consumers. The objective of the Decision is therefore the prevention of risk to the health of humans and animals and the attendant concern. Furthermore, the Decision makes it quite clear that the SEAC report of 20 March 1996 disclosed new information on BSE and that the United Kingdom itself considered it necessary to take additional measures in the light of that report. [25] It follows that the information on which the Commission relied is clearly set out so as to enable those concerned to challenge its substance and the Court to exercise its review of legality, with the result that the statement of reasons for the Decision is sufficient.

Breach of the principle of proportionality

28. The United Kingdom Government also alleges that the principle of proportionality has been infringed inasmuch as the Commission adopted a measure, namely a total embargo in relation to non-member countries as well, that was not necessary for the achievement of the aim pursued, which —

22 — See, for example, Case 13/72 *Netherlands* v *Commission* [1973] ECR 27 and Case 819/79 *Germany* v *Commission* [1981] ECR 21.

23 — Case C-205/94 *Binder* [1996] ECR I-2871, paragraph 25.

24 — See the Opinion of Judge Vesterdorf, designated as Advocate General in Joined Cases T-1/89 to T-4/89 and T-6/89 to T-15/89 (*Polypropylene*), delivered on 10 July 1991 ([1991] ECR II-869, in particular p. II-908).

25 — See the second and third recitals in the preamble to the Decision.

even if lawful — could have been attained by measures less liable to restrict trade. On that point, the Government submits that 'the disproportionality and unlawfulness of the contested decision are particularly obvious in relation to exports to third countries, the meat of animals from non-BSE herds, bovine animals born after 1 May 1996, semen, embryos, tallow and gelatin'. In the case of live animals, beef and derived products exempted from the export ban imposed by Decision 94/474, as amended by Decision 95/287, it is abundantly clear that, as the United Kingdom has expressly stated, the Decision is not justified by the appearance of a new risk connected to BSE, with the result that the previous national and Community measures, in so far as they were adequate and appropriate, were sufficient to ensure the protection of health.

I have had occasion to point out that this argument is contradicted by the factual circumstances which gave rise to the Decision and, in particular, by the information set out in the SEAC's report of 20 March 1996, which induced the United Kingdom itself to take additional measures. Furthermore, since that argument is based on the assumption that the Decision is inappropriate for the attainment of aims other than that of allaying concern among consumers, a concern which is purportedly without foundation, it calls into question, albeit from a different angle, the problem of scientific uncertainty in this area.

29. Given that, in the absence of irrefutable scientific evidence, the Court lacks any basis on which to assess the adequacy or otherwise of the measure at the time when it was decided upon, I would emphasize first of all that the Commission has a sufficiently wide measure of discretion in exercising the powers conferred on it by the basic directives and thus in determining itself, with the assistance of the technical bodies expressly designated which, in this case, were in fact consulted, the adequacy or otherwise of the measures to be adopted. [26] However, as the Court reaffirmed recently in relation to veterinary inspections imposed in the interests of health protection by a directive on intra-Community trade in fresh meat, 'the Community institutions must, when exercising their powers, take account of the requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals' and that 'by virtue of that principle, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution intends to pursue'. [27]

Regard being had to those general considerations, therefore, it is necessary to examine whether the individual measures laid down by the Decision are in breach of the principle of proportionality, as the United Kingdom and the applicants in Case C-157/96 maintain. The answer, let me say this at once,

26 — See, albeit it in a different context, Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraphs 30 and 31.

27 — Case C-27/95 *Woodspring District Council* [1997] ECR I-1847, paragraphs 37 and 38. See, in addition, Case 265/87 *Schräder* [1989] ECR 2237, paragraph 22.

must perforce be that they are not, essentially because, given the scientific uncertainty in this area and the absence of reliable national controls, [28] the measures in question cannot be regarded as manifestly inappropriate to ensure the attainment of the aim pursued, namely the protection of health.

Furthermore, alternative solutions less liable to restrict trade, such as, for example, those suggested by the applicants in Case C-157/96 consisting in a ban on reimportation coupled with a satisfactory system of certification, are incapable of preventing the risk of fraud or the possible reimportation into the Community of derived or processed products.

30. In the first place, once it has been established that the Commission is competent, on the basis of Directives 90/425 and 89/662, to adopt measures also in relation to trade with non-member countries, it must follow, to my mind, that the comprehensive ban on exports to all non-member countries is lawful, precisely because it is aimed at ensuring the effectiveness of the other measures imposed, in particular the complete eradication of BSE, and ultimately therefore the attainment of the priority objective of health protection. Nor is the problem altered by the fact that the Community does not import from all non-member countries, since, as pointed out earlier, the possibility cannot be ruled out of reimportation through those non-member countries from which imports into the Community are allowed. [29]

31. Secondly, I do not believe it is possible to argue that the measure in question is disproportionate in that, unlike Decision 94/474, it also prohibits exports of meat derived from bovine animals which have resided on holdings not contaminated with BSE, particularly in view of the difficulties connected with the marking of cattle and controls on their movements from one herd to another. [30]

A ban only on exports of bovine animals — as well as of fresh meat obtained from such animals and products derived therefrom — which have resided on holdings in which cases of BSE have occurred would indeed be adequate, but only, I need scarcely add, if coupled with a reliable system of marking the animals and controlling their move-

28 — On this point, it should be borne in mind that the ban on the use in cattle feed of meat and bone-meal, which was deemed sufficient by the United Kingdom to eliminate hazards to health in that it concerns the factor responsible for BSE, dates back to July 1988. As at 31 December 1995, however, 23 148 cases of BSE had been recorded in animals born after the imposition of the ban. Admittedly, that may mean that the ban has not been adhered to, as evidenced by the inadequacy of the controls, which the United Kingdom itself has acknowledged, but it may also mean, and in any event it does not rule out the possibility, that contamination occurs by other means as well. In any event, it confirms the need for further, more drastic measures.

29 — See point 24 above.

30 — See the Conclusions of the Council of 29 and 30 April 1996.

ments. [31] The United Kingdom itself has acknowledged that only animals infected with BSE or suspected of being infected were recorded, [32] with the further and inevitable result that it was impossible to identify all the animals directly at risk of infection because they had been fed with contaminated products or had come into contact with animals infected with BSE, the latter possibility being one which, in the present state of scientific knowledge, cannot be ruled out. It follows, as the Court of Justice itself pointed out in its interim order, that 'the lack of marking of animals and of controls on their movements makes it impossible, moreover, to meet some of the recommendations of the international experts of the OIE (International Office of Epizootic Diseases), to the effect that animals should be identified as coming from herds in which no case of BSE has ever been confirmed'. [33]

32. Thirdly, the measure which bans exports of live animals aged less than six months cannot be considered disproportionate either. In that regard, suffice it to recall that non-transmissibility through the mother has not been demonstrated [34] and that research in this area is complicated by the fact that the ban on the use, as cattle feed, of sheep or bovine meat and bone-meal has not been complied with. [35] The fact that the existence of a risk of vertical transmission cannot be ruled out clearly means that the same considerations apply in relation to the ban on the export of embryos.

I need scarcely add, also in relation to the bans referred to above, that the lack of marking of animals and of controls on their movements makes it impossible to establish with certainty whether a particular animal,

31 — I would remind the Court that Commission Decision 89/469/EEC of 28 July 1989 concerning certain protection measures relating to bovine spongiform encephalopathy in the United Kingdom (OJ 1989 L 225, p. 51, as amended by Decision 90/261/EEC (OJ 1990 L 146, p. 29) required the United Kingdom to 'make full use of computer records to guarantee identification of animals' (Article 1(3)). Except in Northern Ireland, however — which makes it likely, according to recent press reports, that the export ban will be relaxed in relation to cattle from certain herds in the area concerned — that computerized system has not been introduced. In its Report on alleged contraventions or maladministration in the implementation of Community law in relation to BSE, without prejudice to the jurisdiction of the Community and national courts, the European Parliament's temporary committee of inquiry into BSE has highlighted and criticized the situation which has thus arisen. In particular, the Report states: 'Shortcomings in the British registration system led to the appearance of "cesspool" farms (a question debated in the UK Parliament). These farms, which already had a high incidence of BSE, bought animals in the first stages of the disease and received compensation for the slaughter of the diseased cattle. The farms which sold the sick animals eluded the restrictions by concealing their true health situation. This undermined the reliability of statistics on the disease and made it difficult to study and control it. In addition, it reduced the effectiveness of the Community regulations, subjecting consumers to a risk that could have been avoided. The failure to apply the rules on branding, registration and control raises doubts as the validity of any selection cull programme of the kind envisaged at the Florence summit' (Doc. PE 220.544/fin/A, Results of the inquiry, p. 11).

32 — The information furnished by the Commission, to the effect that it was impossible to identify the herd of origin in as many as 11 000 cases of animals with BSE, has not been challenged.

33 — Order of 12 July 1996 (cited in footnote 11), paragraph 70.

34 — As stated earlier, such transmissibility has, however, been demonstrated in relation to scrapie, which renders hereditary transmission plausible in the case of BSE as well.

35 — As at 31 December 1995, 933 cases of BSE were found in animals which were the offspring of infected mothers but which were born after the entry into force of the ban in question. In such cases, therefore, it is difficult to ascertain whether transmission of the disease was hereditary or the result of failure to comply with the ban in question, and consequently the result of eating contaminated feed.

though it has no symptoms of BSE, may have been contaminated. The same considerations are equally valid in relation to the ban on exports of fresh meat from bovine animals aged less than two and a half years, in view of the fact that, as stated earlier, the possible risk of consuming meat derived from infected animals continues to be the subject of controversy. [36]

33. Fourthly, there remains to be considered the need for the ban on exports of sperm and certain derived products such as gelatin and tallow. The ban has meanwhile been lifted, by Decision 96/362, both in relation to sperm — inasmuch as additional information permitted the conclusion to be drawn that this product does not present any risk of transmissibility — and in relation to tallow and gelatin, provided they are obtained by specified manufacturing methods and subject to strict controls. [37] But that fact, I need hardly point out, is neither decisive nor relevant for the purposes of this case, in that the lifting of the ban cannot be considered *per se* to point to the conclusion that there was no need for it in the first place with the result that the principle of proportionality was infringed.

In view of the prevailing uncertainty at the time when the Decision was adopted, the urgency with which the Commission was called upon to act and the fact that the measures in question are provisional 'pending an overall examination of the situation', it certainly cannot be said that the export ban relating to such products was manifestly inappropriate for the attainment of the aim pursued.

34. Finally, and for the sake of completeness, I would point out that the alternative measures less liable to restrict trade, advocated by the United Kingdom and considered by it to be as least as effective as those under discussion here, are too vague to be seriously taken into consideration. The United Kingdom Government refers [38] to a consumer information programme, whose impact on the eradication of BSE I am, however, unable to gauge, to measures similar to those already adopted unilaterally by the United Kingdom itself, but whose effectiveness has proved questionable, [39] and to stricter measures, of the kind in fact adopted by the Commission and challenged by the United Kingdom.

Breach of the principle of non-discrimination and incompatibility with Article 39(1) of the Treaty

35. Nor does it seem to me that there has been any breach of the principle of non-discrimination referred to in Articles 6 and

36 — See Dr Ring's statement annexed to the opinion of the Scientific Veterinary Committee of 22 March 1996.

37 — It is worth noting that the Commission has yet to conclude that these conditions, which must be fulfilled before exports of the products in question can recommence, have been satisfied, with the result that the ban remains in force in relation to these products as well.

38 — See pages 75 and 76 of the application.

39 — See, in particular, footnotes 28, 31 and 32.

40(3) of the Treaty, in terms of discrimination either between producers in the United Kingdom and producers in other Member States of the Community or between consumers in the United Kingdom and consumers in other Member States. With regard to the first aspect, suffice it to note that 97.9% of the cases of BSE in Europe were recorded in the United Kingdom, with the result that breeders in that country are certainly not in the same position as those operating in other Member States. In particular, the pockets of BSE existing in other Member States are so small that it would be absurd to take the view that the same measures must also be applied there. On that point, it is worth recalling that, as the Court has consistently held, the principle of non-discrimination between producers or consumers within the Community, which is a specific enunciation of the general principle of equality, requires that 'similar situations must not be treated differently unless differentiation is objectively justified'. [40]

So far as concerns the allegation that the requirements of health protection relied upon in support of the Decision disregard the health of consumers resident in the United Kingdom, [41] I would point out in the first place that the legal basis underlying the Decision is in any event inappropriate to cover a ban on the marketing of 'domestic' meat in the United Kingdom, since it concerns the abolition of frontier controls with a view to the completion of the internal market and therefore affects trade between Member States. However, it cannot be denied that a marketing ban of that kind, unless accompanied by drastic measures, such as the slaughter of all the heads of cattle within the national territory (a measure which would indeed be disproportionate), would have been very expensive to monitor and its effectiveness would not have been guaranteed. Containment of the geographical area in which the disease developed, in order to bring it under control, was therefore the only appropriate means of preventing the free movement of the products in question from causing serious injury to animals and human health.

36. The United Kingdom's argument that the Decision and the other contested acts do not fall within the scope of any of the objectives referred to in Article 39(1) of the Treaty can be rebutted with ease. More specifically, the argument put forward is that, by imposing a ban on exports, the Decision destabilized the markets and made it impossible to guarantee reasonable prices in supplies to consumers, contrary to two fundamental objectives laid down in Article 39(1).

Let me begin by pointing out that the protection of health, as emphasized earlier, is an aspect of all Community policies and, in

40 — See, most recently, *Woodspring District Council* (cited in footnote 27), paragraph 27. See, along the same lines, Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7.

41 — This argument, I would point out, was also put forward by the applicants in Case C-157/96, albeit in support of the view that the Commission adopted the Decision on grounds other than the protection of health and thereby committed a misuse of powers.

particular, an inescapable requirement also in relation to the aims pursued by the common agricultural policy. [42] Furthermore, the measures aimed at guaranteeing health protection cannot fail to enhance consumer confidence in the quality of the products and thus lead to an increase in consumption and consequently in trade and production, which cannot but contribute to the attainment of the objectives referred to in Article 39(1) of the Treaty. In those circumstances, the allegation made by the United Kingdom is entirely devoid of substance.

Validity of Article 1, third indent, of the Decision

37. The United Kingdom claims, moreover, that the third indent of Article 1 of the Decision is invalid; that indent, as I said earlier, bans exports of 'products obtained from bovine animals slaughtered in the United Kingdom which are liable to enter the animal feed or human food chain, and materials destined for use in medicinal products, cosmetics or pharmaceutical products'. That provision is said to be in breach of the principle of legal certainty, inasmuch as it does not define clearly and unequivocally the scope of the ban in question, which cannot be clarified by reference to the basic directives either; the latter require the Commission not only to adopt the measures necessary for the animals and products expressly referred to, but also to adopt measures, 'if the situation so requires, for the products derived from those animals' (Article 10(4) of Directive 90/425) or 'for the originating products or products derived from those products' (Article 9(4) of Directive 89/662). It is also allegedly in breach of the duty to state reasons, since there is no link between the provision in question and the relevant recital in the preamble, which merely refers to the expediency of banning the transport of all products derived from beef and veal from the United Kingdom. Finally, and in any event, the United Kingdom claims that the Commission had no power to impose the ban in relation to the export of certain products such as gelatin, di-calcium phosphate, amino acids and peptides, which are not included in Annex II to the Treaty, the reason being that the directives serving as a basis for the Decision, which are in turn founded on Article 43 of the Treaty, can only be interpreted as applying solely to those agricultural products listed in Annex II to the Treaty.

The Commission's response to those criticisms is that, in view of the urgency of the situation and of the need to ensure total control over it 'pending an overall examination of the situation', it should follow that the Decision complies with the principle of legal certainty. Furthermore, the recitals in the preamble to the Decision give sufficient reasons for the provision in question and, moreover, make it quite clear that all derived products which may constitute a hazard to health are (also) covered by the export ban.

42 — See point 20 above, in particular footnotes 16 and 17.

Finally, the Commission maintains that the scope of the basic directives expressly includes all the secondary products and, therefore, all the products to which the Decision applies.

38. Given that Community legislation, like national legislation, must be sufficiently clear and its application foreseeable to those who are subject to it, [43] let me add that the Decision is addressed to the United Kingdom which, having regard to its detailed knowledge of the situation, monitored in close contact with the Commission, could not have been unaware, if only as a result of discussions within the Veterinary Committee, of the products covered by the Decision. Having said that, moreover, I do not consider that the United Kingdom is justified in claiming that the provision in question lacks an adequate statement of reasons and is therefore in breach of Article 190 of the Treaty. [44]

As for the fact that the Commission thus exercised powers not vested in it, I will confine myself to the view, shared by the Commission, that the expression 'derived products' used in the basic directives may (and must) be interpreted as covering all products and materials obtained from bovine animals. It would be paradoxical if a product manufactured from beef could not be classified as a 'derived product' within the meaning and for the purposes of the directives in question.

Validity of Directives 90/425 and 89/662

39. Finally, the United Kingdom submits that if Directives 90/425 and 89/662 were interpreted as applying also to products falling outside Annex II to the Treaty, those directives would have to be considered invalid since Article 43 of the Treaty does not empower the Council to adopt directives which apply to products not listed in the annex in question. The Commission, on the other hand, contends that Article 43 constitutes the correct legal basis also in the case of directives which cover products not listed in the annex, to the extent to which they are merely ancillary products. The Council has endorsed that argument, emphasizing above all that Annex II not only refers to live animals and to the majority of products of animal origin but also contains a catch-all heading which covers 'animal products not elsewhere specified or included'. It has also pointed out that the allegation in question concerns products in respect of which the ban has already been lifted by Decision 96/362. [45]

43 — See, amongst others, Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11, and Case C-325/91 *France* v *Commission* [1993] ECR I-3283, paragraph 26.

44 — See, in particular, the observations set out in points 26 and 27 above.

45 — See, however, footnote 37.

I believe that the view taken by the United Kingdom cannot be endorsed. Even if it were concluded that the aforesaid catch-all heading could not in any event cover the products in question, the fact would remain, as both the Council and the Commission have emphasized and as the Court has already stated, that the mere fact that a measure falling within the scope of Annex II also covers, in an ancillary fashion, products not referred to in that annex, is not sufficient to remove the legislation concerned from the scope of the common agricultural policy. [46] I need scarcely add that the majority of the products to which the Decision applies are expressly and specifically included in Annex II.

Conclusion

40. In Case C-180/96 (*United Kingdom* v *Commission*), I propose that the Court dismiss the application and order the United Kingdom to pay the costs.

41. In Case C-157/96 (*National Farmers' Union and Others*), I propose that the Court should answer the question submitted by the High Court of Justice, Queen's Bench Division, as follows:

Examination of the question raised has not disclosed any factor capable of calling in question the validity of Article 1 of Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy.

46 — See Case C-11/88 *Commission* v *Council* [1989] ECR 3799 — summary publication.