

ORDER OF THE COURT
12 July 1996 *

In Case C-180/96 R,

United Kingdom of Great Britain and Northern Ireland, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, Sir Nicholas Lyell QC, Attorney-General, K. P. E. Lasok QC and David Anderson, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

applicant,

v

Commission of the European Communities, represented by Dierk Booss, Principal Legal Adviser, and James Macdonald Flett, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Council of the European Union, represented by Arthur Brautigam and Moyra Sims, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

* Language of the case: English.

intervener,

APPLICATION for suspension of the operation of Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy (OJ 1996 L 78, p. 47) and/or for interim measures,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann, H. Ragnemalm and L. Sevón (Rapporteur), Judges,

Advocate General: G. Tesauero,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 24 May 1996, the United Kingdom brought an action under Article 173 of the EC Treaty for the annulment of Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy (OJ 1996 L 78, p. 47) and of certain other measures.

- 2 By a separate document lodged at the Court Registry on the same day, the United Kingdom made application under Articles 185 and 186 of the EC Treaty and Article 83 of the Rules of Procedure for suspension of the operation of Decision 96/239 and/or certain interim measures.
- 3 The Commission submitted its written observations on the application for interim relief on 12 June 1996.
- 4 On the same day, the Council applied to intervene in the interlocutory proceedings in support of the form of order sought by the Commission and submitted its written observations on the application for interim relief. That application to intervene should be granted, pursuant to the first and fourth paragraphs of the Statute of the Court of Justice of the EC and to Article 93(1 and (2)) of its Rules of Procedure.
- 5 By decision of 13 June 1996, the President of the Court referred the application for interim relief to the Court, pursuant to the first paragraph of Article 85 of the Rules of Procedure.
- 6 Oral argument was heard from the parties on 19 June 1996.

Background to the dispute

- 7 According to the documents before the Court, bovine spongiform encephalopathy ('BSE'), or 'mad cow disease', was first detected in the United Kingdom in 1986. It is one of a group of diseases known as transmissible spongiform encephalopathies, which are characterized by brain degeneration with a sponge-like appearance of the nerve cells under microscopic analysis. Those diseases may affect both humans

(kuru, in New Guinea, and Creutzfeldt-Jakob disease, which generally affects older people) and various animal species, including cattle, sheep (scrapie), domestic cats and farmed mink.

8 The probable origin of BSE is thought to have been a change in the method of preparing cattle feed containing proteins derived from carcasses of sheep affected by scrapie. There is an incubation period lasting several years, during which the disease cannot be detected in living animals.

9 In order to combat BSE, the United Kingdom has adopted a number of measures since July 1988, including a ban on the sale of feed for ruminants containing proteins derived from ruminants and on the feeding of ruminants with such feed (the 'ruminant feed ban' contained in the Bovine Spongiform Encephalopathy Order 1988, SI 1988/1039, as subsequently amended). Since the supposed origin of the disease was the ingestion of contaminated feed, scientists believed that such a ban should prevent any new case of BSE in animals born after it came into effect.

10 The United Kingdom has also taken a number of measures to reduce hazards to human health, including a ban on the sale or use of specified bovine offal, presumed to contain the infection (The Bovine Offal (Prohibition) Regulations 1989, SI 1989/2061, as subsequently amended). Banned parts include, in particular, the head and spinal cord.

11 In its application for interim relief, the United Kingdom refers to a new Mature Beef Assurance Scheme, proposed in May 1996, which would enable certain beef farmers to obtain quality certification subject to compliance with very strict conditions relating in particular to the feeding of the cattle and to the absence of any case of BSE in the herds to which they belong.

- 12 The Commission also has adopted a number of decisions relating to BSE in the United Kingdom, including Commission Decision 90/200/EEC of 9 April 1990 concerning additional requirements for some tissues and organs with respect to bovine spongiform encephalopathy (OJ 1990 L 105, p. 24), replaced by 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 (OJ 1994 L 194, p. 6), itself amended, most recently, by Commission Decision 95/287/EC of 18 July 1995 (OJ 1995 L 181, p. 40). Those measures concern the removal from bovine meat of tissue likely to contain the infective agent and the feeding of ruminants. In addition, Commission Decision 92/290/EEC of 14 May 1992 concerning certain protection measures relating to bovine embryos in respect of bovine spongiform encephalopathy (BSE) in the United Kingdom (OJ 1992 L 152, p. 37) imposed strict conditions on the export of embryos.
- 13 In a statement dated 20 March 1996, the Spongiform Encephalopathy Advisory Committee ('SEAC'), an independent scientific body which advises the United Kingdom Government, referred to ten cases of a variant of Creutzfeldt-Jakob disease identified in people aged under 42. It stated: '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 [specified bovine offal] ban in 1989. This is cause for great concern.'
- 14 In the same document, SEAC emphasized that it was imperative that the current measures to protect public health should be properly enforced and recommended constant supervision to ensure the complete removal of spinal cord. It further recommended a requirement that carcasses from cattle aged over 30 months be deboned in licensed plants supervised by the Meat Hygiene Service and that trimmings

be classified as specified bovine offal, together with a prohibition on the use of mammalian meat and bone meal in feed for all farm animals.

- 15 On the same day, the Minister of Agriculture, Fisheries and Food took the decision to prohibit the sale or supply of mammalian meat and bone meal or its use in feed for any livestock, including poultry, horses and farmed fish and to prohibit the sale of meat from bovine animals over 30 months old for human consumption.
- 16 At the same time, a number of Member States and non-member countries took measures banning imports of cattle or beef and veal from the United Kingdom or, in the case of some non-member countries, from the European Union.
- 17 On 22 March 1996, the Scientific Veterinary Committee of the European Union concluded that, on the available data, it was not possible to prove that BSE was transmissible to humans. However, in view of the risk that existed of such transmissibility, the Committee recommended that the measures recently adopted by the United Kingdom concerning the deboning of carcasses from cattle aged over 30 months in licensed plants should be implemented for intra-Community trade and that the Community should adopt appropriate measures as regards the ban on the use of meat and bone meal in animal feed. The Committee further considered that any contact of spinal cord tissue with fat, bone and meat must be excluded, failing which the carcass should be treated as specified bovine offal. Finally, the Committee recommended that research on the question of transmissibility of BSE to humans be continued.

- 18 On 24 March 1996, SEAC confirmed its previous recommendations: that carcasses be deboned in licensed plants; that trimmings comprising nervous and lymphatic tissue, the vertebral column and the head (with the exception of the tongue, provided that it is removed without contamination) be treated as specified bovine offal; and that the use of mammalian meat and bone meal be prohibited in feed for ruminants or farmed animals (including fish and horses) or even as fertilizer on land to which ruminants have access. SEAC stressed, however, that it was not in a position to confirm whether or not there was a causal link between BSE and the recently discovered variant of Creutzfeldt-Jakob disease, a question which required further scientific research.
- 19 On 27 March 1996, the Commission adopted Decision 96/239, with which these proceedings are concerned. That decision is based on the EC Treaty, 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 (OJ 1990 L 224, p. 29), as last amended by Council Directive 92/118/EEC of 17 December 1992 (OJ 1993 L 62, p. 49), and in particular Article 10(4) thereof, and 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 (OJ 1989 L 395, p. 13), as last amended by Directive 92/118, and in particular Article 9 thereof.
- 20 The preamble to Decision 96/239 refers to the publication of new scientific information, the announcement of additional measures taken by the United Kingdom Government (deboning of carcasses of bovine animals over 30 months of age in licensed plants supervised by the Meat Hygiene Service, classification of trimmings as specified bovine offal and prohibition of the use of mammalian bone meal in feed for all farm animals), the measures banning imports adopted by various

Member States and the opinion of the Scientific Veterinary Committee. 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’.

21 Article 1 of Decision 96/239 provides:

‘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.’

- 22 Under Article 3, the United Kingdom is to send the Commission every two weeks a report on the application of the protective measures taken against BSE and, under Article 4, is invited to ‘present further proposals to control bovine spongiform encephalopathy in the United Kingdom’.
- 23 On 1, 2 and 3 April 1996, the Council held an extraordinary meeting in Luxembourg on the problems raised by BSE. The conclusions of that meeting include the following:

‘1. Following the publication of new information by the United Kingdom concerning BSE, the Council emphasizes its determination to put in place all the necessary measures to ensure that public health is safeguarded. The overriding objective is a high level of health protection based on the best available scientific evidence.

2. BSE is a serious animal health problem and may also have implications for public health. The EU as well as the United Kingdom has taken a number of important decisions in order to minimize any potential risk to public health. The Council, however, recognizes that decisive action must be taken in order to control and finally eradicate the disease in order to restore confidence in beef.

3. In the wake of the consequences that have hit the United Kingdom as well as the rest of the Union, on 27 March 1996 the Commission took a safeguard decision temporarily banning export of bovine animals, meat and meat products, etc. from the United Kingdom to other Member States and third countries. The Council has therefore agreed on a set of measures involving additional health and market support measures. Our objective is to restore consumer confidence, stability on the markets and the Single Market.'

24 The Council also concluded that a number of health measures had to be taken, such as: excluding from the human and animal food chains bovine animals in the United Kingdom over the age of 30 months at the time of slaughter and specified bovine offal from animals in the United Kingdom aged less than 30 months at slaughter; reinforcing controls, including checks on the system of registration of livestock farms and individual identification of cattle to ensure effective control of cattle movements ('traceability'); setting up a team of specialists from the Member States to check on the implementation of the measures taken in the United Kingdom; and adopting market support measures for beef and veal producers.

25 At the same time, a consultation of international experts was convened in Geneva by the World Health Organization, with the participation of the United Nations Food and Agriculture Organization and the Office International des Épizooties (International Office of Epizootic Diseases, 'the OIE'). Those experts also came to the conclusion that a link had not yet been proven between BSE and the variant of Creutzfeldt-Jakob disease, but that the most likely explanation for the cases of that variant of the disease discovered in the United Kingdom was the exposure of the United Kingdom population to BSE. The experts recommended particularly that all countries should ensure that animals affected by transmissible spongiform encephalopathy are slaughtered and that all parts or products of such animals are disposed of so that the infective agent cannot enter any food chain; and furthermore that all countries should review their rendering procedures so as to ensure that they effectively inactivate the agents of transmissible spongiform encephalopathy.

26 With respect to specific products, the group of experts stated:

- ‘— Milk and milk products, even in countries with a high incidence of BSE, are considered safe. There is evidence from other animal and human spongiform encephalopathies to suggest that milk does not transmit these diseases.

- Gelatin in the food chain is considered to be safe if produced by a manufacturing process utilizing production conditions which has been demonstrated to significantly inactivate any residual infectivity ... that may have been present in source tissues.

- Tallow is likewise considered safe if effective rendering procedures are in place ...’.

27 On 9 April 1996, the Scientific Veterinary Committee issued an opinion in which it considered that tallow and the tissues from which gelatin is made are in the ‘low risk’ category. It also described the production processes which give the best possible guarantees.

28 On 18 April 1996, the Scientific Veterinary Committee issued a further opinion in which it concluded that bovine semen did not present a risk of transmission of BSE. It also noted that the scientific studies on the transmissibility of BSE by embryos had not all been completed and that no case of vertical transmission of the disease had so far been found, but that there was evidence of transmission of scrapie by such a route. The Committee therefore confirmed the need for the Community rules requiring embryos to come only from donors which were born after July 1988 and are not the offspring of females in which BSE is suspected or

confirmed. However, since the rules on meat separation and ruminant feed had not been observed in the United Kingdom as soon as they came into force, it suggested as the reference date 1 August 1993 rather than July 1988.

- 29 On 26 April 1996, the Scientific Veterinary Committee studied the Report from the World Health Organization consultation of experts. In particular, the Committee described the procedures to be used for processing gelatin and tallow.
- 30 At its meeting of 29 and 30 April, the Agricultural Council took note of the respective reports of the Commission, the United Kingdom, the Community inspection team which visited the United Kingdom, and the veterinary experts. It noted that some measures still needed to be put into practice in relation to the slaughter of animals over the age of 30 months and the destruction of carcasses, and that some deficiencies had been reported in the system of animal identification and traceability. The Council considered, *inter alia*, that 'the combination of measures put in place by the UK, the proper implementation and follow-up by the Commission, the selective slaughter programme, the additional measures, and lastly the renewed impetus on the need to rely on sound scientific advice for all future decisions, is the start of a process which should allow the export ban to be progressively lifted, on a step by step basis'.
- 31 At its session of 20 to 24 May 1996, the International Committee of the OIE adopted new recommendations specifying in particular that, in countries with a high incidence of BSE, it was important to verify whether the animals were born after the date on which the feed ban was effectively enforced or whether they came

from a herd entirely free from the disease and had never been fed meat and bone meal.

32 On 11 June 1996, after the initiation of the present interlocutory proceedings, the Commission adopted Decision 96/362/EC amending Decision 96/239/EC on emergency measures to protect against bovine spongiform encephalopathy (OJ 1996 L 139, p. 17).

33 The preamble to Decision 96/362 refers to the opinions of the various scientific committees, to the absence of an opinion of the Standing Veterinary Committee and to a proposal for measures to be adopted, submitted to the Council by the Commission on 23 May 1996 in accordance with Article 17 of Directive 89/662.

34 Decision 96/362 lifts the ban on exports of bovine semen, considered by the Scientific Veterinary Committee to be safe with respect to BSE. The ban is also lifted in respect of various products — gelatin, di-calcium phosphate, amino acids and peptides, tallow and tallow products — provided that they are produced in accordance with the methods described in the annex to the decision, in establishments under official veterinary control which have been shown to be operating in accordance with the conditions set out in the annex (Article 1(2)), and that they are labelled or otherwise identified to show the method and establishment of production (Article 1(3)).

35 Article 1(a) of Decision 96/239, as amended, further imposes, for the export of certain types of meat, official veterinary controls and the setting-up of a system of tracing of the raw material which will guarantee its origin throughout the whole

production chain. Under Article 1(a)(2), the United Kingdom is to forward the list of establishments which meet those conditions to the Commission and the other Member States.

36 Finally, Article 1(c) provides:

‘1. The Commission shall carry out Community inspections on the spot in the United Kingdom to verify the application of the provisions of this Decision, in particular in relation to the implementation of official controls.

2. The inspections mentioned in paragraph 1 shall be carried out in respect of the products referred to in the Annex before the dispatch of those products recommences.

3. The Commission, after having consulted the Member States in the framework of the Standing Veterinary Committee, shall set the date on which dispatch may recommence.’

37 In addition, from April 1996 the Commission adopted a series of support measures for the beef market in the Community as a whole, considerably broadening, in particular, the conditions for intervention. Some of those measures concern more particularly the beef market in the United Kingdom and provide for financial contributions from the Community to a scheme for slaughtering and subsequently destroying bovine animals aged over 30 months at the time of slaughter. The latter include Commission Regulation (EC) No 716/96 of 19 April 1996 adopting exceptional support measures for the beef market in the United Kingdom (OJ 1996 L 99, p. 14).

Forms of order sought

38 The United Kingdom claims that the Court should, pursuant to Articles 185 and/or 186 of the EC Treaty:

(A) suspend the application of Article 1 of Commission Decision 96/239 save in so far as it relates to:

(1) meat of bovine animals slaughtered in the United Kingdom at the age of more than 30 months and not meeting the requirements of the Mature Beef Assurance Scheme; and

(2) mammalian meat and bone meal;

(B) alternatively, suspend the application of Article 1 of Commission Decision 96/239 in relation to:

(1) export to third countries (alternatively, export to third countries from which there is no real risk of trade deflection) of the animals, meat, products and materials covered by the contested decision;

(2) meat from bovine animals meeting the requirements of the Mature Beef Assurance Scheme;

- (3) bovine animals born after 1 May 1996 which are not the offspring of BSE suspected or confirmed cases, the meat of such animals and products and materials obtained from such animals;
- (4) bovine semen;
- (5) bovine embryos;
- (6) tallow and tallow derivatives, on the conditions approved by the Commission on 22 May 1996; and/or
- (7) gelatin, on the conditions approved by the Commission on 22 May 1996;
- (C) alternatively, suspend such parts of Commission Decision 96/239 or take such further interim measures as the Court shall deem appropriate; and
- (D) order the Commission to pay the costs.

At the hearing on 19 June 1996, however, the United Kingdom withdrew points (4) (semen), (6) (tallow) and (7) (gelatin) of its alternative claim, in order to take account of Decision 96/362.

39 The Commission contends that the Court should:

— dismiss the application for interim relief; and

— order the United Kingdom to pay the costs.

40 The Council contends that the Court should:

— dismiss the application for interim relief.

Conditions for granting interim relief

41 Under Articles 185 and 186 of the EC Treaty, the Court may, if it considers that circumstances so require, order that application of a contested act be suspended or prescribe any necessary interim measures.

42 Article 83(2) of the Rules of Procedure of the Court of Justice requires applications for such measures to state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for.

43 Under the third paragraph of Article 36 of the Statute of the Court and Article 86(4) of its Rules of Procedure, an interlocutory order has only an interim effect and is without prejudice to the decision of the Court on the substance of the case.

- 44 It is thus open to the Court hearing an application for interim relief to order the suspension of the operation of an act, or other interim measures, if it is established that such an order is justified, *prima facie*, in fact and in law and that it is urgent in so far as it must, in order to avoid serious and irreparable damage to the applicant's interests, be made and produce its effects before a decision is reached in the main action (order of 19 July 1995 in Case C-149/95 P(R) *Commission v Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22). According to settled case-law, the Court is also to balance the interests at stake. Suspension and other measures granted under Article 186 of the Treaty must, moreover, be provisional inasmuch as they must not prejudice the points of law or fact in issue or neutralize in advance the effects of the decision subsequently to be given in the main action (*Atlantic Container Line*, paragraph 22).
- 45 In the context of that overall examination, the Court hearing the application enjoys a broad discretion and is free to determine, having regard to the particular circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a preestablished scheme of analysis by reference to which the need to order interim measures must be assessed (*Atlantic Container Line*, paragraph 23).

Positions of the parties

- 46 The United Kingdom maintains, first, that the beef and bovine products for which it seeks a lifting of the ban present no danger for human consumption or other relevant uses and that the ban is not legally justified; secondly, that the ban has caused and continues to cause serious and irreparable harm; and, finally, that the balance of interests favours the immediate lifting of the ban.

- 47 In particular, it considers that there is no scientific basis for the ban on exports, which was decided solely or primarily to reassure consumers and protect the beef and veal markets. Far from achieving that aim, however, it has been counter-productive in terms of consumer confidence.
- 48 The Commission contends that the United Kingdom has failed to establish a *prima facie* case, circumstances giving rise to urgency or the probability of serious and irreparable harm. It further considers that the balance of interests clearly militates in favour of maintaining the existing provisional emergency measures until such time as the research currently under way may provide solid grounds for lifting them. The Council supports those arguments.

Findings of the Court

- 49 As regards the *prima facie* case, the United Kingdom submits, first, that the decision and other contested measures are outside the scope of the Commission's powers and margin of discretion, are not justified by any serious hazard to human or animal health, form an unlawful impediment to free movement of goods within the Community, constitute a misuse of powers and are inconsistent with the objectives of the common agricultural policy set out in Article 39(1) of the EC Treaty; secondly, that they do not comply with the duty to state reasons; thirdly, that they are discriminatory and contrary to Articles 6 and 40(3) of the EC Treaty; fourthly, that they infringe the principle of proportionality; and, fifthly, that the third indent of Article 1 of Decision 96/239 is unlawful because it infringes the principle of legal certainty and the duty to state reasons and because it concerns products falling outside the scope of the Commission's powers.
- 50 In addition, the United Kingdom claims that Directives 89/662 and 90/425 are unlawful in so far as they may provide a legal basis for an extension of the export ban to products not listed in Annex II to the EC Treaty.

- 51 Finally, the United Kingdom states that 'the disproportionality and unlawfulness of the contested decision are particularly obvious in relation to export to third countries, the meat of animals from non-BSE herds, bovine animals born after 1 May 1996, semen, embryos, tallow and gelatin'.
- 52 In order to determine whether, as the United Kingdom claims in its first argument, the Commission has *prima facie* overstepped the bounds of its powers, it is necessary in turn to examine the provisions on which the contested decision is based, namely Article 10(4) of Directive 90/425 and Article 9 of Directive 89/662; to ascertain in the light of those provisions the aim of the contested decision; and, finally, to verify whether the information on which it was based was of a serious nature, in order to determine if there was in fact a grave hazard to animal and human health.
- 53 The purpose of Directives 90/425 and 89/662, adopted on the basis of Article 43 of the EEC Treaty, is to replace veterinary checks at the Community's internal frontiers by checks carried out at the place of dispatch of the goods. According to the sixth recital in the preamble to Directive 90/425, 'this solution implies increased confidence in the veterinary checks carried out by the State of dispatch' and 'the dispatching Member State must ensure that such veterinary checks are carried out in an appropriate manner'.
- 54 Article 10 of Directive 90/425 and Article 9 of Directive 89/662, both couched in similar terms, provide that each Member State is immediately to notify the other Member States and the Commission of any outbreak of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health. In that event, the Member State of dispatch is immediately to implement the control or precautionary measures provided for in Community rules, and the Member State of destination may take precautionary measures. Paragraph 4 of both those articles provides that the Commission is in all cases to review the situation at the

earliest opportunity in the Standing Veterinary Committee; to adopt the necessary measures for the products referred to in the directives and, if the situation so requires, for derived products; and, finally, to monitor the situation and, by the same procedure, to amend or repeal the decisions taken, depending on how the situation develops. Annex C to Directive 90/425 lists diseases or epizootic diseases subject to mandatory emergency action with territorial restrictions, which may affect one or more Member States, regions or zones.

- 55 It is now necessary to determine the objective of Decision 96/239.
- 56 The United Kingdom states that the decision was adopted on the basis of economic considerations and the need to reassure consumers and protect the beef and veal market as a whole. It refers in that regard to the third phrase in the fifth recital in the preamble to the decision and to the public statements of the Member of the Commission responsible for agriculture.
- 57 At the hearing, the Commission described its decision as a 'containment measure' to be followed by special measures aimed at eradicating the disease, and specified that the decision had the broad aim of protecting public health in the context of the internal market. The Council confirmed that description, which is clear in particular from the conclusions it adopted at its extraordinary meeting on 1, 2 and 3 April 1996.
- 58 The second recital in the preamble to Decision 96/239 refers to the publication of new information on the appearance of certain cases of Creutzfeldt-Jakob disease in the United Kingdom. In addition, the first two phrases in the fifth recital state 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'. It is not possible to isolate one part of that recital and refer only to the phrase relating

to concern among consumers. The text in issue must be considered as a whole. Moreover, in view of the nature of the measures adopted, it is clear that Decision 96/239 imposes a containment measure pending subsequent measures aimed at eradicating BSE.

59 Finally, it must be determined whether the information on which the Commission based its adoption of the contested decision was of a serious nature and whether there was in fact a grave hazard to animal and human health.

60 Undeniably, the SEAC statement referring to the likelihood of a link between BSE and the variant of Creutzfeldt-Jakob disease was a particularly important piece of information justifying a re-examination of the measures relating to exports of bovine animals, beef and veal and derived products from the United Kingdom. Even though the scientists cautiously refrained from expressing any certainty, the situation had changed considerably in that the transmissibility of BSE to humans had ceased to be a theoretical hypothesis and was now regarded as the most likely explanation of the new variant of Creutzfeldt-Jakob disease recently detected in a number of people. Whilst the possibility of such a hazard to human health had been envisaged for a number of years, the SEAC statement disclosed new evidence rendering it more likely and justifying the Commission's intervention.

61 The information which the Commission took into consideration when adopting Decision 96/239 was thus particularly serious. It was indeed regarded as such by the United Kingdom Government, which immediately took various measures of its own to comply with SEAC's recommendations.

62 There is therefore nothing to suggest that the Commission acted, as the United Kingdom claims, solely for economic reasons in order to stabilize the beef and veal market. On the contrary, as is clear from the fifth recital in the preamble, read as a

whole, the circumstances show that it had regard above all to protecting public health in the context of the internal market, as it is moreover obliged to do pursuant to Directives 90/425 and 89/662.

63 It must be stressed that Article 3(o) of the EC Treaty provides that the objectives of the Community include 'a contribution to a high level of health protection'. That objective is reiterated in the first subparagraph of Article 129(1) of the EC Treaty, under which the Community is to contribute towards ensuring a high level of human health protection. The third subparagraph of Article 129(1) further specifies that health protection requirements are to form a constituent part of the Community's other policies. Finally, the Court has already held that efforts to achieve the objectives of the common agricultural policy cannot disregard requirements of public interest, such as the protection of consumers or of the health and life of humans and animals, which the Community institutions must take into account in exercising their powers (Case 68/86 *United Kingdom v Council* [1988] ECR 855, paragraph 12).

64 With regard, secondly, to the obligation to state reasons, the United Kingdom submits that, even assuming that Decision 96/239 was adopted for the protection of human or animal health, it should still be annulled on the ground that, contrary to Article 190 of the Treaty, it fails to explain why the Commission considered that the measures previously adopted were inadequate and thus why new measures were justified.

65 The preamble to Decision 96/239 shows that it was prompted by a series of factors including: the publication of new information on the appearance of certain cases of Creutzfeldt-Jakob disease in the United Kingdom; the fact that the United Kingdom had taken additional measures relating to the treatment of bovine meat and the use of bone meal in feed for farm animals; and the import bans adopted by other Member States. Those factors are sufficient evidence that, in the light of the risk involved, there was considerable uncertainty as to whether the measures

previously taken by both the United Kingdom and the European Community were effective and adequate.

66 Thirdly, the United Kingdom claims that Decision 96/239 arbitrarily discriminates against the United Kingdom and its producers, operators and consumers, since no safeguard measures were taken with regard to other Member States. The United Kingdom is not, however, the only State to have had cases of BSE, even if it does have the highest incidence of the disease. The discrimination against consumers in the United Kingdom lies in the fact that Decision 96/239 could, at most, restore consumers' confidence in the rest of the Community but not in the United Kingdom.

67 Suffice it to observe that, as was stressed at the hearing, 97.9% of cases of BSE in Europe have been reported in the United Kingdom.

68 Furthermore, as the Commission and Council have pointed out, the reason for the containment measure's covering the whole of the United Kingdom rather than one or more specific regions is that the disease, while doubtless localized several years ago, had spread over the whole country and that, since not all animals were adequately identified, it was impossible to determine where they came from or whether they had at any time in their life belonged to a herd in which cases of BSE had been found. In that regard, the United Kingdom stated at the hearing that only animals infected or suspected of being infected by BSE were recorded and it did not challenge the Commission's figure of 11 000 cases of animals affected by BSE whose herd of origin was not identifiable.

69 There are still scientific uncertainties regarding the modes of transmission of the disease. Up to 31 October 1995, 23 148 cases of BSE had been confirmed in animals born after the introduction of the ban on the use of meat and bone meal in cattle feed, assumed to be the cause of the disease (*Bovine Spongiform Encephalopathy in Great Britain, A Progress Report*, November 1995, point 7). Only by

identifying and reconstituting the herd of origin of each affected animal would it have been possible both to verify whether, despite the ban, the animal had been given contaminated feed or whether the origin of the disease was to be sought elsewhere and also, if unsound feed had been given, to trace all the animals which had been given the same feed and might be infected even if they did not yet show any signs of the disease.

- 70 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, to the effect that animals should be identified as coming from herds in which no case of BSE has ever been confirmed (see the revised chapter in the International Animal Health Code, adopted at the session of 20 to 24 May 1996).
- 71 Nor has it been established that there is no maternal transmission of the disease. Research into that question is continuing, but the results are difficult to interpret because of failures to comply with the ban on the use of meat and bone meal in cattle feed. Up to 31 October 1995, there had been 933 confirmed cases of BSE in offspring, born after that ban came into effect, of affected dams. It is not, however, possible in those cases to determine whether the disease was transmitted maternally or contracted through eating infected feed (*Bovine Spongiform Encephalopathy in Great Britain*, cited above, point 9). Vertical transmission of scrapie, on the other hand, is established. The possibility that the disease may be transmitted in the same way in cattle is therefore a serious hypothesis.
- 72 Finally, whilst the disease does not appear to be contagious (horizontal transmission), there is an unexplained rate of infection in calves born close to the date of calving by another cow which is infected (perinatal infection).
- 73 Fourthly, as regards the breach of the principle of proportionality, the ban has a legitimate aim — the protection of health — and, as a containment measure prior to eradication measures, it was essential to the achievement of that aim.

- 74 It is not disputed that the measures taken by the United Kingdom to prohibit the use of ruminant meat and bone meal in ruminant feed and those relating to meat-processing procedures have produced positive results — in particular, a drop in the number of cases of BSE. But there are serious doubts as to their effectiveness. It appears that, despite the ban introduced in 1988, suspect meal was still fed to some cattle for at least five years because certain farmers used up their stocks or intentionally or inadvertently fed cattle with ruminant meat and bone meal intended for other farm animals or because they fed cattle with cattle feed which was thought to be healthy but had been infected during manufacture as a result of inadequate precautions.
- 75 In any event, even if the composition of the feed given by every farmer to his cattle could be known with certainty, the lack of controls on the origin and movements of cattle ('traceability') means that it would not be possible to determine for certain the herd in which each animal was born, the number of times it had changed hands and thus whether it might have been given infected feed in any of the herds to which it had belonged.
- 76 As regards the measures concerning slaughter and meat separation, the documents annexed to the United Kingdom's application for annulment reveal that unannounced visits to the relevant undertakings have been made only since May 1995 (*Bovine Spongiform Encephalopathy in Great Britain*, cited above, point 16). According to that report, in September 1995, 48% of slaughterhouses were failing to comply fully with the statutory requirements. It is established that some of those failures concerned the separation of specified bovine offal (head and spinal cord). In October 1995, 34% of slaughterhouses were still not complying fully.
- 77 As to the arguments alleging the unlawfulness of the third indent of Article 1 of Decision 96/239 and of Directives 86/662 and 90/425, on the basis of which the decision was adopted, these appear at first view to be relevant only to derived beef products. Those products are covered by Decision 96/362 which, in some respects,

lifts the ban imposed by Decision 96/239, and the United Kingdom has therefore withdrawn points (4), (6) and (7) of its alternative claim. It does not therefore appear necessary, at this stage, to examine those arguments.

- 78 As regards the specific products referred to in the United Kingdom's alternative claim, in view of the withdrawal of certain points of that claim following the adoption of Decision 96/362, the arguments which were developed concern essentially meat from herds unaffected by BSE, cattle born after 1 May 1996 and embryos. In view of the uncertainties still surrounding the modes of transmission of the disease and the lack of marking and means of tracing the origins and movements of animals ('traceability'), and thus the impossibility of determining the herds to which they have belonged, the pleas alleging that the decision is unlawful or disproportionate in so far as those products are concerned do not appear, *prima facie*, to be founded.
- 79 Finally, with regard to the ban on exports to non-member countries, the United Kingdom submits that the Commission's decision has no legal basis, since the directives pursuant to which it was adopted concern only intra-Community trade.
- 80 The Commission replies that, as a containment measure with a view to eradication, the decision had to isolate completely the territory affected by the disease and that, in view of the great number of fraudulent practices in relation to the importation of beef and veal, extension of the export ban to non-member countries was essential to ensure effectiveness. At the hearing, the Council supported the Commission on that point and put forward an alternative argument based on a broad interpretation of the Commission's powers in the day-to-day management of the common agricultural policy.

- 81 The arguments put forward both by the United Kingdom and by the Commission and the Council raise, at first view, complex questions of law which warrant detailed analysis after hearing argument from all parties.
- 82 As regards the condition as to the urgency of the measures requested, this must be considered by reference to whether it is necessary to make a provisional ruling in order to avoid the occurrence of serious and irreparable harm as a result of application of the measure contested in the main action until such time as the Court gives judgment thereon.
- 83 The United Kingdom points out that its exports of live bovine animals, beef and veal and bovine products were worth over ECU 840 000 000 in 1995 and that the sector helps to maintain some 500 000 people in employment. It further observes that farmers, particularly specialist beef producers, are seriously affected by the closure of export markets. The contested decision also damages all those engaged in activities connected with calf and meat exports, in particular exporters, hauliers and slaughterhouses. The applicant refers, *inter alia*, to bankruptcies, redundancies and resultant social problems. Sheep farmers and exporters and dairy producers and exporters are also damaged by the export ban. According to the United Kingdom, the financial loss could exceed ECU 1 200 000 000 a year. Some 55 000 jobs in the beef sector are immediately threatened by the BSE crisis, many as a direct result of the export ban.
- 84 The United Kingdom accepts that demand for the products covered by the contested decision would inevitably have dropped even without a Community export ban. It none the less considers that the serious and irreparable harm resulting from the loss of markets is largely attributable to that decision, which has magnified, prolonged and given apparent legitimacy to the apprehensions of consumers as regards beef and veal. In a number of countries both inside and outside the Community, moreover, it is the only obstacle to market penetration of United Kingdom beef and bovine products.

- 85 It must be noted that the Member States are responsible for those interests, in particular of an economic and social nature, which are regarded as general interests at national level and are thereby entitled to defend such interests before the courts. They may therefore invoke damage affecting a whole sector of their economy, in particular when the contested Community measure may entail unfavourable repercussions on the level of employment and the cost of living (Case C-280/93 R *Germany v Council* [1993] ECR I-3667, paragraph 27).
- 86 It is reasonable to suppose, in the light of the documents and oral argument presented to the Court, that severe damage has been caused in the United Kingdom and that operators, particularly beef producers and exporters, are currently in a very difficult situation; moreover, it cannot be ruled out that the harm will, in part, be irreparable.
- 87 However, the principal cause of that damage remains uncertain and has not been shown to stem from Decision 96/239. The drop in demand for beef was provoked, a week before that decision was adopted, by the announcement by SEAC, and by the United Kingdom Government itself, of a likely link between BSE and the variant of Creutzfeldt-Jakob disease. Decision 96/239 was, moreover, preceded by bans adopted by other Member States and a number of non-member countries. It cannot be held, at the present stage in the proceedings, that Decision 96/239 significantly magnified the damage caused by those measures or that, in the absence of such a decision, demand for United Kingdom beef would have recovered in the other Member States or in non-member countries, given the media coverage of the issue and increasing health awareness among consumers.
- 88 Furthermore, as the Commission has stressed without being contradicted by the United Kingdom, the institutions have adopted various measures to compensate the operators concerned, in order to avoid irreparable consequences for their positions on the market.

- 89 It follows from what has been said above that, whilst some of the pleas in law put forward by the United Kingdom cannot be wholly ruled out at this stage, the Commission has none the less presented serious arguments as to the lawfulness of its decision as a whole, as regards both intra-Community trade and exports to non-member countries. Accordingly, even assuming that the United Kingdom had fully established the existence of serious and irreparable harm, the Court would still have to balance the applicant's interest in a suspension of the ban on exports of bovine animals, meat and derivatives against the interest of the other parties in having that ban maintained. In so doing, it would have to determine whether the possible annulment of the contested decision by the Court seized of the main action would allow the situation brought about by its immediate implementation to be reversed and, conversely, whether suspension of the operation of that decision would be such as to prevent its being fully effective in the event of the main application being dismissed (order in *Atlantic Container Line*, paragraph 50).
- 90 Such a balancing of interests would, on any view, favour maintaining the Commission's decision, inasmuch as the interest in having the contested decision maintained is not readily comparable to the applicant's interest in having its operation suspended.
- 91 It is true that the foregoing analysis has shown that damage to commercial and social interests is likely to result from maintaining the export ban in force for the time being and that a part of such damage would not easily be reparable if the main action were to be upheld.
- 92 That damage cannot, however, outweigh the serious harm to public health which is liable to be caused by suspension of the contested decision, and which could not be remedied if the main action were subsequently dismissed.

- 93 Scientists have as yet only an imperfect knowledge of Creutzfeldt-Jakob disease and, more particularly, its recently-discovered variant. Its fatal consequences were reiterated several times at the hearing. There is at present no cure for it. Death ensues several months after diagnosis. Since the most likely explanation of this fatal disease is exposure to BSE, there can be no hesitation. Whilst acknowledging the economic and social difficulties caused by the Commission's decision in the United Kingdom, the Court cannot but recognize the paramount importance to be accorded to the protection of health.
- 94 In the light of all the foregoing considerations, both the main and the alternative claims put forward by the United Kingdom in its application must be dismissed.

On those grounds,

THE COURT

hereby orders:

1. **The United Kingdom's application is dismissed.**
2. **Costs are reserved.**

Luxembourg, 12 July 1996.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President