

**JUDGMENT OF THE COURT**  
**5 May 1998<sup>\*</sup>**

In Case C-157/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the High Court of Justice, Queen's Bench Division (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

**The Queen**

and

**Ministry of Agriculture, Fisheries and Food,**

**Commissioners of Customs & Excise,**

**ex parte: National Farmers' Union,**

**David Burnett and Sons Ltd,**

**R. S. and E. Wright Ltd,**

<sup>\*</sup> Language of the case: English.

Anglo Beef Processors Ltd,

United Kingdom Genetics,

Wyjac Calves Ltd,

International Traders Ferry Ltd,

MFP International Ltd,

Interstate Truck Rental Ltd,

Vian Exports Ltd,

interveners: Anglo Dutch Meat Exports Ltd,

Beck Food Group Ltd,

First City Trading Ltd,

Weddel Swift Ltd,

Carrex August Ltd,

**Meatal Supplies (Wholesale Meats) Ltd,**

**Meat Marketing Services (UK) Ltd,**

**NWL (Ireland) Ltd,**

**Hibernia Foods plc,**

**Duggins Ltd (D. T.),**

**Swallow Foods International Ltd,**

**British Association of Sheep Exporters,**

on the validity of Article 1 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),

**THE COURT,**

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

Advocate General: G. Tesauro,  
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- the National Farmers' Union and others, by Stuart Isaacs QC and Clive Lewis, Barrister, instructed by Badhams Thompson, Solicitors,
- Anglo Dutch Meat Exports Ltd and others, by Nicholas Green, Barrister, instructed by Michael Parker and Conor McGuire, Solicitors,
- the British Association of Sheep Exporters, by David Vaughan QC and Conor Quigley, Barrister, instructed by Anthony M. Burstow, Solicitor,
- the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by Paul Lasok QC and David Anderson, Barrister,
- the Council of the European Union, by Arthur Brautigam and Moyra Sims, Legal Advisers, acting as Agents,
- the Commission of the European Communities, by James MacDonald Flett, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the National Farmers' Union and others, represented by Stuart Isaacs, Clive Lewis and Sarah Moore, Barrister, the British

Association of Sheep Exporters, represented by David Vaughan and Conor Quigley, the United Kingdom Government, represented by Lindsey Nicoll, and by Paul Lasok and David Anderson, the Council, represented by Arthur Brautigam and Moyra Sims, and the Commission, represented by James Macdonald Flett, at the hearing on 2 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 30 September 1997,

gives the following

### Judgment

- 1 By order of 3 May 1996, received at the Court on 8 May 1996, the High Court of Justice, Queen's Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the validity of Article 1 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, hereinafter 'the decision').
- 2 That question was raised in proceedings in which 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 (hereinafter referred to collectively as 'the NFU') are contesting various acts adopted pursuant to Article 1 of the decision by the Ministry of Agriculture, Fisheries and Food and the Commissioners of Customs and Excise. Twelve parties have intervened in the main proceedings in support of the applicants. The first to eleventh interveners are meat exporters and members of the International Meat Traders Association, whilst the twelfth is the British Association of Sheep Exporters, which claims to have suffered serious injury in consequence of the decision, since it has resulted in the discontinuance of the transportation of sheep by ferries, which is not economically viable for exports of sheep alone.

- 3 The decision was adopted by the Commission following the issue on 20 and 24 March 1996 of two statements by the Spongiform Encephalopathy Advisory Committee ('SEAC'), an independent scientific body which advises the United Kingdom Government, concerning the existence of a possible link between bovine spongiform encephalopathy ('BSE') and Creutzfeldt-Jakob disease.
- 4 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 amended by Council Directive 92/118/EEC of 17 December 1992 laying down animal health and public health requirements governing trade in and imports into the Community of products not subject to the said requirements laid down in specific Community rules referred to in Annex A (I) to Directive 89/662/EEC and, as regards pathogens, to Directive 90/425/EEC (OJ 1993 L 62, p. 49), 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 amended by Directive 92/118, in particular Article 9 thereof.
- 5 The first subparagraph of Article 10(1) and Article 10(4) of Directive 90/425 provide as follows:

'1. Each Member State shall immediately notify the other Member States and the Commission of any outbreak in its territory, in addition to an outbreak of diseases referred to in Directive 82/894/EEC, of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health.

...

4. The Commission shall in all cases review the situation in the Standing Veterinary Committee at the earliest opportunity. It shall adopt the necessary measures for the animals and products referred to in Article 1 and, if the situation so requires, for the products derived from those animals, in accordance with the procedure laid down in Article 17. The Commission shall monitor the situation and, by the same procedure, shall amend or repeal the decisions taken, depending on how the situation develops.'

- 6 Article 1 of Directive 90/425 refers to live animals and products which are covered by the directives listed in Annex A and those referred to in the first paragraph of Article 21, that is to say, the products listed in Annex B to that directive.
- 7 The first subparagraph of Article 9(1) and Article 9(4) of Directive 89/662 provide as follows:

'1. Each Member State shall immediately notify the other Member States and the Commission of any outbreak in its territory, other than an outbreak of diseases referred to in Directive 82/894/EEC, of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health.

...

4. The Commission shall in all cases review the situation in the Standing Veterinary Committee at the earliest opportunity. It shall adopt the necessary measures for the products referred to in Article 1 and, if the situation so requires, for the originating products or products derived from those products in accordance with the procedure laid down in Article 17. The Commission shall monitor the situation and, by the same procedure, shall amend or repeal the decisions taken, depending on how the situation develops.'

8 Article 1 of Directive 89/662 refers to products of animal origin which are covered  
by the directives listed in Annex A and those referred to in Article 14, that is to  
say, the products listed in Annex B to that directive.

9 The preamble to the decision 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-derived 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’.



10 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 [meal] and bone-meal.’

11 Having regard to the arguments raised by the parties, the national court, uncertain as to the validity of the decision, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘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?’

- 12 It is necessary to examine in turn the various pleas in law in the light of which the national court has asked the Court to assess the validity of Article 1 of the decision.

### The plea alleging lack of competence on the part of the Commission

- 13 The NFU claims, first, that the decision was not adopted with a view to affording protection against any serious hazard to human health, which would have justified the exercise by the Commission of its competence under Directives 90/425 and 89/662. The United Kingdom and the Commission had already adopted measures regarded as necessary for the protection of public health since 1988, and the new information published on the appearance of certain cases of Creutzfeldt-Jakob disease in the United Kingdom did not indicate that there was a new risk. By contrast, the Commission took no steps in relation to meat and live bovine animals exported prior to the decision.

- 14 Furthermore, Directives 90/425 and 89/662 do not authorise the Commission to ban exports from the United Kingdom to third countries. No provision for such a ban is contained in those directives, and it was not open to the Commission to act outside the framework of expressly defined powers. As for the attempt to justify the extension of the ban 'so as to prevent deflections of trade', it does not warrant the adoption of a decision which goes beyond what is necessary in order to prevent products exported from the United Kingdom to a third country from being re-imported into the Community.

- 15 Finally, if the Commission did not wholly lack competence to adopt the decision, in the submission of the NFU it did lack competence to prohibit the export of certain products, given the absence of any risk from bovine semen, bovine embryos, live calves under six months of age, fresh bovine meat from animals aged less than two-and-a-half years at slaughter, tallow and gelatin.

- 16 The first eleven interveners in the main proceedings, who are associations and exporters of bovine meat, challenge in particular the legality of the decision inasmuch as it prohibits exports to third countries. In their view, such a prohibition is not justified under Directives 90/425 and 89/662, since there is no meaningful or material risk of deflections of trade or of the re-importation into the Community of beef from the United Kingdom. The number of third countries which may export fresh bovine meat or meat products to the Community is small and both meat and products must satisfy the rigorous conditions laid down in Community legislation. Furthermore, exports to third countries are eligible for export refunds and, in that connection, the United Kingdom authorities conduct tests to establish that the product has passed customs control and has been marketed in the country of destination. Finally, there are import duties on beef even if, at the outset, it is of Community origin.
- 17 Those parties consider that the Commission's arguments relating to fraudulent practices are unfounded or, in any event, that they could not justify a total worldwide ban but rather specific prohibitions following consultation with the authorities of the third countries concerned and the national authorities of Member States liable to re-import the diverted beef. In any event, a ban should have been adopted under the specific measures governing imports of beef from third countries, and not under measures aimed at the internal market.
- 18 Those eleven interveners in the main proceedings consider, therefore, that the powers conferred on the Commission by Directives 90/425 and 89/662 did not permit it to adopt a measure of such far-reaching effect as a worldwide ban. In any event, it was for the governments and traders of third countries, and not for the Commission, to determine their own policy with regard to beef from the United Kingdom.

19 The United Kingdom Government denies that the decision is justified by the need for containment: such a measure is not appropriate in the case of BSE, which is not a contagious disease.

20 According to the United Kingdom Government, the Commission had no competence to adopt measures applicable to trade with third countries. Directives 90/425 and 89/662 are concerned only with checks applicable 'in intra-Community trade ... with a view to the completion of the internal market'. Those directives are not concerned with animals or products intended for export to a third country except in so far as there is a risk to human or animal health within the Community while the animal or product in question is still within the Community, for example, while it is in transit through the territory of a Member State (see, in particular, Article 3(1)(g) of Directive 90/425 and Article 3(2) of Directive 89/662). Consequently, the Commission had no competence to ban exports from the United Kingdom to third countries that do not involve transit through the territory of another Member State. Moreover, the cattle posed no hazard to animal or human health since BSE is not contagious. Finally, if the beef or beef products did pose a risk, its assessment and the adoption of measures based on the Animal Health Code of the International Office of Epizootics was a matter for third countries, not the Commission.

21 The Council states that Directives 90/425 and 89/662 form part of a coherent and exhaustive body of law established in order to substitute a set of common rules for unilateral action on the part of each Member State pursuant to Article 36 of the Treaty. It considers that, in enacting Directives 90/425 and 89/662, it has expressly and specifically empowered the Commission to take all the necessary measures as regards both live animals and products of animal origin. In view of the broad discretion enjoyed by the Commission under the safeguard clauses, the Council submits that, by acting in a prudent manner and pursuing the safest option for public health, the Commission has neither made a manifest error in its assessment of the risk to animal and human health nor manifestly exceeded the powers conferred on it.

- 22 The Council considers that the emergency measures were correctly applied to Community exports to third countries. Article 43 of the EC Treaty constitutes an appropriate and sufficient legal basis in relation to trade in agricultural products with third countries and there is nothing in Directives 90/425 and 89/662 to warrant the conclusion that the Council has expressly limited the powers of the Commission under the safeguard clause by explicitly excluding exports to third countries. Moreover, public health requirements are indivisible and universal and it would have been indefensible to apply dual standards, depending on whether the products were destined for the Community or for third countries. In any event, the extension of an export ban to third countries was already justified for the sole reason of preventing deflections of trade.
- 23 With particular regard to the question whether a serious new risk had appeared, the Commission considers that, although BSE already existed, the SEAC announcements reclassified the disease: it was no longer regarded merely as affecting cattle, but as a hazard to human health. That new information modified the risk assessment and justified the Commission's intervention pursuant to Directives 90/425 and 89/662. The Commission further emphasises that there is nothing to suggest that the new cases of Creutzfeldt-Jakob disease resulted from exposure prior to the ban on specified bovine offal; on the contrary, SEAC recommended that additional steps be taken. Moreover, infected feed is not necessarily the main route of transmission. Finally, the 1988 feed ban had taken a long time to become effective, the 1989 specified bovine offal ban was ineffective and the bovine control system was inadequate since over 11 000 cases of BSE had never been traced to their herd of origin.
- 24 With regard to the measures which it was empowered to adopt under Directives 90/425 and 89/662, the Commission observes, first, that in matters concerning the common agricultural policy the Community legislature has a broad discretion. The Council may be prompted to confer on the Commission wide implementing powers, since the Commission alone is able continually and closely to monitor trends on the agricultural markets and to act with urgency if the situation so requires.

Such powers are all the more justified when they are to be exercised in accordance with a procedure which allows the Council to reserve its right to intervene. Finally, Article 10(4) of Directive 90/425 and Article 9(4) of Directive 89/662 are drafted in very wide terms and empower the Commission to act 'in all cases' and to adopt 'the necessary measures'. In so far as it imposes a ban on the movement of animals and products outside a specified area of the Community, that is to say, a containment measure, the decision is appropriate.

25 Next, the Commission submits that a careful reading of Article 10(4) of Directive 90/425 and Article 9(4) of Directive 89/662 reveals no provision which precludes it from taking such measures as may be necessary in relation to third countries. Given the urgency of the situation and the fact that BSE was essentially a problem in the United Kingdom, it would clearly have been inappropriate and ineffective to seek to use legislation relating to animals and products from third countries, since that would have necessitated the amendment of the directives relating to imports into the Community or negotiations with third countries.

26 In order to determine whether, in adopting the contested decision, the Commission was acting within the framework of the powers conferred on it by Directives 90/425 and 89/662, it is necessary to determine whether the conditions governing the adoption of safeguard measures in accordance with those directives were fulfilled, whether it was open to the Commission to ban exports and whether that ban could extend to third countries.

27 Article 10(1) of Directive 90/425 and Article 9(1) of Directive 89/662 provide that the adoption of safeguard measures is permitted where there is an 'outbreak ... of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health'.

28 In the present case, it is necessary to determine in particular whether the announcements by SEAC that BSE was 'the most likely explanation' for the outbreak of the new variant of Creutzfeldt-Jakob disease justified the adoption

of safeguard measures, given that BSE had already existed for a number of years, that measures had been adopted both by the United Kingdom and by the Community and that the risk which that disease posed to humans had already been taken into consideration.

- 29 According to Directives 90/425 and 89/662, the Commission's power to adopt safeguard measures is justified by the fact that a zoonosis, disease or other cause is likely to constitute a serious hazard.
- 30 The objective of Directives 90/425 and 89/662 is to enable the Commission to intervene rapidly in order to prevent the propagation of a disease affecting animals or a threat to human health. It would be contrary to that objective if the Commission were to be precluded from adopting the necessary measures in response to the publication of new information significantly altering what is known about a disease, particularly as regards its transmissibility or its consequences, on the ground that the disease had been in existence for a long time.
- 31 In the present case, the new information contained in the SEAC announcements was that a link between BSE and Creutzfeldt-Jakob disease had ceased to be a theoretical hypothesis and had become a possibility. According to 'the most likely explanation', the cases of Creutzfeldt-Jakob disease were linked to exposure to BSE before the introduction of the specified bovine offal ban in 1989.
- 32 Despite the fact that BSE previously existed, the new information provided by SEAC significantly altered the perception of the risk which that disease represented for human health, and thus authorised the Commission to adopt safeguard measures in accordance with Directives 90/425 and 89/662.

- 33 As regards the Commission's powers, Directives 90/425 and 89/662 are drafted in very wide terms, inasmuch as they authorise the Commission to adopt 'the necessary measures' for live animals, products derived from such animals, products of animal origin and products derived from those products, without imposing any restrictions as to the temporal or territorial scope of those measures.
- 34 It follows from the provisions of Directives 90/425 and 89/662 that only animals and products of animal origin which fulfil the conditions laid down by those directives may be the subject of trade. The authorities of the Member States of dispatch are required to check that those conditions are fulfilled before issuing export authorisations (Articles 3 and 4 of Directive 90/425 and Articles 3 and 4 of Directive 89/662).
- 35 Directives 90/425 and 89/662 provide that, in the event of discovery, at the place of destination of a consignment or during transport, of the presence of a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans, the competent authorities of the Member State of destination may order that the animal or consignment of animals be put in quarantine at the nearest quarantine station or slaughtered and/or destroyed (first subparagraph of Article 8(1)(a) of Directive 90/425) or that the batch of products of animal origin be destroyed or used in any other way laid down by Community rules (first subparagraph of Article 7(1)(a) of Directive 89/662).
- 36 Those provisions suffice to show that, in the event of a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans, the immobilisation of the animals and/or products and their containment within a specified territory constitutes an appropriate measure, since it may result from decisions taken by the authorities either of the Member State of export or of the Member State of import.



- 37 It is clear that, in order for such containment to be effective, it may in some cases be necessary to impose a total ban on the movement of animals and products outside the frontiers of the Member State concerned, thereby affecting exports to third countries.
- 38 It should be noted in that regard that Directives 90/425 and 89/662 do not expressly preclude the Commission from banning exports to third countries. Nor, as the Advocate General states in point 23 of his Opinion, can such a restriction be inferred from the fact that the directives in question refer to checks 'applicable in intra-Community trade', since the powers of the Commission are linked only to the need for the measures adopted in order to ensure the protection of health in a single market.
- 39 Lastly, it must be recalled that, since the Commission enjoys a wide measure of discretion, particularly as to the nature and extent of the measures which it adopts, the Community judicature must, when reviewing such measures, restrict itself to examining whether the exercise of such discretion is vitiated by a manifest error or a misuse of powers or whether the Commission did not clearly exceed the bounds of its discretion (Case 98/78 *Racke v Hauptzollamt Mainz* [1979] ECR 69, paragraph 5).
- 40 In the present case, the publication of new scientific information had established a probable link between a disease affecting cattle in the United Kingdom and a fatal disease affecting humans for which no known cure yet exists.
- 41 Having regard, first, to the uncertainty as to the adequacy and effectiveness of the measures previously adopted by the United Kingdom and the Community and, second, to the risks regarded as a serious hazard to public health (see paragraph 63

of the order of 12 July 1996 in Case C-180/96 R *United Kingdom v Commission* [1996] ECR I-3903), the Commission did not clearly exceed the bounds of its discretion in seeking to contain the disease within the territory of the United Kingdom by banning the export from that territory to other Member States and to third countries of bovine animals, meat of bovine animals and derived products.

### The plea alleging misuse of powers

42 According to the NFU, even if the Commission were competent to adopt the decision, it nevertheless misused its powers. It is clear from the way in which the fifth recital in the preamble to the decision is worded that its purpose was not so much to protect public health as to allay consumer concern.

43 It must be recalled in that regard that misuse of powers is defined by settled case-law as the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see, in particular, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 69).

44 As the Advocate General states in point 21 of his Opinion, it would not be right, for the purposes of describing the objective of the contested decision, to isolate, from amongst all the recitals in the preamble to that decision, the phrase relating to concern among consumers.

- 45 Whilst the objective of a decision is to be determined by an analysis of the recitals in its preamble, that analysis must relate to the whole of the text, and not to a single element taken in isolation. In the present case, the recitals in the preamble to the decision, read as a whole, show that the Commission was prompted to adopt the provisional measures by concerns as to the risk of transmissibility of BSE to humans, after examining the measures adopted by the United Kingdom and consulting the Scientific Veterinary Committee and the Standing Veterinary Committee.
- 46 There is thus no evidence to support the argument that the Commission's exclusive or main purpose was to allay consumer concern. Consequently, it has not been established that there was a misuse of powers.

### **The plea alleging breach of the principle of proportionality**

- 47 The NFU relies on four grounds in support of the view that the decision must be regarded as disproportionate in its entirety or, alternatively, in respect of certain products. It submits, first of all, that the ban was unnecessary given both the existence of Community and United Kingdom measures which had already been adopted and the fact that the new information provided on 20 March 1996, in which SEAC indicated a possible link between BSE and Creutzfeldt-Jakob disease, did not suggest that a ban on the products specified in Article 1 of the decision was necessary or appropriate. Next, it observes that there was no evidence of the need for a ban on exports to third countries for reasons of public health or to reassure consumers, or of the existence of any deflection of trade. It emphasises, moreover, that the consequences of the decision, which is applicable for an unlimited period, in particular as regards the United Kingdom beef industry, are disproportionate to the underlying aim, even if the decision fulfils requirements relating to the protection of public health. Finally, it considers that less restrictive measures could have been adopted. In the case of third countries, provision could have been made for a prohibition on re-importation into the Community, together with an appropriate certification system. As regards the other Member States, recourse could have been

had to a system of certification and/or labelling to the effect that the meat came from United Kingdom herds which had not had a case of BSE and were fed on a diet which did not include animal protein.

- 48 The British Association of Sheep Exporters considers that, by adopting the decision without taking into account the effects thereof on the live sheep export trade, the Commission manifestly failed to exercise its discretion properly and, in so doing, infringed the principle of proportionality coupled with the principle of good administration.
- 49 The United Kingdom Government considers that the ban on exports to third countries, purportedly imposed in order to prevent deflections of trade, is in breach of the principle of proportionality, since it is not an appropriate means of addressing the risk involved, is not necessary and is not proportionate. The ban caused serious injury to traders operating on third-country markets, even though the risk of trade deflection is largely illusory, having regard to the restricted number of third countries authorised to export bovine animals, fresh bovine meat and meat products to the Member States of the Community, the strict conditions applied to exports, the checks carried out pursuant to the rules on export refunds and the existence of import duties. The requirements imposed in respect of bovine semen and embryos make it impossible to import any products from the United Kingdom into a Member State via a third country.
- 50 Finally, the United Kingdom Government takes the view that a less restrictive measure to prevent the re-importation of unwanted beef into the Community would have been to apply the directives specifically designed to regulate the importation of beef from third countries, such as Council Directive 90/675/EEC of 10 December 1990 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries

(OJ 1990 L 373, p. 1) and Council Directive 91/496/EEC of 15 July 1991 laying down the principles governing the organisation of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC (OJ 1991 L 268, p. 56).

- 51 The Commission points out that its decision is a containment measure, designed to eradicate the disease, combined with market and other support measures. It considers that containment is universally recognised as a legitimate response to a problem such as that in the present case, in order to prevent the disease from spreading. The United Kingdom was identified as the relevant area of containment because, for various reasons, it was not sufficient to create local containment zones and 99.7% of all confirmed BSE cases had occurred in the United Kingdom. The Commission also submits that the directives relating to specific diseases provide that areas of containment are to be set having regard to natural barriers and administrative controls.
- 52 In the Commission's view, the decision is justified as regards live animals on account of the reassessment of the significance of existing doubts, particularly in relation to the presence of the BSE agent in young animals, the uncertainties associated with the system for tracing animals and identifying those that were at risk, the lack of certainty regarding the age at which the animal will be slaughtered and the risk of vertical or horizontal transmission.
- 53 In the case of semen, the ban was lifted after an opinion was delivered by the Scientific Veterinary Committee. However, that does not affect the validity of the contested decision, which was justified, as an emergency measure, by the risk of vertical transmission, by research which was still in progress to establish the incidence of transmission in the case of embryo transfer in cows inseminated with semen from bulls with confirmed BSE, and by the absence of a recent opinion of the Scientific Veterinary Committee on the subject.

- 54 A similar line of reasoning applies in respect of embryos, as does the observation of the Scientific Veterinary Committee that there is evidence of transmission of scrapie by embryo transfer.
- 55 The Commission refers to existing doubts in relation to meat, in particular as regards the operation of the system for the identification and tracing of animals in the United Kingdom and the effective implementation of the control measures to ensure removal of specified bovine offal. The Commission also points out that all meat contains small amounts of lymphatic tissue and that one of the members of the Scientific Veterinary Committee did not exclude the risk posed by muscle meat.
- 56 Similar considerations apply in the case of derived products, such as tallow and gelatin. Mammalian-derived meat meal and bone meal is considered to be the principal cause of the BSE epidemic.
- 57 The Commission also considers that the contested decision was justified in so far as it relates to exports to third countries. Those exports account for no more than about 5% of United Kingdom beef production; hence the extension of the ban to those countries was a relatively small price to pay in order to ensure the complete effectiveness of the containment measures. There was a risk of re-importation of the animals, the meat or derived products, possibly in another form and, in certain cases, with another origin. Furthermore, there was a real risk of fraud, bearing in mind the available data on irregularities in relation to export refunds. According to the Commission, the effectiveness of the measures adopted would have been undermined had they not covered exports to third countries; in that sense, the prohibition on exports to third countries is an integral and necessary part of the decision and is therefore consistent with the principle of proportionality. Moreover, it is doubtful that failure to act in relation to exports to third countries would have been consistent with the obligations imposed on the Council and the

Commission by the Treaty, in particular the obligation to take into account the position of Community agricultural produce on world markets, and with the Community's bilateral and multilateral international obligations.

58 In the Commission's view, no alternative measures could have been taken. A Community-wide ban on specified bovine offal would not have contributed to the eradication of BSE; it would have been of very limited use given the negligible incidence of BSE in the other Member States. Moreover, a great deal of time would have been needed for the effective implementation of such a measure, which was inappropriate given the urgency of the situation. Improved control and certification of certain types of beef would have been an inadequate response, given the urgency of the matter and the doubts as to effectiveness of the control systems in the United Kingdom.

59 Finally, the Commission observes that, in order to assess the proportionality of the contested decision, it is necessary to examine it in the light of the package of measures adopted, costing some ECU 2.5 billion (including adjustment of the intervention thresholds, exceptional support measures in the United Kingdom and in other Member States, calf processing premiums, income support for beef and veal farmers, special measures for exporters, private storage aid for veal, export refunds, measures to promote and market quality beef and veal, and research).

60 It must be recalled that the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni* [1994] ECR I-4863, paragraph 41).

- 61 With regard to judicial review of compliance with the abovementioned conditions, in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 to 43 of the Treaty. Consequently, 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 is seeking to pursue (*Fedesa and Others*, cited above, paragraph 14, and *Crispoltoni*, cited above, paragraph 42).
- 62 At the time when the contested decision was adopted, there was great uncertainty as to the risks posed by live animals, bovine meat and derived products.
- 63 Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.
- 64 That approach is borne out by Article 130r(1) of the EC Treaty, according to which Community policy on the environment is to pursue the objective *inter alia* of protecting human health. Article 130r(2) provides that that policy is to aim at a high level of protection and is to be based in particular on the principles that preventive action should be taken and that environmental protection requirements must be integrated into the definition and implementation of other Community policies.
- 65 The decision was adopted as an 'emergency measure' 'temporarily' banning exports (fifth recital in the preamble). Moreover, the Commission acknowledges in the preamble to the decision the need for the significance of the new information and the measures to be taken to be subjected to detailed scientific study and, consequently, the need to review the contested decision following an overall examination of the situation (seventh recital).



- 66 As regards live animals, and in the light of the export ban already imposed 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. 96), itself amended by Commission Decision 95/287/EC of 18 July 1995 (OJ 1995 L 181, p. 40), the export ban resulting from the decision relates only to cattle aged under six months born to cows not known or suspected to be affected by BSE. However, the scientific uncertainty concerning the manner in which BSE is transmitted, particularly as regards its transmissibility through the mother, coupled with the lack of a system for tagging animals and controlling their movements, has meant that there can be no certainty that the mother of a calf is completely free from BSE or, even if she is, that the calf itself is completely unaffected by the disease.
- 67 Consequently, the ban on the export of live bovine animals cannot be regarded as a manifestly inappropriate measure.
- 68 As regards bovine meat, it is sufficient to recall that, because the disease has a long incubation period, all animals aged six months or more had to be treated as potentially infected with BSE, even if they showed no signs of the disease. Special measures had been adopted in the United Kingdom, relating to the slaughtering of animals and the cutting of meat. However, it was only from May 1995 onwards that unannounced visits were made to United Kingdom undertakings to check compliance with those measures (*Bovine Spongiform Encephalopathy in Great Britain, A Progress Report*, November 1995, paragraph 16); those checks revealed that a significant proportion of slaughterhouses were failing to comply with the legislation.
- 69 Moreover, as is apparent from the report of the Scientific Veterinary Committee of 11 July 1994, meat invariably contains some residual nervous and lymphatic tissues. Similarly, according to the statement of one of the members of that committee, annexed to the opinion of the Scientific Veterinary Committee of 22 March 1996, it was not possible, on the basis of the available scientific data, to exclude the danger of transmission of the infection through muscle meat.

- 70 As is apparent from that opinion, the Scientific Veterinary Committee concluded that, on the available data, it was not possible to prove that BSE was transmissible to humans. However, in view of the possibility of such transmissibility, which the Committee had always considered, it recommended that the measures recently adopted by the United Kingdom concerning the deboning of carcasses from cattle aged over 30 months in approved establishments should be implemented for intra-Community trade and that the Community should adopt appropriate measures as regards the ban on the use of meat meal 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. Annexed to that opinion was the following statement by one of the members of the Committee: 'On the basis of the limited scientific data, which are only based on the evaluation carried out with material from nine cattle, we cannot be confident indeed that muscle meat from cattle does not constitute a danger for transmission of BSE infection.'
- 71 It follows that the ban on exports of bovine meat likewise cannot be regarded as a manifestly inappropriate measure.
- 72 As regards semen and embryos, it is sufficient to recall that when the contested decision was adopted the risk of vertical transmission had not been definitively excluded.
- 73 In so far as other products, such as tallow and gelatin, are concerned, the Commission must be regarded as having displayed appropriate caution by banning the export of those products pending completion of an overall examination of the situation.
- 74 The ban on exports to third countries was appropriate since it ensured the effectiveness of the measure by containing within the territory of the United Kingdom all animals and products likely to be infected with BSE. It would not have been possible, by limiting the number of third countries from which imports were

authorised and by imposing import controls, wholly to exclude the possible re-importation of meat in another form or to prevent deflections of trade.

75 The United Kingdom has suggested possible alternative measures. However, in view of the seriousness of the risk and the urgency of the situation, the Commission did not react in a manifestly inappropriate manner by imposing, on a temporary basis and pending the production of more detailed scientific information, a general ban on exports of bovine animals, bovine meat and derived products.

76 Consequently, the Commission has not breached the principle of proportionality.

77 It follows from the foregoing that the Commission was competent to adopt the decision and that, by adopting it, it did not misuse its powers or breach the principle of proportionality.

78 The answer to be given to the national court must therefore be that consideration of the question referred has disclosed no factor capable of affecting the validity of Article 1 of the decision.

## Costs

79 The costs incurred by the United Kingdom Government and by the Council and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the High Court of Justice, Queen's Bench Division, by order of 3 May 1996, hereby rules:

**Consideration of the question referred has disclosed no factor capable of affecting the validity of Article 1 of Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy.**

Rodríguez Iglesias

Gulmann

Ragnemalm

Wathelet

Schintgen

Mancini

Moitinho de Almeida

Murray

Edward

Puissochet

Hirsch

Jann

Sevón

Delivered in open court in Luxembourg on 5 May 1998.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President