OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 3 February 1998 *

1. In this application the Commission is seeking a declaration by the Court that the Federal Republic of Germany has failed to fulfil its obligations under Directive 64/433/EEC (as amended by Directive 91/497/EEC [1]), Directive 89/662/EEC [2] and Article 30 of the Treaty. In particular, it claims that the practice followed by the relevant German authorities in connection with the importation of pigmeat from other Member States is contrary to those directives and, moreover, is a measure having equivalent effect to a quantitative restriction, which is prohibited by Article 30.

Community legislation

2. Let me briefly summarise the Community legislation which, it is alleged, has not been properly implemented. Directive 64/433 was subject to a number of amendments which are now consolidated in Directive 91/497. It harmonises the health regulations of the Member States in the area of trade in fresh meat to prevent any disparities between national rules from acting as an obstacle to intra-Community trade. [3] The provisions of the directive with which this case is concerned are Articles 5 and 6.

In particular, Article 5(1)(o) provides that 'Member States shall ensure that the official veterinarian declares unfit for human consumption ... meat which gives off a *pronounced sexual odour*.' [4]

* Original language: Italian.

1 — Council Directive of 26 July 1991 amending and consolidating Directive 64/433/EEC on health problems affecting intra-Community trade in fresh meat to extend it to the production and marketing of fresh meat (OJ 1991 L 268, p. 69).

2 — Council Directive 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).

3 — See second and third recitals.

4 — Emphasis added. It should be made clear from the outset that the 'pronounced sexual odour' should not be confused with any other unpleasant olfactory sensation caused, for example, by poor preservation of meat or possibly by putrefaction. What is in issue here is, rather, a stench — and the parties agree in describing it as sickening — which the meat emits only when it is cooked, as a result of the sex hormones present in the pig's carcase: hence the expression 'sexual odour'.

Article 6, in so far as is relevant to this case, reads as follows:

'1. Member States shall ensure that:

...;

(b) meat from:

...

(iii) without prejudice to the cases provided for in Article 5(1)(o) uncastrated male pigs with a carcase weight in excess of 80 kilograms, except where the establishment is able to guarantee by means of a method recognised by the procedure laid down in Article 16, or in the absence of such a method by a method recognised by the competent authority concerned, that *carcases giving off a pronounced boar taint* may be detected,

bears the special mark provided for by Decision 84/371/EEC and undergoes one of the treatments provided for in Directive 77/99/EEC ...' [5]

3. The objective of Directive 89/662 is, as its preamble states, to ensure that veterinary checks are carried out at the place of dispatch only, through 'the harmonisation of the basic requirements relating to the safeguarding of public health and animal health'. [6] The provisions of the directive which concern us in these proceedings are as follows. Article 5 provides that:

'1. Member States of destination shall implement the following measures:

(a) The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

5 — Emphasis added.
6 — See fourth recital.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport;

...'

Further, Article 7 provides that 'if, during a check carried out at the place of destination of a consignment or during transport, the competent authorities of a Member State establish:

...

(b) that the goods do not meet the conditions laid down by Community directives, or, in the absence of decisions on the Community standards provided for by the directives, by national standards, they may, provided that health and animal-health considerations so permit, give the consignor or his representative the choice of:

— destroying the goods, or

— using the goods for other purposes, including returning them with the authorisation of the competent authority of the country of the establishment of origin.

...'

Article 8(1) then sets up a special procedure to resolve cases in which the competent authorities of the country of destination, on the one hand, and those of the country of origin on the other, make a different assessment of a consignment's conformity with the health regulations in force. I feel it will be useful to set out Article 8 in full, in so far as it concerns us here:

'In the cases provided for in Article 7, the competent authority of the Member State of destination shall contact the competent authorities of the Member State of dispatch without delay. The latter authorities shall take all necessary measures and notify the competent

authority of the first Member State of the nature of the checks carried out, the decisions taken and the reasons for such decisions.

If the authority of the first Member State fears that such measures are inadequate, the competent authorities of the two Member States shall together seek ways and means of remedying the situation; if appropriate this may involve an on-the-spot inspection.

Where the checks provided for in Article 7 show repeated irregularities, the competent authority of the Member State of destination shall inform the Commission and the veterinary departments of the other Member States.

The Commission, at the request of the competent authority of the Member State of destination or on its own initiative, and taking into account the nature of the infringements established, may:

— send a mission of inspection to the establishment concerned; or

— instruct an official veterinarian, whose name shall be on a list to be prepared by the Commission at the suggestion of the Member States, and who is acceptable to the various parties concerned, to check the facts in the establishment concerned;

— request the competent authority to intensify its sampling of the products of the establishment concerned.

It shall inform the Member States of its findings.

Where these measures are taken to deal with repeated irregularities on the part of an establishment, the Commission shall charge any expenses occasioned by the application of the indents of the foregoing subparagraph to the establishment involved.

Pending the Commission's findings, the Member State of dispatch must, at the request of the Member State of destination, intensify checks on products coming from the establishment in question, and if there are serious animal health or public health grounds, suspend approval.

The Member State of destination may, for its part, intensify checks on products coming in from the same establishment.

At the request of one of the two Member States concerned — where the irregularities are confirmed by the expert's opinion — the Commission must, in accordance with the procedure laid down in Article 17, take the appropriate measures, which may go as far as authorising the Member States to prohibit provisionally the bringing into their territory of products coming from that establishment. These measures must be confirmed or reviewed as soon as possible in accordance with the procedure laid down in Article 17.

The general rules for the application of this article shall be adopted in accordance with the procedure set out in Article 18.

...'

Subject-matter of the proceedings

4. I now turn to the subject-matter of these proceedings and the substance of the national measures in issue.

On 26 January 1993, the Federal Minister of Health sent a note to the veterinary authorities of the Member States setting out the requirements to be fulfilled when fresh meat is imported into Germany. A copy of that note was also sent to the Commission.

Paragraph 1 of that note stated that meat in which the presence of tuberculosis and/or brucellosis had been detected was not considered fit for human consumption and its importation into Germany was therefore prohibited.

Paragraph 2 stated that the competent German authorities would authorise the importation of livers and kidneys from pigs used for reproduction and from solipeds and calves over two years old only on submission of a certificate that the organs in question did not contain residues of heavy metals in amounts above the reference level fixed by the Bundesgesundheitsamt (Federal Department of Hygiene and Public Health).

Finally, paragraph 3 provided that Article 6(1)(b) of Directive 64/433, as amended by Directive 91/497, 'is transposed into national law with a limit level of 0.5 g/g for androsterone, irrespective of weight limit. If this level is exceeded, the meat gives off a pronounced sexual odour and is unfit for human

consumption within the meaning of Article 5(1)(o). Only the modified immuno-enzyme test of Professor Claus is recognised as a specific method for measuring the level of androsterone. Meat from uncastrated male pigs which exceeds this level cannot be imported into the Federal Republic of Germany as fresh meat.

By agreement with the Commission and the Council (see the declaration in the summary record of the Council concerning Article 6(1)(b) at the time of the adoption of Directive 91/497), Article 7(1)(b) of Directive 89/662 is applicable to all consignments of pigmeat from other Member States. All consignments of pigmeat, irrespective of any marking attesting to hygiene standards, will be inspected at the place of destination to check whether this limit level has been complied with and, where it has been exceeded, action will be taken ...'.

This is the substance of the national legislation in issue. Furthermore, it is of general application, in that the note applies to products from all the Member States. However, the problems which gave rise to this application relate exclusively to imports of pigmeat from Denmark, in that — as will be explained below — the German authorities object to the methods used by their Danish counterparts to detect pronounced sexual odour.

5. The Commission took the view that the content of that note infringed Directives 64/433 and 89/662, and Article 30 of the Treaty, and set in motion the pre-litigation procedure provided for by Article 169 against the Federal Republic of Germany. In reply to the reasoned opinion, the German Government undertook to adopt all measures necessary to comply therewith in connection with the allegations relating to paragraphs 1 and 2 of the note in issue. However, with reference to paragraph 3 of the note, the Federal Republic was only prepared to modify the system of monitoring so that it is carried out only by means of non-discriminatory spot-checks. For the rest, the German Government disputed the Commission's assessment and expressed the view that paragraph 3 of the note did not in any way contravene the directives in question or Article 30 of the Treaty.

The Commission then brought an action before the Court limiting its application to paragraph 3 of the note in issue. More specifically, the applicant institution seeks the following form of order:

'A declaration that the Federal Republic of Germany has failed to fulfil its obligations under Articles 6(1)(b) and 5(1)(o) of Directive 64/433/EEC, as amended by Directive

91/497/EEC, in conjunction with Articles 5(1), 7 and 8 of Directive 89/662/EEC and Article 30 of the Treaty,

in imposing a particular requirement for special marking and heat treatment of carcases of uncastrated male pigs pursuant to Article 6(1)(b) of the directive irrespective of the weight of the animal, as soon a concentration of androsterone over 0.5 g/g can be detected in the meat by applying Professor Claus's modified immuno-enzyme test

and

in stipulating that where the limit level of 0.5 g/g of androsterone is exceeded, the meat gives off a pronounced sexual odour with the result that under Article 5(o) of the directive it is rendered unfit for human consumption.

An order that the defendant pay the costs.'

The defendant Member State defended the action calling for the dismissal of the application and an order requiring the Commission to pay the costs.

The harmonisation brought about by Directives 64/433 and 89/662

Before considering the substance of the individual claims made by the Commission, let me first assess whether or not the rules laid down by the directives under consideration have achieved the complete harmonisation of the legislation we are concerned with in this case. The Federal Republic of Germany justifies the national rules in issue by arguing that, in the case under consideration, there is only partial harmonisation, with the result that the establishment of a limit level for 'pronounced sexual odour' and of methods to detect it is a matter for the national legislatures. Obviously this argument can be accepted or refuted according to whether total or only partial harmonisation is involved. The answer to that question, moreover, affects the judgment which the Court will be called upon to give on a possible infringement of Article 30, and in particular on the possibility for the defendant Member State to justify the measures in issue, on the basis of Article 36, by reference to the need to protect public health. It is established case-law that 'where ... Community directives provide for the harmonisation of the measures necessary to ensure the protection of animal and human health and

establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonising directive'. [7]

It is, therefore, my opinion that the investigation into the question whether there has been harmonisation holds the key to the correct interpretation of this case. In making this assessment, I believe we should consider Directives 64/433 and 89/662 together: the purpose of the first is to lay down rules in respect of the health requirements for the production and marketing of fresh meat; the second lays down the rules relating to 'veterinary checks in intra-Community trade with a view to the completion of the internal market'. Accordingly the Community rules concerning trade in pigmeat, in so far as they are relevant here, derive from these two pieces of legislation read in conjunction with one another.

If, then, we look at the preamble to the above legislation it seems clear to me that the intention of the legislature was to achieve total harmonisation. The second recital in the preamble to Directive 64/433, as annexed to Directive 91/497, refers to obstacles to intra-Community trade resulting from 'differences between the health requirements of Member States concerning meat'. The third recital points to the need to eliminate such differences by approximating the provisions of the Member States in this area; according to the following recital 'the object of this approximation must be ... to standardise ...' the above health requirements. The recitals in the preamble to Directive 91/497 in this regard are even more explicit: the need to 'harmonise the conditions under which certain meat is declared unfit for human consumption' [8] is seen by the legislature as a direct consequence of the abolition by Directive 89/662 of veterinary checks at the frontiers of the Member States. The directive under consideration, then, is included amongst the 'measures for the gradual establishment of the internal market'. [9] From that point of view Directive 89/662 complements Directive 64/433 in that its objective is to relocate veterinary checks in the place of origin, so that goods which meet Community requirements can be moved freely within the Community unhindered by obstacles which might otherwise result from subsequent checks justified by the need to ensure the protection of public health.

Analysis of the recitals, then, reveals the legislature's desire to achieve the total harmonisation of health requirements relating to trade in meat through the legislation under consideration. Moreover, this is how the Court interpreted Directive 64/433. On this point I think it useful to quote in full a passage from

7 — See, *inter alia*, Case 5/77 *Tedeschi* [1977] ECR 1555, paragraph 35; Case 148/78 *Ratti* [1979] ECR 1629; Case 251/78 *Denkavit* [1979] ECR 3369; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553.

8 — See seventh recital.

9 — See third recital.

the judgment in the *Delhaize Frères* case [10] which seems to me to be of particular interest: '... as far as fresh meat is concerned, the Court has already stated in its judgment of 15 December 1976 in Case 35/76 *Simmenthal* [1976] ECR 1871 that the harmonised system of public health inspections, introduced in particular by Directive 64/433, has as its aim the abolition of barriers to intra-Community trade in fresh meat by the harmonisation of public health measures. That system, which is based on the principle that the *public health guarantees* required by all the Member States are *equivalent*, accordingly has as its purpose to transfer supervision to the exporting Member State and to replace in this way the systematic measures of protection at the frontier with a uniform system so as to make multiple frontier inspections unnecessary, whilst at the same time giving the Member State of destination the opportunity of ensuring that the guarantees provided by the system of inspections thus standardised are in fact given'.

In the judgment in the *Ligur Carni* case [11] the Court recognised that '... the directive established a *harmonised* system of health inspections, based on the principle that *the public health guarantees* required by all the Member States *are equivalent*, which ensures the protection of health and at the same time equal treatment of products. The purpose of that system is to transfer supervision to the exporting Member State'.

6. It now remains to be seen in the light of the relevant substantive provisions of the directive whether it is possible to speak of total harmonisation even in the specific circumstances of this case, that is to say the detection of a pronounced sexual odour which renders meat unfit for consumption. The German Government argues that we cannot, on the ground that the Community legislation has not established either a standard level at which it is agreed that a pronounced sexual odour is given off or a common method for measuring that level. On that basis it concludes that, in the absence of a common reference level, each Member State is free to set its own.

However, I am not swayed by that argument. First of all, the objective of harmonisation, and thus liberalisation, which the Community legislature had in mind in drawing up the legislation in question would thereby be frustrated. Elsewhere, [12] the Court has demonstrated its preference for the only interpretation which is compatible with the fundamental principles of the single market and the free movement of goods.

Moreover, it would, in my view, be erroneous to maintain that harmonisation exists only where the legislature has laid down a uniform

10 — Joined Cases 2/82, 3/82 and 4/82 *Delhaize Frères* [1983] ECR 2973, paragraph 11. Emphasis added.

11 — Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni* [1993] ECR I-6621, paragraph 25. Emphasis added.

12 — See Case C-105/95 *Paul Daut* [1997] ECR I-1877.

standard. It is true that, in the present case, there is no such standard, in the sense that the legislature has not 'quantified' the pronounced sexual odour which renders meat unfit for consumption; and it is also true that Article 6(1)(b)(iii) of the directive provided for the establishment of a common method for detecting such sexual odour. However, the same article provides that in the absence of a common method, that '*recognised by the competent authority concerned*' is to apply, that is to say, the method adopted by the authorities of the country of origin. Now, for present purposes, it seems to me that this constitutes harmonisation. We must bear in mind that the work of the legislature aimed at harmonising health regulations for trade in meat is not an end in itself but a means of achieving an ultimate purpose: [13] in this case to allow the free movement of goods which meet the harmonised requirements. That purpose can be achieved by means of legislative techniques which are different but substantially equivalent as regards the final result. A common rule may be laid down to replace the corresponding national standards and that is the first possibility envisaged by Article 6(1)(b)(iii) which refers to 'a method recognised by the procedure laid down in Article 16'; or else, and this is the possibility which concerns us, in the absence of such a method, the detection of pronounced sexual odour may be a matter for the competent authorities of the country of origin of the goods. For the purposes of this case, the two possibilities are equivalent. The above legislation purposely makes provision for both as alternatives but in terms of absolute equivalence. Hence the objective of approximating the relevant health regulations is achieved here through the Member States' agreeing, in adopting this directive, to assume the obligation to accept the decisions of the authorities of the country of origin.

7. Furthermore, Directive 89/662 provides for the possibility for the Member State of destination of the goods to carry out non-discriminatory spot-checks to ensure the goods conform to the health regulations in force. [14] This is obviously a provision intended to safeguard public health through the system set up by this directive: it makes it possible to prevent the marketing of meat where irregularities are found in the consignment. [15] In such a case, however, the State availing itself of that option is required to set in motion 'without delay' the special procedure set up by Article 8 to deal with any complaints which may be made regarding the conformity of the goods with health regulations.

13 — The harmonisation, or approximation, of laws has been the subject of special study in legal writings. On the functional nature of approximation and on the various means by which it may be achieved, see *inter alia* R. Mastroianni, 'Ravvicinamento delle legislazioni nel diritto comunitario', in *Digesto delle Discipline Pubblicistiche*, Turin, 1996, vol. XXII p. 457 et seq. and its many references to other works.

14 — See Article 5.

15 — See Article 7.

The alleged infringement of Directives 64/433 and 89/662

8. In the light of these preliminary observations, I now turn to the alleged infringement of these directives.

In this connection, I do not believe there is any doubt that the requirements imposed by the German authorities relating to the special marking and heat treatment of pigmeat are contrary to Article 6(1)(b)(iii). That provision is clear and unequivocal: only carcases *weighing in excess of 80 kilograms* must bear the special mark and undergo heat treatment, except where the establishment is able to guarantee by means of a common method or, in the absence of such a method, by means of *a method recognised by the competent authority of the country of origin*, that 'carcases giving off a pronounced boar taint may be detected'. The German authorities on the other hand require special marking and heat treatment for carcases *below* the threshold of 80 kilograms. Moreover, they impose these requirements despite the fact that the authorities of the country of origin are using a method suitable for detecting meat which gives off a pronounced sexual odour; indeed, in the note in issue it is expressly stated that '*only the modified immuno-enzyme test of Professor Claus is recognised as a specific method for measuring the level of androsterone*'. This is clearly in breach of Article 6(1)(b)(iii).

9. I now turn to consider the Commission's claim alleging a breach of Article 5(1)(o) of Directive 91/497 in conjunction with Article 8 of Directive 89/662. According to the applicant institution, the failure to fulfil obligations lies in the fact that the German authorities refused to recognise that pigmeat imported from Denmark meets the relevant health requirements but did not set in motion the special procedure under Article 8. Here, too, the problem raised by the defendant government relates to the detection of a pronounced sexual odour in pigmeat: the German authorities do not recognise the validity of the Scatol method used by the Danish authorities to detect pronounced sexual odour. Instead they use Professor Claus's method and maintain, as set out in paragraph 3 of the note in issue, that meat containing a level of androsterone higher than 0.5 g/g gives off a pronounced sexual odour and is therefore not fit for human consumption.

In my view, this claim by the Commission should also be upheld. It turns on the failure to set in motion the procedure required by Article 8 and there is no doubt that the German authorities did not use that procedure. The fact that the provision in question allows the Member State no discretion as to whether to set in motion the procedure in question is similarly beyond doubt: under

Article 8 the authorities of the country of destination *must* [16] contact the competent authorities of the Member State of dispatch without delay — and take the various procedural steps laid down by Article 8 — where irregularities are discovered in the consignment and recourse is had to the options open to them under Article 7. The presence of a pronounced sexual odour clearly constitutes an 'irregularity' within the meaning of that legislation.

10. In my view, the arguments put forward by the defendant government cannot be upheld. As regards the allegation just considered, the German Government confines itself to denying, *without more*, its failure to set in motion the procedure under consideration, but without furnishing any evidence to substantiate the contention made in its own defence. Accordingly, for the purposes of these proceedings, the Federal Republic of Germany has not discharged the burden of proof incumbent upon it; for that reason its defence should be rejected as not proven.

11. As regards, then, the national legislation in issue under which the conformity with health requirements of meat is only recognised if it has a level of androsterone of below 0.5 µg/g measured by the method of Professor Claus, the German Government essentially puts forward two arguments. First, it alleges that there are no harmonised rules on this subject, so that each Member State is entitled to set independently the level of pronounced sexual odour which renders meat unfit for consumption. However, this argument is based on the premiss that the relevant rules have not been harmonised: therefore, as this premiss has proved to be unfounded, this argument also fails.

12. The defendant Member State argues further that the Danish authorities use a method which is scientifically unsuitable for detecting sexual odour. In its written observations, the German Government argues that it is willing to accept the principle that checks for 'pronounced sexual odour' should be carried out by the authorities of the country of dispatch using methods recognised by those authorities, but they must none the less use *suitable methods*. This was allegedly not the case here, since the Scatol method used by the Danish authorities does not allow the presence of sexual odour to be detected properly. In other words, the German Government appears to acknowledge, in the abstract, the power of the authorities of the countries of origin, but denies that, in this case, that power was properly exercised.

16 — The wording used in the directive is 'the competent authority of the Member State of destination *shall* contact"; this makes plain that this course of action is compulsory and not optional.

However, that argument also strikes me as unfounded. I concur with the German Government in the fact that the competent authorities of the country of origin must use 'suitable methods', that is to say methods suited to achieving the result required by the provision in question, particularly as the system set up by the directives is based precisely on the confidence which the authorities of the country of destination must have in the checks carried out by the State of dispatch; therefore — as the sixth recital in the preamble to Directive 89/662 states — 'the latter must ensure that such veterinary checks are carried out in *an appropriate manner*'. However, if the defendant government considers that Denmark is not complying with this condition it must first set in motion the procedure provided for in Article 8, and thereby resolve, using the framework provided by the directive, any disputes which may arise regarding the conformity with health requirements of goods which are covered by the harmonised rules. [17]

13. In any event, leaving aside the question of recourse to the above procedure, I would point out here that the Court has consistently held that, if a Member State considers that another Member State has failed to fulfil its obligations under a directive, it must bring proceedings against the State allegedly in breach of its obligations for a declaration to that effect and to bring the infringement to an end. [18] However, I do not believe that the State concerned can act unilaterally and impose substantive requirements for the marketing of pigmeat which are not provided for in the relevant Community legislation. To proceed in this way would not only be contrary to the letter of the directives under consideration. It would also conflict with the fundamental principle of the Community legal order according to which the Member States must avail themselves of the judicial remedies provided for by the Treaty and cannot take matters into their own hands. [19] In the light of that principle, I cannot see how the German Government can justify the imposition of requirements which are clearly not provided for by the directive under consideration — such as the requirement for special marking and heat treatment for carcases weighing less than 80 kilograms as well, and the refusal to recognise the validity of any method other than that of Professor Claus — on the basis of the Danish authorities' alleged failure to fulfil their obligations, in that they did not use appropriate methods to detect pronounced sexual odour. If the defendant Member State considers that the Danish authorities are using unsuitable methods — and are not therefore properly implementing the directive — it can (and

17 — At the hearing the question was discussed whether the procedure provided for in Article 8 could usefully be implemented in this case: in particular, it was said that there would be no 'irregularity' within the meaning of that article, since every Member State would be free to fix the limit level for sexual odour and the methods for detecting it. However, this is a point of view which I cannot share. The detection of pronounced sexual odour is one of the checks for which the authorities of the country of origin are responsible; if, in the course of checks which it is allowed to make using its own methods, the authority of the country of destination takes the view, disagreeing with the first authority, that the meat gives off a pronounced sexual odour, it will have to set in motion the procedure in question disputing precisely the fitness of the meat to be marketed because of that sexual odour. At that point there will be an assessment of whether or not the meat is tainted in this way and it will obviously be possible to criticise the suitability of the methods used.

18 — See Case C-14/96 *Paul Denuit* [1997] ECR I-2785; *Hedley Lomas*, cited above, and Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115.

19 — See Joined Cases 90/63 and 91/63 *Commission* v *Luxembourg and Belgium* [1964] ECR 625 and Case 232/78 *Commission* v *France* [1979] ECR 2729.

indeed, must) use the administrative and judicial mechanisms provided for by the system. The path followed by the German Government — that is to say, taking matters into its own hands by introducing requirements not provided for by the directive — is, on the other hand, contrary to the logic of the Community legal order.

14. All these considerations lead me to consider that the wide-ranging and detailed arguments relied on by the German Government which seek to demonstrate, in scientific terms, the unsuitability of the Scatol method used by the Danish authorities and to emphasise the merits of Professor Claus's method used by the German authorities are wholly irrelevant. Such considerations strike me as beside the point in this context: the procedure provided for in Article 8 is the most appropriate context in which to assess, at a technical level, whether the Scatol method is suitable for detecting the presence of a pronounced sexual odour. And the failure of the defendant Member State to fulfil its obligations in this case consists precisely in its not having set in motion the procedural mechanism specifically set up by the directive, or, in any event, in not having brought proceedings in the relevant court to obtain a declaration that Denmark has failed to fulfil its obligations.

Infringement of Article 30

In the light of the foregoing considerations, I take the view that the Commission's allegation regarding the infringement of Article 30 must also be upheld. First of all, there is no doubt that the practice followed by the German authorities in accordance with the note in issue falls within the scope of Article 30. This point is conceded by the Federal Republic of Germany itself which recognises that the national measures in issue might, in the familiar wording used in the *Dassonville* judgment, 'hinder, directly or indirectly, actually or potentially, intra-Community trade ...'. [20] The defendant government believes, however, that those measures are justified, in this case, in that they are intended to protect public health within the meaning of Article 36.

However, I cannot endorse the defence of the German Government. As I have already said, in my view, there is in this case a sufficient degree of harmonisation to preclude reliance on Article 36 and thus to preclude recourse to national rules purportedly based on the need to protect public health in respect of the marketing of pigmeat. The detection of 'pronounced sexual odour' is one of the checks

20 — See Case 8/74 [1974] ECR 837, paragraph 5.

which must be carried out by the country of origin, using methods recognised by the competent authorities of that country. This does not mean that it is impossible to monitor the proper fulfilment by the Member State of origin of the obligation to make provision for suitable checks on the conformity of the goods with health regulations and thus to use methods which are *objectively suitable* for detecting the presence of any 'pronounced sexual odour'. The special procedure provided for in Article 8 is specifically intended to iron out speedily any possible disparities in assessment which may arise between national authorities regarding the conformity of meat with the health requirements in force.

On the other hand, it does not seem to me that, in this case, the protection of consumer health has been jeopardised in any way. In that connection, suffice it to note that Directive 89/662 itself provides for the possibility for the Member State of destination of the goods to carry out spot checks for the purpose of ascertaining whether the requirements laid down by the Community directives have been complied with. Obviously those requirements include the absence of a pronounced sexual odour, which, according to Article 5(o) of Directive 64/433, renders meat unfit for human consumption. If the competent authority of a Member State finds that the goods do not meet those requirements it can, under Article 7(1)(b), give the consignor the choice of '*destroying* the goods or *using the goods for other purposes*, including returning them with the authorisation of the competent authority of the country of the establishment of origin'. The risk of a threat to public health is thus averted. For the rest, the Commission itself does not dispute that it is possible for the defendant Member State to prevent the marketing of the meat by recourse to the options available to it under Article 7 of Directive 89/662; however, it takes the view, I think justifiably, that the German authorities should have applied Article 8 of that directive and opened the procedure provided for by that article without delay. I would add that public health can be adequately protected by means of the special procedure which, however, the defendant State unjustifiably failed to use: according to the sixth subparagraph of Article 8(1), 'pending the Commission's findings, the Member State of dispatch must, at the request of the Member State of destination, intensify checks on products coming from the establishment in question, and if there are serious animal health or public health grounds, suspend approval'; the eighth subparagraph goes on to provide that 'at the request of one of the two Member States concerned — where the irregularities are confirmed by the expert's opinion — the Commission must, in accordance with the procedure laid down in Article 17, take the appropriate measures, which may go as far as authorising the Member States to prohibit provisionally the bringing into their territory of products coming from that establishment. These measures must be confirmed or reviewed as soon as possible in accordance with the procedure laid down in Article 17'.

To conclude, then, I do not consider that the grounds provided for in Article 36 can be taken into account by way of justification: the system set up by the abovementioned directives is quite comprehensive and, in particular, allows situations requiring rapid

intervention to guarantee the protection of health to be dealt with.

15. Moreover, leaving aside the question of the, albeit compulsory, setting in motion of the procedure laid down by Directive 89/662, I would stress that the complaints of the German Government regarding the validity of the Scatol method used by the Danish authorities should logically point to the conclusion that Denmark had failed to fulfil its obligations under the directives under consideration here: more specifically, it has failed to meet the obligation to arrange adequate monitoring of goods by using methods suitable for the detection of the presence of pronounced sexual odour. In my view, however, a full refutation of that argument is to be found in the consistent case-law to which I have already referred: 'if a Member State considers that another Member State has failed to fulfil its obligations under the directive, it may ... bring Treaty infringement proceedings under Article 170 of the EC Treaty or request the Commission itself to take action against that Member State under Article 169 of the Treaty'. [21] On that basis, the Court concludes that 'it is settled case-law that a Member State cannot unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law'. [22]

16. I therefore consider that the conduct of the defendant State is clearly contrary to the directives under consideration and to Article 30, since that State, 'reacted' as it were, by non-judicial means to the alleged unsuitability of the Scatol method used by the Danish authorities, all the more so as the German Government itself surprisingly conceded at the hearing that it could have brought an action against Denmark for a declaration that it had failed to fulfil its obligations in that it used a method which was scientifically unsuitable for detecting any pronounced sexual odour; and it added that it could also have challenged the decision recognising the validity of the Danish Scatol method under the procedure provided for in Article 8, instigated at the request of France. However, the German Government did not trouble itself to specify the reasons why it chose the more convenient route of adopting unilateral measures rather than making use of the remedies provided for by the Treaty and secondary legislation, a course of action which is more in keeping with the character of a Community based on the rule of law. It is scarcely necessary to add that in such a Community governed by the

21 — See *Commission* v *Belgium*, cited above at footnote 18, paragraph 36.

22 — See the judgment cited above, paragraph 37. As regards the need to ensure that legality is restored without delay, suffice it to note — in line with the judgment in *Commission* v *Belgium*, cited above — that the Member State concerned 'may request the Court under Article 186 of the EC Treaty to prescribe interim measures in any proceedings brought before it under Article 170 of the Treaty'.

rule of law the concept of 'rough justice' — on which the German Government has largely relied in the case now before the Court — is necessarily subordinated to a structure of legal remedies to which the Member States must submit. For these reasons, I do not consider that I can endorse the position of the defendant government in this case.

Conclusion

17. In the light of the foregoing considerations, I therefore propose that the Commission's application should be upheld in its entirety and that the defendant State should be ordered to pay the costs.