

and, on the other hand, of putting forward its defence to the Commission's complaints.

2. Although it is true that under the procedure provided for in Article 169 the action brought by the Commission must relate to the same subject-matter as the reasoned opinion, which must in turn be preceded by a letter inviting the Member State concerned to submit its observations, there is nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in its initial letter. Indeed, the reply to that letter may give rise to a fresh consideration of those complaints.
3. Article 11 (1) of Directive 71/118 must be understood as leaving the Member States power to lay down health control provisions for intra-

Community trade in fresh poultry-meat, pending the adoption of Community measures. That provision cannot have the effect of relieving Member States of their obligation to comply with the prohibitions laid down in Articles 30 and 36 of the Treaty in the field which it covers.

4. The question whether or not national measures on animal health may include an import licensing system without infringing Article 36 of the Treaty cannot be answered uniformly in every case. In fact, the reply to that question depends upon the relationship in an individual case between, on the one hand, the inconvenience caused by the administrative and financial burdens imposed under such a system and, on the other hand, the dangers and risks for animal health resulting from the imports in question.

In Case 74/82

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Richard Wainwright, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

applicant,

v

IRELAND, represented by Louis J. Dockery, Chief State Solicitor, H. J. O'Flaherty, Senior Counsel, and G. O'Reilly, Senior Counsel, acting as Agents, with an address for service in Luxembourg at the Irish Embassy,

defendant,

APPLICATION for a declaration that, by imposing restrictions on imports of poultrymeat, eggs, and poultry products, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty,

THE COURT,

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot, Presidents of Chambers, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco, O. Due, U. Everling and C. Kakouris, Judges,

Advocate General: G. F. Mancini

Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

This application relates to the legislation in Ireland on measures to combat Newcastle disease (pseudo-fowl pest) and in particular the application of restrictions on imports in relation to poultry and eggs.

Newcastle disease: nature and prophylaxis

1. It is clear from the file that Newcastle disease is a particularly

contagious disease which is capable of affecting virtually all types of poultry, particularly chickens and turkeys of all ages. The disease is caused by a virus which develops very rapidly in chick embryos and in certain living cells of poultry. The virus remains active for a long period outside a living bird: for more than two years at very low temperatures, and for several months at normal temperatures, depending upon the circumstances and the type of carrier of the virus. It survives in poultry sites and poultry houses, in birds, dead or live, in birds' eggs, in birds' excreta, in certain parasites and even in certain vaccines. Sea-birds (and even the wind) may, in certain climatic conditions, transport the virus.

The disease appears in various forms, the acuteness of which depends on the degree of virulence of the strain of virus and the resistance of the host. The symptoms of the disease are respiratory and digestive difficulties, partial paralysis and loss of appetite. The course of the disease in poultry varies widely: in some cases heavy mortality within a short time, in others a more or less severe effect on growth and laying, and in others an infection which cannot be detected except by laboratory tests.

Because it is an epidemic disease, an outbreak may entail serious economic consequences for poultry producers. Serious epidemics of the disease, which appeared for the first time in Europe in 1926 in Newcastle-upon-Tyne, occurred during the 1960s and from 1969 to 1972. According to the information provided by the International Office of Epizootics, reproduced in the table below, since then the number of outbreaks has fallen appreciably.

Newcastle disease statistics — 1972-81

IOE returns

Number of outbreaks

Member State	1972	1973	1974	1975	1976	1977
Belgium	65	26	125	17	1	—
Denmark	4	—	—	—	—	—
France	887	471	465	204	4	—
Germany	5 523	963	69	97	21	8
Greece	1 933	1 399	673	349	267	511
Ireland	—	—	—	—	—	—
Italy	349	564	105	197	97	38
Luxembourg	33	2	14	1	—	—
Netherlands	160	27	—	18	—	2
United Kingdom (GB)	400	74	35	7	6	—
United Kingdom (Northern Ireland)	—	36	—	—	—	—
Total	9 354	3 562	1 486	890	396	559

COMMISSION v IRELAND

Member State	1978	1979	1980	1981 ¹	Total 1972-81
Belgium	6	1	6 ¹	—	247
Denmark	—	—	—	—	4
France	—	—	—	—	2 031
Germany	2	4	2	—	6 689
Greece	150	36	10	12	5 340
Ireland	—	—	—	—	—
Italy	107	17	2	2	1 478
Luxembourg	—	—	—	—	50
Netherlands	—	—	—	—	207
United Kingdom (GB)	1	—	—	—	523
United Kindom (Northern Ireland)	—	—	—	—	36
Total	266	58	20	14	16 605

1 — As completed by the Commission.

In Ireland, attempts to eradicate both Newcastle disease and other avian diseases have long been concentrated on a policy of non-vaccination and slaughter of contaminated flocks, accompanied by strict import controls. The last outbreak of Newcastle disease was in 1956. No outbreak of other avian diseases, such as infectious laryngotracheitis, fowl pox, turkey coryza, or Arizona disease, has previously been recorded in Ireland. A similar policy has been followed in Northern Ireland and the fact that the whole of Ireland is an island has greatly contributed to the effectiveness of that policy. The same method has also given good results in Scandinavia, particularly in Denmark. In other countries, the disease has been controlled by the adoption of a policy of slaughter and vaccination combined or of generalized vaccination, sometimes compulsory, sometimes on a voluntary basis, according to the incidence of the disease. For vaccination, two types of

vaccine are used: live vaccine and inactivated vaccine. The live lentogenic virus used in vaccines is liable to persist in a carcass in a similar manner to other strains of Newcastle disease. Moreover, vaccinated birds, and even their descendants, may be hidden carriers of field virus.

The Irish legislation

2. Controls on the import of poultry, poultrymeat, poultry eggs and poultry products have been applied in Ireland in the interests of avian health in essentially unchanged form since 1938. The measures which are in force at present are based on the Disease of Animals Act 1966. They are contained in the Poultry, Poultry Carcasses, Poultry Eggs and Poultry Products (Restriction on Import-

ation) Order 1971 (Statutory Instrument No 139 of 1971). That Order prohibits the importation of poultry, poultry carcasses, poultry eggs and poultry products except under licence granted for that purpose by the Minister for Agriculture and Fisheries, subject to the conditions contained therein.

In practice, licences are granted for the importation of the products in question from any country in which the avian health status is equivalent to that of Ireland, namely, in the context of the Community, from Northern Ireland and Denmark. As for imports from elsewhere in the Community, the Minister for Agriculture is prepared to issue and does freely issue licences for the importation of poultry eggs and poultry products which have been cooked or heat-treated at the temperature necessary to eliminate avian disease virus; the importation from those countries of poultry carcasses, poultry eggs and poultry products which have not been cooked or heat-treated is not permitted.

The Community provisions

3. In the Community, health control in the poultry sector was covered by Council Directive 71/118 of 15 February 1971 on health problems affecting trade in fresh poultrymeat (Official Journal, English Special Edition, 1971 (I), p. 106).

The last recital in the preamble to that directive is worded as follows:

“... animal health provisions relating to trade in live poultry and fresh poultrymeat will be the subject of other

Community directives; ... it has become apparent that the first steps should now be taken towards approximating national provisions in this field by laying down certain conditions under which Member States may prohibit or restrict the introduction of poultrymeat into their territory for animal health reasons and by providing for a Community emergency procedure within the Standing Veterinary Committee under which measures taken by a Member State could be examined in close cooperation by Member States and the Commission and, where appropriate, amended or repealed;”

and Article 11 thereof provides:

- “(1) Without prejudice to paragraphs (2) to (4) the animal health provisions of Member States concerning trade in live poultry and poultrymeat shall continue to apply until the entry into force of any Community provisions.
- (2) A Member State may, if there is a danger that animal diseases may be spread by the introduction into its territory of fresh poultrymeat from another Member State, take the following measures:
 - (a) in the event of an outbreak of an epizootic disease in the other Member State, temporarily prohibit or restrict the introduction of fresh poultrymeat from the affected areas of that Member State;
 - (b) if an epizootic disease becomes widespread or if there is an outbreak of another serious

contagious or infectious animal disease, temporarily prohibit or restrict the introduction of fresh poultrymeat from the entire territory of that State.

- (3) Each Member State must immediately inform the other Member States and the Commission of the outbreak in its territory of any such disease as in referred to in paragraph (2) and of the measures taken to control it. It must also inform them immediately of the elimination of the disease.
- (4) Measures taken by the Member States under paragraph (2), and any repeal of such measures, must be communicated forthwith to the other Member States and to the Commission together with the reasons therefor. Under the procedure laid down in Article 12, a decision may be taken to repeal or amend those measures, in particular in order to coordinate them with measures adopted by other Member States.
- (5) If the situation envisaged in paragraph (2) arises and if it appears necessary that other Member States also apply the measures taken under that paragraph, amended, where necessary, pursuant to paragraph (4), appropriate measures shall be adopted under the procedure laid down in Article 12."

information on Ireland's policy and legislation in relation to imports of poultry products and in particular on the question whether Ireland "presently maintains its import ban on fresh poultrymeat, on eggs and live poultry from Member States which allow vaccination". That telex message was addressed to the Irish Government as a result of the notification by the United Kingdom of new national restrictions on imports of poultry products and eggs to combat Newcastle disease which entered into force on 1 September 1981.¹ The Commission, conducting an urgent examination of the compatibility with Community law of the measures imposed in that sphere, requested the Irish Government to forward the required information within five days.

By a telex message of 7 September 1981, the Irish Government gave details of the applicable legislation and confirmed that Ireland did not allow the import of live poultry, poultrymeat or eggs from Member States which permit vaccination. As to the legal basis for those measures, it referred to Article 11 (1) of Directive 71/118, which states that animal health provisions of Member States concerning trade in live poultry and fresh poultrymeat are to continue to apply. It noted that the import policy applied by Ireland prior to its accession to the Community was designed to maintain Ireland's position as a country free from Newcastle disease without recourse to vaccination.

5. The Commission then sent to Ireland on 24 September 1981 the initial letter

Administrative procedure

4. By a telex message of 2 September 1981, the Commission requested the Irish Government to provide it with

¹ — Those United Kingdom measures were the subject of the judgment of the Court of 15 July 1982 in Case 40/82 *Commission v United Kingdom* [1982] ECR 2793.

provided for in the first paragraph of Article 169 of the Treaty, stating that the import restrictions in question infringed Article 30 of the Treaty. It requested the Irish Government to submit its observations on those measures within 15 days.

In its letter, the Commission stated that the effect of the Irish measure was to ban the import of the products in question from all areas of the Community except Denmark and Northern Ireland. It presumed that the ban would continue to apply for the time being to imports from Great Britain, in view of the continuing presence of vaccinated birds in the British flock.

It stated that the animal health rules then in force relating to trade in live poultry, poultrymeat, eggs and egg products had not, apart from certain provisions of a largely procedural nature in respect of fresh poultrymeat, been harmonized at a Community level. In that regard, it admitted that under Article 11 (1) of Council Directive 71/118 of 15 February 1971 the national rules on the matter were to continue to apply until the entry into force of any Community provisions. However, it stated that as a result the animal health measures taken by Member States for poultry products were still subject to Article 30 of the Treaty in so far as they restricted intra-Community trade. According to the judgment of 15 December 1976 in Case 41/76 *Donckerwolcke v Procureur de la République* [1976] ECR 1921, import restrictions and an import licensing system such as those applied by Ireland constituted measures having equivalent effect within the meaning of Article 30 of the Treaty.

The Commission then stated in its letter that in its view the import restrictions imposed by Ireland could not be justified on the ground of the protection of animal health under Article 36 of the Treaty. In that regard, it pointed out that the animal health record of the Community in relation to Newcastle disease had in recent years been exceptionally good. No major outbreaks had occurred since the early 1970s and the sporadic minor outbreaks which had appeared since then had rapidly been dealt with and had not led to more widespread outbreaks either within the Member States or across intra-Community frontiers. The Member States subject to the import ban, particularly those which had the most substantial trade in the products concerned, namely France and the Netherlands, had had a particularly good record of freedom from the disease in recent years.

In relation to vaccination, the Commission observed that in general only a proportion of the flocks in the Member States in which vaccination was permitted were in fact vaccinated. Indeed, although it was usual to vaccinate breeding stocks and laying hens, birds reared for their meat, especially broiler fowl, were commonly not vaccinated. Thus, vaccinated and unvaccinated flocks existed at the same time within each Member State. By way of example, it pointed out that in recent years up to 60% of the United Kingdom flock had been unvaccinated but no outbreak of Newcastle disease had been attributed to fresh poultrymeat, eggs or egg products imported from other Member States. Consequently, the argument that a Member State which did not vaccinate against Newcastle disease necessarily had to prevent the import of meat or eggs because the vaccine might mask wild strains of the virus had to be rejected in

view of the present state of health of poultry flocks within the Community.

In those circumstances, the Commission considered that the Irish rules on imports were out of proportion to the risks involved in relation to avian health. In that connection, it also noted that Ireland continued to allow into its territory exotic birds which constituted a much greater potential danger with regard to the spread of Newcastle disease than the products the import of which was banned.

In a letter dated 23 October 1981, the Irish Government sent its observations to the Commission. It contended in essence that the avian health status in Ireland and the magnitude of the risk to the entire poultry industry inherent in the high degree of susceptibility of the Irish flocks fully justified the controls which were carefully applied on the basis of scientific veterinary knowledge and with the sole purpose of preventing the introduction of avian disease through imported products.

In support of that argument, the Irish Government referred first to the exceptional position in Ireland with regard to avian health, which was the result of a consistent policy over very many years of compulsory slaughter of birds when Newcastle disease occurred or was suspected, together with a total ban on vaccination and the regulation of imports. In fact there had been no outbreak of Newcastle disease in the country for over 25 years. During that period, freedom from avian disease together with the progressive introduction of improved poultry strains had consolidated that exceptional health status and resulted in the development of

disease-free unvaccinated poultry stocks of high genetic quality. Those flocks were also accepted as a source of breeding stock and hatching eggs by such non-member countries as Australia, New Zealand and Norway, which would take flocks only from countries with the highest health status. There were therefore no grounds whatsoever for changing a policy at the very time at which Community policy was being directed towards achieving the highest possible animal and avian health standards in all the Member States.

In that regard, the Irish Government stated that Ireland had consistently supported harmonization within the Community to ensure the highest possible standard of health. Moreover, although the aim of the Irish rules was to avoid endangering the health status achieved, they did not involve an absolute ban on imports, as substantial imports had been admitted in recent years and would continue to be admitted in the future from countries which had achieved a standard of health equivalent to that in Ireland.

However, the Commission's contention that the Irish rules were out of proportion to the potential risk failed to take adequate account of the exceptional conditions which it had described. Because of the absence of avian disease for more than 25 years and the ban on vaccination, the Irish poultry flocks had become extremely susceptible to disease. The danger from imports of birds or of meat which might be derived from or have been in contact with vaccinates would therefore constitute a serious hazard to the entire Irish poultry industry. In that regard, the Community situation was scarcely reassuring. Although outbreaks continued and, in view of variations in the manner of establishing what constituted a case of

Newcastle disease, there was reason to doubt whether all outbreaks were in fact reported to the International Office of Epizootics or elsewhere. The fact that vaccination had continued to be widely practised was an indication of the general concern about the risk of further outbreaks of the disease. Furthermore, vaccination was liable to mask field strains of the virus. According to scientific evidence available, vaccinated birds, their carcasses and offal were indeed a source of infection. The danger of spread of the disease as a result of vaccination had moreover been confirmed by a working document circulated by the Commission at a meeting of the Standing Veterinary Committee on 23 September 1981.

With regard to the Commission's assertion relating to the potential danger constituted by the import of exotic birds, the Irish Government stated that the limited imports involved were subject to the most stringent quarantine conditions and veterinary controls; they were permitted only from countries which issued the veterinary certification required in each case.

6. By letter of 9 November 1981, the Commission sent to the Irish Permanent Representation its reasoned opinion pursuant to Article 169 of the Treaty. In it it stated that by subjecting poultry, eggs and poultry products from some Member States to an import ban and by subjecting all imports of those products to an import licensing system other than a system of general open licences, Ireland had failed to fulfil its obligations under Article 30 of the Treaty. Ireland was requested to take the measures

necessary to comply with the reasoned opinion within five days.

In the statement of grounds of the reasoned opinion, the Commission repeated the complaints made against Ireland in its letter of 24 September 1981.

In relation to the applicability of Article 36 of the Treaty, it stated that in its opinion it was not open to a Member State which had a good health record with respect to an animal disease systematically to ban imports of products which might theoretically carry that disease. In that regard, the Commission did not accept that the Irish poultry flock was any more susceptible to Newcastle disease than unvaccinated poultry in any other Member State. Ireland's policy in respect of that disease was aimed at preventing any risk of outbreak, even theoretical, by banning imports. In practice, it would be quite possible to give the national poultry flock a high degree of protection without affecting trade by, in particular, adjusting the measures taken to the real risks involved in importation. In that regard, the Commission pointed out that the types of live virus vaccine which represented a real danger of spread of the disease were not in use in any of the Member States. Furthermore, the statistics of the International Office of Epizootics, called in question by the Irish Government, were accepted throughout the world.

Finally, the Commission stated in its reasoned opinion that an import licensing system could be justified on grounds of protection of animal health under Article 36 in the absence of

harmonization only if it concerned "general open licences", that is to say those which:

are published and open to all importers;

require no further authorization from the authorities in the importing Member State;

are not subject to any other condition.

In a reply dated 7 December 1981, the Irish Government objected to the haste with which the Commission had taken action against a number of measures applied for many years, even before Ireland's accession to the Community. Although that action was related to the importance which the Commission appeared to attach to a similar action brought against another Member State, the Commission had none the less failed to take account of the obvious differences between the two cases.

In addition, the Irish Government put forward more detailed arguments relating to the risks of the spread of Newcastle disease. It stated that as well as the poultry and egg products which had been subjected to the level of heat treatment required to inactivate the virus, Ireland imported day-old chicks and hatching eggs, under strict quarantine conditions which eliminated the possibility of the spread of infection from countries which did not have a health status equal to that of Ireland.

With regard to the import licensing system, the Irish Government stated that it was ready to consider constructive suggestions from the Commission for any adjustments which recognized the need to maintain the health status of the Irish poultry flock.

By a supplementary reply dated 10 February 1982, the Irish Government

developed further its observations on the prevalence of Newcastle disease virus in most other Member States and on the threat to Irish flocks from certain other diseases which affected the poultry flocks of many other Member States.

Written procedure

7. By an application lodged on 18 February 1982, the Commission brought this action under the second paragraph of Article 169 of the Treaty.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the parties to reply to the following questions:

Commission

1. The Commission is requested to forward to the Court its comments on the conclusions which it draws with regard to Cases 40/82 and 74/82 from the judgment of 8 February 1983 in Case 124/81 relating to UHT milk.
2. The Commission is requested to provide the Court with statistics on the incidence in the territory of the various Member States over the past five years of all the avian diseases to which these actions relate.

Irish Government

The Irish Government is requested to state in writing whether it participated in the discussions between the Member States on the measures to be adopted by the United Kingdom following the judgment of the Court of 15 July 1982.

II — Conclusions of the parties

The *Commission of the European Communities*, the *applicant*, claims that the Court should:

1. Declare that, by adopting the import ban and the import licensing system referred to with respect to poultry carcasses, poultry eggs and poultry products, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty.
2. Order Ireland to pay the costs.

Ireland, the *defendant*, claims that the Court should:

1. Declare the Commission's application to be inadmissible in its entirety or in part;
2. Dismiss the application in so far as it may be found to be admissible;
3. Order the Commission to pay the costs.

III — Submissions and arguments of the parties

The *Commission*, the *applicant*, states that whereas the reasoned opinion extended to live poultry and hatching eggs, its application does not concern those products. Therefore, the application covers only import restrictions on poultrymeat, poultry eggs (other than hatching eggs) and poultry products.

Admissibility of the action

The *Irish Government*, the *defendant*, considers that the application is

inadmissible on the ground that, during the preliminary administrative procedure prior to the adoption of the reasoned opinion, the Commission disregarded the procedural safeguards provided for by Article 169 of the Treaty. In that regard, it refers to the unusually short time-limit of 15 days which it was given to reply to the initial letter from the Commission. In addition, after Ireland's observations were submitted on 23 October 1981 and in spite of the complexity of the subject, the Commission, without any further consultation, issued its reasoned opinion on 9 November 1981 and required the withdrawal of the measures in question within a period of five days. In its request for information in a telex message of 2 September 1981, the Commission referred to similar measures introduced by the United Kingdom on 1 September 1981. The Irish Government considers that it may well be that the effect on pre-existing trade of those measures encouraged the Commission to act as a matter of some urgency. That consideration does not, however, apply to the Irish measures which in substance pre-dated Ireland's accession to the Community by many years. As is apparent from the same telex message, the Commission has been aware of the Irish measures for a long time but has never seriously questioned them.

The undue haste with which the Commission carried out the administrative procedure is reflected on the one hand in the uncompromising terms of the reasoned opinion which does not take sufficient account of the explanations provided by Ireland in its letter of 23 October 1981. On the other hand, the Commission's complaint concerning the form of the Irish licensing system was raised for the first time in the reasoned opinion. The fact that the scope of the application to the Court was more limited than that of the reasoned opinion is yet another indication of the Com-

mission's haste during the administrative procedure. In those circumstances, the Irish Government considers that the reasoned opinion was not lawfully adopted and therefore cannot serve as the basis for this action.

The *Commission* states in its *reply* that it not only agreed to extend the period of five days given to Ireland to comply with the reasoned opinion but that, before lodging the application on 18 February 1982, it also took cognizance of Ireland's replies to the reasoned opinion dated 7 December 1981 and 10 February 1982.

Substance

With regard to the effect of *Article 11 of Council Directive 71/118* on the assessment of the Irish legislation in question, the *Commission* points out that Article 11 (1) provides that the animal health provisions of Member States concerning trade in live poultry and poultrymeat are to continue to apply until the entry into force of any Community provisions, subject expressly however to Article 11 (2) to (4).

The *Commission* states that Article 11 (2) to (4) provides only for harmonization of restrictions on trade which the Member States may impose in the event of an outbreak of an epizootic disease such as Newcastle disease. Furthermore, the Member States are free to maintain or to adopt any animal health measures which they consider appropriate, in so far as they are compatible with Articles 30 to 36 of the Treaty. Indeed, a provision of secondary law

such as Article 11 (1) of the directive may not override Article 30 of the Treaty or extend the scope of Article 36. Therefore that provision cannot be used as a basis for maintaining national measures which are not justified under Article 36. According to paragraph 34 of the judgment of the Court of 15 July 1982 in Case 40/82, *Commission v United Kingdom* [1982] ECR 2793, the matter is essentially to be considered under Article 36 of the Treaty.

According to the *Irish Government* Article 11 (1) of the directive contemplates measures already in existence in the Member States when the directive came into force and the provisions of Article 11 (2) to (4) contemplate any new measures which a Member State may take to prevent the introduction of avian disease from other Member States.

By stating that Article 11 (1) applies "subject to" Article 11 (2) to (4), the *Commission* is advocating an interpretation which is not only contrary to the express wording of Article 11 but which also envisages that the Member States may adopt measures affecting trade with other Member States only when there have been actual outbreaks of disease. Such an interpretation would have disastrous consequences for the control of avian disease within the Community.

In the view of the Irish Government, the expression "without prejudice to" Article 11 (2) to (4) means that where the pre-existing legislation of a Member State is found to be insufficient to meet a situation involving a particular disease within the Community, that State may take the further necessary measures under Article 11 (2) to (4). Furthermore,

Article 11 (1) constitutes not simply a temporary authority but rather a duty to maintain the existing national laws in the interest of the Community in order to prevent the spread of highly contagious avian diseases. By adopting that provision, the Council intended to pave the way for further harmonization in this field, first of all by preserving the *status quo* in the Member States. Article 11 (1) to that extent reflects the need, recognized in Article 36 of the Treaty, to prevent the spread of disease by maintaining national laws, notwithstanding their potential effects on trade between Member States. In those circumstances, it is no longer necessary separately to justify those national measures, which so far as Ireland is concerned are contained in Statutory Instrument No 139/71, under Article 36 of the Treaty (cf. Opinion of Mr Advocate General Capotorti delivered on 7 July 1982 in Case 40/82, [1982] ECR 2830, especially at p. 2835).

Ireland considers that the judgment of 15 July 1982 in Case 40/82 has no effect on the interpretation of Article 11 (1) of the directive. In fact the Court expressed no view on the interpretation of Article 11, except for its observation that paragraphs (2) to (4) represent only the beginning of the process of harmonization in the field of avian health. The Irish Government also points out that the Commission's argument to the effect that the Council directive could not derogate from Article 30 of the Treaty suggests that the directive is unlawful. Such an argument may not be raised in these proceedings, to which the Council is not a party.

In relation to the *assessment of the Irish measures under Article 36 of the Treaty*, the parties put forward in their written observations essentially the arguments

relied upon during the administrative procedure.

The *Commission* for its part accepts the importance to be attached to animal health and the seriousness of the financial consequences of an outbreak of Newcastle disease. However, it stresses that measures intended to reduce the incidence of animal diseases must remain within the limits fixed by the Treaty. The Irish measures in question are more restrictive of imports than is necessary for the protection of animal health. They are therefore not justified under Article 36. On that point, the Commission further points out that a Member State which relies upon Article 36 bears the burden of showing that the contentious measures are justified under that provision (cf. judgment of 8 November 1979 in Case 251/78 *Denkavit Futtermittel* [1979] ECR 3369).

In the Commission's opinion, the statistics published by the International Office of Epizootics show unequivocally that the incidence of Newcastle disease in the Community has fallen dramatically in the past five years. From that it infers that field virus, that is to say all virus other than that used for vaccine, is extremely rare, or even non-existent, in most Member States.

In the light of the present situation in the Community, which is characterized by the widespread practice of keeping vaccinated and non-vaccinated flocks in the same Member State, the Commission considers the argument that vaccination might mask field virus to be somewhat theoretical. Indeed, in those Member States in which a significant proportion of the national poultry flock is not vaccinated and is therefore fully susceptible

to Newcastle disease, the presence of field virus would undoubtedly cause outbreaks within a short space of time. Partial vaccination cannot therefore mask for any appreciable period the presence of field virus in a country. The correctness of that view is demonstrated by the examples of France, which, before recently adopting its non-vaccination policy, had a flock consisting of 15% vaccinated and 85% unvaccinated birds, and Great Britain, which until September 1981 had a national flock consisting of 40% vaccinated and 60% unvaccinated birds. Since 1976, there had been no outbreak of the disease in France and only in Great Britain.

The policies followed concerning vaccination against Newcastle disease vary from one Member State to another. However, the vaccines used are the subject of innocuity controls in respect of both Newcastle disease and other diseases with which a vaccine could theoretically be contaminated.

With regard to the French policy, the Commission also states that the decision of 24 November 1981 to reintroduce vaccination had no connection with any outbreak of the disease. Indeed, in September 1981, at the time when the United Kingdom introduced its non-vaccination policy, France also abandoned vaccination in an endeavour to regain access to the British market. When it became clear that in spite of the change in the French policy, the United Kingdom refused to accept French exports, France decided again to permit vaccination. Vaccination is now authorized throughout the country but only for poultry intended for the production of eggs and for poultry in areas close to any foci of Newcastle disease.

Consequently, the Commission considers that the risk of introduction into Ireland of disease virus from certain Member States is at the present time very low and from the remainder is non-existent.

It considers that in practice the importation of poultry carcasses, poultry eggs or poultry products does not give rise to any danger of the introduction of other avian diseases, such as classic fowl pest, infectious laryngotracheitis, turkey coryza, Arizona disease and rabies. In that regard, it mentions the favourable situation in the Community with regard to those diseases, the nature of the infections involved and the controls to which trade may be subjected.

The *Irish Government*, in its defence, relies on Article 36 of the Treaty only in so far as Article 11 of Directive No 71/118 does not fully afford justification for the maintenance of the Irish measures in question. It maintains that the Irish measures are necessary in their entirety mainly in the interests of animal health and are therefore justified under Article 36. They are necessitated by the prevalence in most Member States of the Newcastle disease virus, the effects of which can be contained only by the vaccination of flocks.

The Irish Government states that a policy of appropriate import controls combined with non-vaccination and, where necessary, slaughter is generally accepted as the best line of defence against exotic diseases. That policy

effectively prevents outbreaks of the disease and therefore provides the best possible assurance that poultry flocks are clinically free of the disease. The policy of non-vaccination also ensures that in the absence of clinical outbreaks of the disease, the virus is not even present in a form masked by immunization. The Commission does not dispute the legitimacy of the objective of maintaining the high health standards attained in that way. The maintenance of appropriate controls and restrictions on imports from countries which do not have the same health standards is a *sine qua non* for the achievement of that objective, which also serves as the basis for the Community policy in that sphere.

In that regard, the Irish Government sets out in detail the effects, survival and spread of Newcastle disease virus, citing numerous scientific sources in its support. The Commission, it argues, has in particular under-estimated the danger to Irish flocks which have not been immunized deriving from the varied vaccination practices. The non-vaccinal forms of Newcastle disease virus are still widespread within continental Europe but because of the immunity of the flocks clinical Newcastle disease does not frequently occur. The Commission's argument based on the presence of vaccinated and unvaccinated flocks in the same Member State does not take account of the fact that in practice all parent stock is vaccinated. Moreover, the unvaccinated flocks usually consist of chicks bred from vaccinated parents and benefiting for their short lives from a high degree of indirect immunity. Recent Belgian studies confirm that vaccination can actually mask the presence of field virus, even in flocks benefiting from indirect immunity. Moreover, the Commission's statements concerning the non-

existence of field virus fail to take account of the outbreaks of Newcastle disease in certain Member States until 1980.

Next, the Irish Government contends that the contested measures are also intended to prevent the introduction of several other avian diseases, from which Ireland has been free up to now. In particular, infectious laryngotracheitis (ILT), Arizona disease and turkey coryza are of some importance in relation to this case.

Infectious laryngotracheitis is a contagious infection which occurs mainly in chickens and for which there is no specified treatment. Control depends on good hygiene and vaccination, which none the less offers only moderate protection. In the Community the disease occurs in the United Kingdom, Germany, Italy, the Netherlands, Greece and Belgium. According to the veterinary expertise at Ireland's disposal, the virus is transmitted by live infected birds and also by uncooked contaminated products, including poultry carcasses and meat.

Arizona disease is caused by a bacterium related to salmonella and is passed from one generation to the next mainly by egg transfer. However, the carcasses of infected birds remain contaminated with the bacteria which will survive extended periods of time in the frozen state. The main problem in controlling the disease

arises from the persistence of the symptomless carrier and the fact that there is no vaccine available. Prevention therefore depends on the elimination of infected stocks. The disease affects young turkeys especially and it is therefore not easily identified in adult turkeys. The incidence of the disease, which was imported into Europe from the United States of America, does not appear in the reports of the International Office of Epizootics.

Turkey coryza is a recently identified bacterial disease which is characterized by rapid spread, high morbidity and low mortality. It is difficult to control because there is no vaccine available and there has been no precise evidence on the viability of the bacterium up to now. It is a serious clinical disease of turkeys.

The risk of the introduction of each of those diseases through contaminated poultrymeat justifies the application of strict import controls.

In its *reply*, the *Commission* refers to the judgment of 15 July 1982 in Case 40/82 in support of its view that for Ireland, as for the United Kingdom, there are methods of attaining adequate health protection which are less restrictive than a total ban on imports. Indeed, Ireland might adopt measures similar to those introduced by the United Kingdom in October 1982, following the judgment of the Court. Whilst permitting trade to take place, those measures, in association with the provisions laid down by Council Directive 71/118, would give Ireland every reasonable guarantee against the importation of Newcastle disease and

also the other diseases referred to by the Irish Government. The Commission points out that Directive 71/118 requires inspections and other precautions to check whether the products in question are fit for human consumption. The health certificate provided for by the same directive and signed by the official veterinarian responsible for the exporting State ensures that those inspections have been carried out. That procedure gives all the necessary guarantees that the poultry products covered by the directive are free from the diseases referred to by Ireland.

In addition, the Commission considers that veterinary measures applicable to trade in animals vary in quality and in intensity depending on the nature of the disease in question, the extent to which it is contagious, its gravity and the way in which it is spread. In the field of biology, absolute certainty is not possible, unless all movement or trade in animals and animal products is eliminated.

The Commission then observes that the avian diseases referred to by Ireland, other than Newcastle disease, arise only sporadically in a number of Member States. In particular, Arizona disease has not been reported recently on turkey farms in the Member States which are the main exporters of poultry, namely the Netherlands and France. Moreover, the risk of the spread of that disease, together with laryngotracheitis and turkey coryza, through meat is in practice negligible. In view of the inspections provided for in Directive 71/118, the present situation in the Community regarding those diseases does not therefore justify an import ban on poultrymeat.

In its *rejoinder*, the *Irish Government* maintains its position relating to Newcastle disease and the other diseases. It observes that in 1982 outbreaks of turkey coryza in France wiped out up to 20% of some turkey flocks in that country. Moreover according to the advice available to Ireland, inspections carried out under Directive 71/118 would not identify that disease or infectious laryngotracheitis or Arizona disease.

In relation to the changes made following the judgment of 15 July 1982 in Case 40/82, the *Irish Government* states that, even if the new controls adopted by the United Kingdom were to prove appropriate for Great Britain, they would not necessarily be appropriate for the island of Ireland, in which it has been possible to maintain a higher standard of avian health by virtue of its separation from the rest of Europe by water. It also states that the example of the system of controls applied in Denmark, which is on its face more liberal than that in force in Ireland, is scarcely relevant so far as imports are concerned. In fact, since Denmark is more than self-sufficient in production of poultrymeat, imports of poultrymeat into the country are so minimal that any risk of contamination can easily be avoided.

In conclusion, the *Irish Government* considers that imports of poultrymeat, eggs and other poultry products from other Member States, with the exception of Northern Ireland and Denmark, would present a much greater threat to the health of Irish flocks than the Commission is prepared to admit. Moreover, an assessment of the risks involved would require a detailed examination of the facts concerning the

various diseases put forward by Ireland, if necessary on the basis of experts' reports ordered by the Court.

In relation more especially to the *licensing system* provided for by the Irish legislation, the *Commission* reaffirms the view expressed in its reasoned opinion. It considers that the obligation on importers to obtain a licence for each consignment to be imported is more restrictive than is necessary for the protection of animal health within the meaning of Article 36. The same aim could be achieved by less restrictive measures such as the requirement that imports be accompanied by veterinary certificates issued by the authorities of the exporting Member State.

The *Irish Government* refers to the judgment of 8 February 1983 in Case 124/81 *Commission v United Kingdom* [1983] ECR 203, as confirming that the presence or absence of any justification for a particular form of licensing system must be assessed in the light of the separate circumstances of each case. The Irish licensing system complies in particular with the conditions laid down by Mr Advocate General VerLoren van Themaat in his Opinion in that case, namely that the licences are issued immediately and automatically, subject to production on importation of health certificates from the exporting country. Moreover, it is not certain that a system of general open licences such as that suggested by the Commission in its reasoned opinion would involve fewer difficulties than the present system because of the very detailed conditions which would have to be written into such open licences.

The Irish Government further considers that the Commission's complaint concerning the licensing system is inadmissible because it was raised for the first time in the reasoned opinion. In that regard the Commission states in its reply that the observations on the licensing system made in the reasoned opinion set out in greater detail the complaint made in its initial letter and concern the contested measures in general.

IV — Oral procedure

The parties presented oral argument at the sitting on 5 July 1983.

In relation to the incidence of avian diseases other than Newcastle disease, the Commission supplemented the statistics which it had submitted in answer to a question put by the Court. So far as infectious laryngotracheitis, turkey coryza and Arizona disease are concerned, that information as a whole gives the following table:

Member State	Laryngotracheitis					Turkey coryza					Arizona disease				
	'78	'79	'80	'81	'82	'78	'79	'80	'81	'82	'78	'79	'80	'81	'82
Denmark	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Luxembourg	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Netherlands	—	—	265	52	17	—	—	—	—	—	—	—	55 ¹	4 ¹	4 ¹
Greece	10	1	11	1	—	—	—	—	—	—	—	—	—	—	—
Italy	X	—	11	7	4	X	—	1	—	—	—	—	—	—	—
Germany	—	—	sporadic outbreaks			—	—	—	—	—	—	—	—	—	—
Belgium	2	8	2	5	1	—	—	—	—	—	—	—	—	—	—
Ireland	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
United Kingdom (Northern Ireland) ²	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
United Kingdom (GB)	very little		—	min.		(symptoms ³)					—	—	—	—	—
France	—	X	—	—	—	respiratory syndrome ⁴					—	—	—	—	—

1 — Detected in quarantine stations in poultry imported in particular from the USA.

2 — Appeared in 1983.

3 — Not disease.

4 — Rhinotracheitis rather than actual coryza.

X — Not specified.

The *Irish Government* stated that less than 10% of Irish production of poultry-meat is exported. On the other hand, the export of breeding stock, to Australia, New Zealand, Finland and Norway in particular, is of some importance.

The Advocate General delivered his opinion at the sitting on 8 November 1983.

Decision

- 1 By application lodged at the Court Registry on 19 February 1982, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by adopting the import ban and the import licensing system referred to in the application with respect to poultry carcasses, poultry eggs and poultry products, Ireland had failed to fulfil its obligation under Article 30 of the EEC Treaty.
- 2 The pre-litigation procedure had commenced with a telex message sent by the Commission to the Irish Government on 2 September 1981, stating that, as a result of the notification by the United Kingdom of new measures applicable in the poultry and eggs sector in relation to Newcastle disease, it had become apparent that the question of the legitimacy not only of the restrictions of that Member State but also of those applicable in Ireland might be involved. For that reason, the Commission asked "whether Ireland presently maintains its import ban on fresh poultrymeat, on eggs and live poultry from Member States which allow vaccination".
- 3 In reply the Irish Government stated in a telex message dated 7 September 1981 that Ireland did not allow the importation of live poultry, poultrymeat or eggs from Member States which permitted vaccination against Newcastle disease. The Irish Government noted in the telex message that that import policy had been pursued by Ireland prior to its accession to the Community and was designed to maintain Ireland's position as a country free from Newcastle disease without recourse to vaccination.
- 4 The Commission inferred from that reply that Ireland allowed into its territory only live poultry, poultrymeat and eggs from Northern Ireland and Denmark, since they were the only parts of the Community other than Ireland itself in which a policy of non-vaccination had been pursued for long enough to be fully effective.
- 5 In a letter dated 24 September 1981 the Commission stated that the measures in question were contrary to Article 30 of the Treaty and requested the Irish

Government to submit its observations. The Irish Government replied by letter of 23 October 1981, asserting that the measures in question were justified on grounds of the protection of animal health. The reasoned opinion was sent by letter of 9 November 1981; Ireland was requested to comply with that opinion within five days. The reply of 7 December 1981 and a further reply of 10 February 1982 reasserted that the measures in question were justified. Since Ireland had not complied with the reasoned opinion, the Commission brought the matter before the Court on 19 February 1982.

- 6 The application no longer concerns imports of live poultry; it is limited to the import restrictions on carcasses, eggs and poultry products. In addition, the Commission stated in its application that the action did not concern the importation of hatching eggs. Finally, the Commission accepted that the ban on imports from parts of the Community other than Denmark and Northern Ireland did not apply to egg products which had been subjected to the level of heat treatment required to inactivate the Newcastle-disease virus.
- 7 The basis for the Irish measures which are still challenged by the Commission is the Poultry, Poultry Carcasses, Poultry Eggs and Poultry Products (Restriction on Importation) Order 1971 (SI 1971 No 139). That Order prohibits the importation of poultry, poultry carcasses, poultry eggs and poultry products except under licence granted for that purpose by the Minister for Agriculture and Fisheries, subject to the conditions contained therein.

Admissibility

- 8 Ireland has raised several objections of inadmissibility, of which the first is based on the allegedly unacceptable manner in which the Commission initiated and conducted the pre-litigation procedure. In particular, it complains that the Commission acted with undue haste, probably in order to be able to link its action against Ireland with that brought against the United Kingdom, even though there was no particular urgency in the Irish case.

- 9 In that regard, Ireland points out that the import controls at issue have been applied, on the basis of rules in substance unchanged, since 1938. It submits that under those circumstances it was unreasonable to require a Member State, as the Commission did in its reasoned opinion, to abolish those controls, as regards other Member States, within a period of five days, especially as the reasoned opinion was in fact drawn up only a few days after receipt of the very detailed observations of the Irish Government, which were clearly not taken into account in preparing the reasoned opinion.
- 10 Ireland concludes that the admissibility of an application under Article 169 of the Treaty depends upon the prior issue of a valid reasoned opinion and that that requirement has not been fulfilled in this case.
- 11 The Commission accepts that it must allow a Member State a reasonable time to comply with a reasoned opinion under the procedure provided for in Article 169 of the Treaty. However, it points out that it granted an extension of the period of five days laid down in the reasoned opinion, that it took cognizance of Ireland's reply of 7 December 1981 and also of the further reply of 10 February 1982, and that it did not lodge its application until 19 February 1982. It therefore submits that Ireland was given ample time to comply with the reasoned opinion.
- 12 The Court is compelled to state its disapproval of the Commission's behaviour in this regard. It is indeed unreasonable, as Ireland has pointed out, to allow a Member State five days to amend legislation which has been applied for more than 40 years and which, moreover, has not given rise to any action on the part of the Commission over the period which has elapsed since the accession of that Member State to the Community. Furthermore, it is clear that there was no particular urgency.
- 13 However, the above-mentioned circumstances are not in themselves sufficient to render the action inadmissible. By formally stating the infringement of the Treaty with which the Member State concerned is charged, the reasoned opinion concludes the pre-litigation procedure provided for in Article 169.

The purpose of that procedure is to give the Member State an opportunity, on the one hand, of remedying the position before the matter is brought before the Court and, on the other hand, of putting forward its defence to the Commission's complaints. Those aims were respected in this case, since the Commission waited for Ireland's reply to the reasoned opinion before bringing the matter before the Court and, as the Court has seen, Ireland submitted a reasoned reply to the Commission's letter of 24 September 1981 and to the reasoned opinion, stating that it completely disagreed with the Commission's arguments and intended to retain in force the contested national rules. Those circumstances show, moreover, that the Commission's regrettable behaviour did not affect the further course of the proceedings.

- 14 It follows that the arguments put forward by Ireland are not such as to render the action inadmissible.
- 15 The second ground of inadmissibility is drawn from the opposing interpretations given by the parties to Article 11 (1) of Council Directive 71/118 of 15 February 1971 on health problems affecting trade in fresh poultrymeat (Official Journal, English Special Edition, 1971 (I), p. 106). Ireland submits that the Commission's arguments necessarily amount to challenging the validity of that provision and that such a challenge is not permissible since the Council, which adopted the directive, is not a party to the dispute.
- 16 The Commission contends that its interpretation does not call in question the validity of provisions of the directive.
- 17 In the circumstances, this objection can be examined more conveniently when the relevant problem of interpretation, which is a question of substance, is considered.
- 18 Finally, Ireland submits that the Commission raised a new complaint in its reasoned opinion, concerning the form of the licensing system applied in Ireland, and that consequently Ireland did not have an opportunity to submit its observations on that question before receipt of the reasoned opinion.

- 19 In its rejoinder Ireland clarified that submission by stating that the reasoned opinion and the application were founded on two separate breaches of Community law: Ireland was accused, on the one hand, of applying an import licensing system other than open general licences and, on the other hand, of closing its borders to imports of poultry products on the basis of that licensing system. However, the Commission's letter of 24 September 1981 had not made that distinction but had merely stated that the restrictive measures were not justified.
- 20 That submission must be rejected. Although it is true that under the procedure provided for in Article 169 the action brought by the Commission must relate to the same subject-matter as the reasoned opinion, which must in turn be preceded by a letter inviting the Member State concerned to submit its observations, there is nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in its initial letter. Indeed, the reply to that letter may give rise to a fresh consideration of those complaints.
- 21 From all these considerations it follows that the substance of the application must be considered.

Substance

(a) The import ban

- 22 The Commission accuses Ireland of applying measures which have the effect of preventing imports of poultry carcasses and poultrymeat, eggs not intended for hatching and egg products other than heat-treated egg products from Member States which permit vaccination against Newcastle disease.
- 23 Ireland admits that it applies such measures but considers that they are justified on the basis, first, of Article 11 (1) of Directive 71/118 and, secondly, of Article 36 of the Treaty.

24 Article 11 (1) of Directive 71/118 provides as follows:

“Without prejudice to paragraphs (2) to (4), the animal health provisions of Member States concerning trade in live poultry and poultrymeat shall continue to apply until the entry into force of any Community provisions.”

Paragraphs (2) to (4) of Article 11 concern the measures which a Member State may adopt in the event of an outbreak of an epizootic disease in the territory of another Member State, if that outbreak is likely to give rise to a danger that the disease may be spread by the introduction of fresh poultrymeat from that Member State.

25 According to Ireland, Article 11 (1) must be interpreted as meaning that, until the entry into force of any Community provisions, Member States are entitled to continue to apply the national provisions on animal health which applied at the time of the entry into force of the directive. So far as Ireland is concerned, the relevant date was 1 January 1973, the date of its accession to the Community. Since no Community provision on the subject has been adopted until now, the Irish legislation applicable at that date continues, by virtue of Community law, to apply to imports of the products in question.

26 The Commission disputes that interpretation. It submits that Article 11 (1) of the directive cannot be intended to extend the scope of Article 36 of the Treaty and thus to protect national laws which are contrary to Article 30 of the Treaty.

27 It is this argument on the part of the Commission which gave rise to the Irish contention that the Commission considers Article 11 (1) of the directive contrary to Article 36 of the Treaty.

28 In this regard the Court observes first that, although the object of Directive 71/118 is the approximation of the health provisions of the Member States, it deals more specifically with the harmonization of the control of imports of poultrymeat from another Member State which proves unfit for human consumption. Thus the health certificate which, under Article 8 of the directive, must accompany fresh poultrymeat sent from one Member State to

another contains a health attestation certifying that the meat concerned has been passed as “fit for human consumption”. Only Article 11 concerns the health risks which trade in poultrymeat could create for the poultry flock of the importing Member State.

- 29 Paragraphs (2) to (5) of Article 11 lay down the measures to be taken and procedures to be followed in the event of an outbreak of an epizootic disease in the territory of one of the Member States. As regards the other health risks which trade in meat could pose for the poultry flock, Article 11 (1) merely states that the national provisions “shall continue to apply” until the entry into force of Community measures.
- 30 In that context, Article 11 (1) does not appear to be intended to preserve the situation in existence at the time of the directive’s entry into force. That provision must be understood as leaving the Member States power to lay down health control provisions for fresh poultrymeat, pending the adoption of Community measures. Hence it cannot have the effect of relieving Member States of their obligation to comply with the prohibitions laid down in Articles 30 and 36 of the Treaty in the field covered by Article 11 (1) of the directive.
- 31 The question to be resolved must therefore be examined essentially by reference to Article 36 of the Treaty, which expressly provides that restrictions on imports must be “justified” on grounds of the protection of animal health.
- 32 According to the Commission, there is no doubt that the import prohibition imposed by Ireland is not justified on such grounds. In support of that view it claims that, according to the statistics available, the incidence of Newcastle disease in the Community has fallen dramatically in recent years. Since 1976 there has been no outbreak of the disease in France, while only one has been declared in Great Britain; a large proportion of the poultry flock in those two countries had not, however, been vaccinated. The Commission infers from that that field virus, that is to say virus other than that used for vaccine, the presence of which may be masked by vaccination, is extremely rare, or even non-existent, in most Member States.

- 33 After pointing out the extremely contagious nature of Newcastle disease and the very serious economic consequences which its appearance would have for the country, Ireland goes on to claim that the high standard of health of the poultry flock in Ireland is precisely the result of the policy adopted by the Irish Government in that sphere, a policy based on the compulsory slaughter of contaminated birds in the event of an outbreak of the disease, the prohibition of vaccination on the ground that vaccination could mask the presence of contagious virus and the prohibition of imports of live poultry and poultrymeat from countries which permit vaccination. That prohibition thus constitutes, in Ireland's view, a necessary corollary of the slaughter policy which it has chosen; it was not introduced for reasons of commercial policy.
- 34 Ireland stresses in this connection that the Irish Government is responsible for animal health in Irish territory; that responsibility implies a power to choose between the two systems which have been developed to combat Newcastle disease — that based on compulsory slaughter and the prohibition of vaccination and that based on generalized or selective vaccination. If the effect of the choice made is to restrict imports, such restrictions are permitted by Article 36 of the Treaty.
- 35 Ireland has submitted veterinary studies to the Court in order to prove that in the countries in which vaccination is permitted, such as Belgium, tests show that field virus subsists, although it is masked by the effects of vaccination.
- 36 Finally, Ireland draws attention to the fact that the system which it has introduced protects the poultry flock not only against Newcastle disease but also against other avian diseases such as infectious laryngotracheitis, turkey coryza, Arizona disease, fowl pox and rabies. Indeed, the result of the non-vaccination of the flock is that the presence of any avian disease can be identified immediately and the appropriate measures can therefore be taken without delay.
- 37 The Court must, in the first place, uphold the view put forward by Ireland to the effect that, in the present state of Community legislation, it is for the authorities of the Member States to choose the system to be used to combat

Newcastle disease. However, the effects upon imports from other Member States of the health policy thus chosen may not exceed the limits laid down by Community law.

- 38 In the course of the proceedings before the Court, the Commission has clarified its arguments by stating that it accepts that the import prohibitions in question were introduced and retained on grounds of the protection of animal health. The Commission does not allege that those prohibitions constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States within the meaning of the second sentence of Article 36 of the Treaty.
- 39 The Commission considers, however, that the prohibitions in question are not justified under Article 36 on the ground that they are excessive and that their negative influence upon the free movement of goods in the Community is disproportionate to their aim of protecting health. It is that argument which must therefore be examined.
- 40 In that regard, certain facts already established by the Court in its judgment of 15 July 1982 in Case 40/82 *Commission v United Kingdom* [1982] ECR 2793) should be recalled. First, the statistics available show a steady reduction in manifestations of Newcastle disease throughout the Community over the last six years; in 1981, the only Member States in which outbreaks of Newcastle disease were recorded were Italy (2) and Greece (12). Secondly, the practice in countries which permit vaccination is to vaccinate only part of the poultry flock (in 1981: 40% in France and Great Britain); normally, vaccination is practised mainly on laying hens and breeding fowl, and not on animals intended for slaughter.
- 41 Under those circumstances the risk of the Irish poultry flock being infected by field virus which has entered vaccinated birds and remained active in the carcasses of those birds or in meat products prepared from those carcasses is extremely slight. The question which must be answered is whether the possibility of such infection would be so much due to sheer hazard that it cannot justify a complete prohibition of imports from Member States which permit vaccination.

- 42 On that point, it must be accepted that the state of avian health has been extremely good in Ireland for some years, but that such a state may render the flock highly vulnerable to infection and may therefore justify measures which would serve no purpose under different circumstances.
- 43 Nevertheless, the Court considers that the prohibitions in question are wider than may be justified by Article 36 of the Treaty. The prohibition of imports of carcasses and poultrymeat is in any event out of proportion to the aim pursued where those imports come from a country in which no outbreak of Newcastle disease has been detected over a number of years and where, moreover, it is established that the carcasses and meat in question are of unvaccinated birds.
- 44 Therefore, although Article 36 of the Treaty permits Ireland to continue to carry out controls and, where necessary, to restrict imports in order to protect its poultry flock from Newcastle disease, that provision is none the less infringed where the Member State concerned prohibits all imports of poultry carcasses and poultrymeat from all Member States other than Denmark and Northern Ireland.
- 45 That conclusion is not invalidated by the defendant's contentions concerning avian diseases other than Newcastle disease. It is clear from the evidence adduced that, in so far as those diseases have appeared in the Community poultry flock in recent years, they are not normally spread by poultry carcasses and poultrymeat or by eggs not intended for hatching. Although it is not possible from the veterinary point of view to rule out all risk of infection from that source, it is common ground that such risk is certainly no greater than that of infection by Newcastle disease.
- 46 It follows from all these considerations that the Commission's application must be upheld on that point.

(b) The licensing system

- 47 The second complaint made by the Commission against Ireland is that it has introduced an import licensing system. Such a system is said by its very

nature to be contrary to the provisions of Articles 30 and 36 of the Treaty, except where the licences in question are open general licences.

- 48 Since the Commission has presented that complaint in general terms, without reference to the import system at present applied in Ireland (namely, a total ban on imports of the products in question except from Denmark or Northern Ireland), the Court must interpret the complaint as meaning that the Irish legislation on which that ban is based is contrary to Articles 30 and 36 in so far as it permits the introduction of an administrative practice requiring import licences other than open general licences.
- 49 In that regard it must be stated that whilst the requirement of a licence, even as a formality, is contrary to Article 30 of the Treaty, it does not necessarily follow that a measure of that kind may in no case be justified under Article 36. It is therefore necessary to consider whether a licensing system constitutes a measure which is disproportionate to the objective pursued, on the ground that the same result may be achieved by means of less restrictive measures.
- 50 In the particular case of Ireland, whose poultry flock exhibits the characteristics described above, such disproportion cannot be established. Although at present, in view of the health status of the poultry flock in the other Member States, a total ban on imports is not permitted by Article 36, that provision does not require the Irish legislature to amend the national provisions applicable in such a way that no import licence other than an open general licence may be required for imports of the products in question from other Member States.
- 51 It must be added that the question whether or not national measures on animal health may include an import licensing system without infringing Article 36 of the Treaty cannot be answered uniformly in every case. In fact, the reply to that question depends upon the relationship in an individual case between, on the one hand, the inconvenience caused by the administrative and financial burdens imposed under such a system and, on the other hand, the dangers and risks for animal health resulting from the imports in

question. In the present case, those dangers and risks may under certain circumstances outweigh the inconvenience alluded to.

52 The second part of the application therefore cannot be upheld.

53 Therefore it must be concluded that, by applying measures which have the effect of preventing all imports of poultry carcasses, poultrymeat, eggs not intended for hatching and egg products other than heat-treated egg products from Member States which permit vaccination against Newcastle disease, Ireland has failed to fulfil its obligations under the Treaty and that the remainder of the application must be dismissed.

Costs

54 According to Article 69 (3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order the parties to bear their own costs. In this case, it is appropriate to make such an order.

On those grounds,

THE COURT

hereby:

1. Declares that, by applying measures which have the effect of preventing all imports of poultry carcasses, poultry products, eggs not intended for hatching and egg products other than heat-treated egg products from Member States which permit vaccination against Newcastle disease, Ireland has failed to fulfil its obligations under the EEC Treaty;

2. Dismisses the remainder of the application; and

3. Orders the parties to bear their own costs.

	Mertens de Wilmars	Koopmans	Bahlmann
Galmot	Pescatore	Mackenzie Stuart	O'Keeffe
Bosco	Due	Everling	Kakouris

Delivered in open court in Luxembourg on 31 January 1984.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL MANCINI

(see Case 40/82, p. 305)