shown that, for reasons of animal health, the only possibility open to the Member State concerned was to apply those measures and that they were therefore not more restrictive than was necessary for the intended purpose, the measures in question constitute a disguised restriction within the meaning of the second sentence of Article 36.

In Case 40/82

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

applicant,

supported by

FRENCH REPUBLIC, represented by Gilbert Guillaume, Director of Legal Affairs in the Ministry of Foreign Relations, acting as Agent, and by Alexandre Carnelutti, acting as Assistant Agent, with an address for service in Luxembourg at the French Embassy,

intervener,

v

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, represented by Sir Ian Percival, QC, Solicitor General, Peter Scott, QC, and Peter Langdon-Davies, Barrister, and Mrs G. Dagtoglou as agent, with an address for service in Luxembourg at the British Embassy,

defendant,

supported by

IRELAND, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, with an address for service in Luxembourg at the Irish Embassy,

intervener,

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

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due, Presidents of Chambers, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: F. Capotorti
Registrar: J. A. Pompe, deputy registrar

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments put forward by the parties during the written procedure may be summarized as follows:

I — Facts and procedure

This application relates to the introduction in Great Britain of new national measures which are intended to combat Newcastle disease (pseudo-fowl pest) and involve restrictions on imports of poultrymeat, eggs and egg products.

Newcastle disease: nature and prophylaxis

1. It is clear from the file, and in particular from the Report of the Committee on Fowl Pest Policy, 1962 (Command Paper 1664) (Annex I to the defence) and from the Report of the Review Panel on the Newcastle Disease Epidemic, 1970-1971 (Command Paper 4797) (Annex II to the defence) that Newcastle disease is a particularly contagious disease which is capable of affecting virtually all types of poultry.

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 two years at very low temperatures, for more than 7 weeks at normal temperatures. It is carried by birds — dead or live — by birds' eggs, by birds' excreta, and by certain animals (foxes, rats) which have been in contact with such excreta. Sea-birds (and even the wind) may, in certain climatic conditions, transport the virus.

The disease appears in different forms, the acuteness of which depends on variations in virulence of the strain of virus and the resistance of the host. The course of the disease in poultry varies widely, from heavy mortality within a short time, to a more or less severe effect on growth and laying, to an infection which cannot be detected except by laboratory tests.

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

I.O.E. 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	—
FR of 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

Member State	1978	1979	1980	1981 [1]	Total 1972-81
Belgium	6	1	6 [1]	—	247
Denmark	—	—	—	—	4
France	—	—	—	—	2 031
FR of 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 Kingdom (Northern Ireland)	—	—	—	—	36
Total	266	58	20	14	16 605

1 — As completed by the Commission.

At first there was an attempt at the total eradication of Newcastle disease by the slaughter of contaminated flocks, often accompanied by financial compensation and restrictions on imports. That method gave good results in Scandinavia, particularly in Denmark, and in Ireland, where the last outbreak of the disease occurred in 1956. In other countries, the disease was controlled by the adoption of a policy of slaughter and vaccination combined or 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. Vaccinated birds may be carriers of field virus.

Thus in the United Kingdom in 1964 the Government abandoned the policy of eradication purely by slaughter and adopted a policy of controlling the milder forms of Newcastle disease by means of inactivated vaccines, whilst retaining the power to slaughter out cases of per-acute disease. Following the epidemic of 1970-71, live vaccine was introduced and administered by mass methods. It appeared that the level of vaccination, which was administered on a voluntary basis but periodically encouraged by the veterinary authorities, tended to decline at the same rate as the incidence of the disease was reduced.

The United Kingdom legislation

2. The United Kingdom rules in question are to be found in the Animal Health Act 1981 and the Importation of Animal Products and Poultry Products Order 1980 (Statutory Instrument 1980,

No 14), as amended by the Importation of Animal Products and Poultry Products (Amendment) Order 1981 (Statutory Instrument 1981, No 1238).

Under Article 4 of the 1980 Order, the Ministry of Agriculture, Fisheries and Food had issued general licences which permitted importation from various countries of fresh or frozen poultrymeat into the United Kingdom. In accordance with the notice published in the London Gazette and the Edinburgh Gazette on 1 September 1981, the existing general licences were revoked with effect from 1 September 1981, and a new general licence, issued on the same day, authorized the importation of fresh or frozen poultrymeat and eggs (other than hatching eggs) from Denmark and the Republic of Ireland. Similar measures already applied in Northern Ireland.

Community trade

3. In the Community, health control in the poultry sector was covered by Council Directive No 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 is 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."

It is clear from the Eurostat statistics for 1980 that during that year the United Kingdom imported considerable quantities of poultrymeat and poultry products from other Member States. The value of imports of whole turkeys from other Member States rose particularly, that is from 941 000 European units of account in 1979 to 5 844 000 units in 1980. Of such imports, the value of imports of whole turkeys from France rose from 28 000 European units of account in 1979 to 4 809 000 units in 1980 and from Ireland from 258 000 units in 1979 to 966 000 units in 1980; the value of imports from Denmark changed from 653 000 European units of account in 1979 to 69 000 units in 1980.

Administrative procedure

4. By letter of 27 August 1981 the United Kingdom Government informed the Commission of its decision to reintroduce in Great Britain with effect from 1 September 1981 a policy already applied in Northern Ireland for the control of Newcastle disease, consisting in the prohibition of vaccination of poultry against that disease and in the compulsory slaughter of any poultry flock in which the disease might appear.

According to that letter, to ensure that the highest recognized status of freedom from Newcastle disease was maintained, the new policy also involved with effect from 1 September 1981 a prohibition of imports into Great Britain of fresh (including frozen) poultrymeat, eggs and egg products from all countries except those which were totally free of Newcastle disease, which prohibited the use of vaccine and which applied compulsory slaughter requirements in the event of an outbreak of the disease. Of the Member States of the European Communities, only Denmark and Ireland were able to satisfy those criteria.

By letter of 4 September 1981, the United Kingdom Government added that, in the light of the discussions which had taken place in the Standing Veterinary Committee on 1 September 1981, it had been decided that the ban

on imports would not apply to egg products which had been heat-treated during their manufacture.

By letter of 11 September 1981, addressed to the United Kingdom under the first paragraph of Article 169 of the EEC Treaty, the Commission claimed that the restrictions on imports published infringed Article 30 of the EEC Treaty and requested the United Kingdom Government to submit its observations in that regard.

In its letter, the Commission assumed that imports of live poultry, hatching eggs and some exotic birds, which were all potential sources of infection of Newcastle disease, were still possible upon presentation of a licence, since the legislation applying to those products had not been changed.

It stated that at the present time animal health rules 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 referred to Article 11 (1) of Council Directive No 71/118 of 15 February 1971 on health problems affecting trade in fresh poultrymeat, which states that the existing national law of Member States concerning animal health provisions for live poultry and poultrymeat are to continue to apply.

The Commission claimed that as a result the animal health measures taken by Member States for those products were still subject to Article 30 of the Treaty in so far as they restricted intra-Community trade. Indeed, according to the judgment in Case 41/76 of 15 December 1976 (*Donckerwolcke* v *Procureur de la République* [1976] ECR 1921), all import restrictions and import licensing systems constituted measures having equivalent effect within the meaning of Article 30 of the Treaty.

The Commission considered that the import restrictions imposed by the United Kingdom could not be justified on the grounds 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 exeptionally good. No major outbreak had occurred since the early 1970s and the sporadic minor outbreaks of infection which had appeared since then had rapidly been dealt with and had not led to more widespread outbreaks either within the Member States involved or across intra-Community frontiers. The Member States subject to the import ban, particularly those which had the most substantial trade with the United Kingdom 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 where vaccination was permitted were in fact vaccinated. Indeed, although it was usual to vaccinate breeding stock 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, and although in recent years up to 60% of the United Kingdom flock had been unvaccinated, nevertheless no outbreak of Newcastle

disease had been attributed to fresh poultrymeat, eggs or egg products imported from the Community.

It therefore considered that 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, must be rejected in view of the present state of animal health within the Community.

Next, the Commission commented that from the entry into force of the contested measures vaccinated United Kingdom stock would continue to be present in the United Kingdom flock, and the meat and eggs resulting from the vaccinated birds would remain on the United Kingdom market for at least a year, whilst imports of corresponding products had been banned with immediate effect. It further pointed out that the United Kingdom still permitted entry on its territory of exotic birds which constituted a much greater potential danger with regard to the spread of Newcastle disease than the products the import of which had been banned.

The Commission concluded its letter by stating that the measures adopted by the United Kingdom amounted to an absolute ban unlimited in time and were:

(i) out of proportion to the risks involved;

(ii) discriminatory as far as the date of their entry into force was concerned; and

(iii) arbitrary, since they concerned only certain products which were alleged to be likely to spread Newcastle disease.

5. By letter dated 2 October 1981 the United Kingdom Government replied to the views expressed by the Commission, claiming essentially that the contested measures were justified on grounds of animal health under Article 36 of the Treaty. In its reply the United Kingdom Government repeated certain explanations already provided during the Standing Veterinary Commitee's discussions held on 1 September 1981.

First, it was noted that the United Kingdom policy on health control in general was guided, on the one hand, by the need to ensure protection of animal health at the highest practicable level consistent with internationally-recognized practice and, on the other, by the United Kingdom's Community obligations.

In the opinion of the United Kingdom Government, the time was right to prohibit vaccination and, for the purpose of dealing with any possible outbreaks of Newcastle disease, to introduce a slaughter with compensation policy for those parts of the United Kingdom to which that policy did not already apply. The aim of the measures adopted on 1 September 1981 was to re-establish the highest health status for the United Kingdom poultry flock in respect of Newcastle disease; they minimized disease risks and improved the efficiency of poultry production.

The measures as a whole were necessary to maintain freedom from Newcastle disease within Great Britain. The restrictions on imports constituted an essential part of the whole, in order to prevent the disease risk to the flock. In the absence of any Community provisions, they had to be imposed at national level.

As to whether those measures could be adopted at a national level, the United Kingdom Government pointed out that the Commission itself affirmed that the animal health provisions relating to trade in live poultry, poultrymeat, eggs and egg products had not yet been harmonized within the Community and that, in accordance with Article 11 (1) of Council Directive No 71/118, it accepted that, so long as this was so, Member States might continue to apply the measures provided for by their own national provisions.

The United Kingdom Government therefore considered that the measures which it had introduced on 1 September 1981 were justifiable under Article 36 of the Treaty and Article 11 (1) of Directive No 71/118 and therefore did not infringe Article 30 of the Treaty.

In relation to the Commission's claim that the Community's health record on Newcastle disease was good, the United Kingdom Government observed that the reports to the International Office of Epizootics and other returns showed that there was a continuing prevalence of the disease. Moreover, there was some doubt whether all outbreaks were properly reported, in view of the varying interpretation as to what constituted an outbreak of Newcastle disease. There was ample scientific and practical evidence that vaccination might mask infection and so lead to the presence of occult virus in birds, carcases and eggs. It was therefore impossible to move to the highest standard of disease freedom which corresponded to the policy of non-vaccination and compulsory slaughter, with the necessary consequence of rendering the national flock more vulnerable, without at the same time minimizing as far as possible the clear risk of re-infection. In view of the presence of field virus in other Member States, possibly masked by vaccination and liable to spread across land frontiers or by trade in poultrymeat and eggs, the import controls were a necessary support of the stringent internal measures. Therefore they were not out of proportion to the risks involved.

In answer to the argument that the restrictions on imports were discriminatory purely because of the date of their entry into force, it was stated that a difference in the short term in the application of the measures in relation to domestic supplies, on the one hand, and imported produce, on the other, was inevitable and did not amount to discrimination in Community law. The new measures had to be applied at an early date both internally and to imports. Imported supplies already in cold storage in Great Britain on 1 September would continue to be sold alongside produce from vaccinated indigenous flocks, and both would diminish rapidly as the new measures took effect. To have allowed the transfer after 1 September of large quantities of imported supplies from countries which vaccinate to cold stores in Great Britain and their distribution over a period of several months would have constituted a clear and unacceptable health risk to the United Kingdom flock.

Finally, in relation to the alleged arbitrary nature of the contested measures, the Government referred to the strict measures provided for by the Importation of Birds, Poultry and Hatching Eggs Order, 1979 (Statutory Instrument 1979, No 1702). It added

that the United Kingdom had now suspended the importation of all exotic birds and their eggs, pending the introduction of stricter controls.

6. By letter of 12 October 1981 the Commission sent to the United Kingdom Government its reasoned opinion, addressed to the United Kingdom under the first paragraph of Article 169 of the Treaty, in which it declared that, by subjecting imports from other Member States of poultrymeat, poultry products, eggs and egg products to the measures adopted in this case, the United Kingdom had failed to fulfil its obligations under Article 30 of the Treaty; it requested the United Kingdom, pursuant to the second paragraph of Article 169 of the Treaty, to take the necessary measures to comply with the reasoned opinion within five working days following notification thereof.

In the reasoned opinion, the Commission repeated the grounds communicated to the United Kingdom by its letter of 11 September 1981. It stated that Article 11 (1) of Directive No 71/118 did not override the prohibition contained in Article 30 of the Treaty.

In relation to the risk of contamination by imports of vaccinated birds, it took the view that field virus was very rare, or even non-existent in most Member States. In that regard, it pointed out that, according to information provided by the International Office of Epizootics, only one outbreak of Newcastle disease had occurred in Great Britain since 1976, even though there had been a steady flow of imports from other Member States and a high proportion of the British flock had not been vaccinated. In France, where, like Great Britain, a policy of non-vaccination had recently been introduced, no outbreak of Newcastle disease had occurred since 1976, even though that country also had a partly vaccinated and partly non-vaccinated flock. The prohibition of imports of the products concerned from France into Great Britain, even though the two countries were in a substantially similar situation with regard to Newcastle disease, therefore constituted arbitrary discrimination within the meaning of the second sentence of Article 36 of the Treaty. That was also the case as regards the arrangements relating to the entry into force of the contested measures.

By letter of 30 October 1981, the United Kingdom Government replied to the reasoned opinion delivered by the Commission by confirming that it considered the restrictions on imports to be fully justified under Article 36 of the Treaty and that it was therefore unable to comply with the Commission's request that they should be removed. In that regard it drew attention to the fact that the same measures, that is to say the internal measures and import prohibitions, had been applied without challenge in respect of Northern Ireland, even against imports from the rest of the United Kingdom, since a slaughter and non-vaccination policy had been introduced there in 1958. Imports had been permitted into Northern Ireland only from countries of equivalent status.

The United Kingdom Government further disputed whether the measures at issue had become arbitrary as a result of the recent adoption of a policy of

compulsory slaughter and non-vaccination by France. Indeed, no comprehensive steps had been taken in France to deal with imports of fresh or frozen poultrymeat or eggs for human consumption. In view of the extent of international trade, that omission represented a significant disease risk. The United Kingdom could not accept as representing an effective policy domestic measures taken in isolation and without a complementary import policy similar to that which it had, itself, adopted.

Written procedure

7. By an application lodged on 4 February 1982, the Commission brought this action under the second paragraph of Article 169 of the Treaty.

By orders of 15 June 1982 the Court allowed the French Republic to intervene in support of the Commission and Ireland to intervene in support of the United Kingdom.

The Commission decided not to submit a reply and the Court, upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. However, it requested the parties to reply to the following questions:

Commission:

(a) The Commission is requested to give information to the Court on the interpretation that it thinks should be given to Directive No 71/118 of the Council of 15 February 1971, on health problems affecting trade in fresh poultrymeat. The Court is particularly interested to know:

(i) Whether in the Commission's view the directive should be considered as harmonizing exhaustively national legislation in the sense that it excludes any resort to national regulations not provided for in the directive?

(ii) What in the opinion of the Commission would be the interpretation to be given to Article 11 (1) of the directive?

(b) What exactly are the measures taken by the United Kingdom that the Commission considers contrary to the Treaty as far as Northern Ireland is concerned?

(c) Would the Commission go more deeply into its argument that Article 36 of the Treaty prevents any systems of import licences except a system of "general open licences"? What does the last expression mean?

(d) The Commission is asked to reply to the argument that Newcastle disease subsists in latent form, masked by the use of vaccine among flocks that have been vaccinated against this illness.

(e) Could the Commission give information to the Court about the system of combating poultry diseases as at present applied in Denmark? Does the system imply restrictions of imports from other Member States?

United Kingdom:

What is to be understood by "ring vaccination"?

French Republic:

Pursuant to Article 21 (2) of the Statute of the Court, the French Government is

invited to explain to the Court the reasons it had for re-establishing the old system of combating Newcastle disease based on vaccination in November 1981, after having introduced a different system of combating the disease based on prohibition of vaccination and compulsory slaughtering of contaminated flocks in September 1981.

Moreover, the main parties and the interveners were requested to bring to the sitting an expert in poultry diseases together with their Agent.

II — Conclusions of the parties

The Commission claims that the Court should:

(1) Declare that by prohibiting imports and adopting the contested system of import licences in the sector of poultry products, the United Kingdom has failed to fulfil its obligations under Article 30 of the Treaty;

(2) Order the United Kingdom to pay the costs.

The United Kingdom contends that the Court should dismiss the application as unfounded.

III — Submissions and arguments of the parties

In their written observations, the parties to the main action in essence develop the arguments already put forward during the administrative procedure.

So far as the facts are concerned, *the Commission of the European Communities, the applicant,* adds that it has received a number of complaints concerning the restrictions on the import of poultry products from traders who claim that they have suffered severe financial damage as a result of those restrictions.

In relation to the *applicability of Article 30 of the Treaty,* the Commission states first that a provision of secondary law such as Article 11 (1) of Council Directive No 71/118, which provides that national animal health provisions concerning trade in poultrymeat are to continue to apply until the entry into force of any Community provisions, cannot override the prohibition contained in Article 30. It states that paragraphs (2) to (5) of Article 11 concerning temporary restrictions on trade which the Member States may adopt apply only in the event of an outbreak of an epizootic disease such as Newcastle disease.

It refers to the Court's judgment of 14 December 1979 in Case 34/79, *(Regina* v *Henn and Darby* [1979] ECR 3795) and claims that an import ban imposed by the withholding of import licences clearly constitutes a quantitative restriction on imports within the meaning of Article 30 of the EEC Treaty. Moreover, the concept of measures of equivalent effect under Article 30 of the EEC Treaty covers "a national provision which requires, even as a pure formality, import licences or any other similar procedure" (judgment of 15 December 1976 in Case 41/76, *Donkerwolcke,* op.cit.), since such a requirement is always liable to give rise to unnecessary delay and cause importers to incur unnecessary expense. Consequently, by the very fact that an import licence is required to import the poultry products referred to, the United Kingdom measures at issue constitute measures of equivalent effect within the meaning of Article 30 of the EEC Treaty.

Next the Commission refers to the *absence of justification* of the import

restriction on the grounds of animal health under Article 36 of the Treaty. In that regard, it emphasizes the importance to be attached to animal health and recognizes the serious financial consequences of an outbreak of Newcastle disease. However, it stresses the fact that measures intended to reduce the incidence of animal disease must remain within the bounds laid down by the Treaty.

In the light of the present situation in the Community, in which there is a widespread practice of keeping vaccinated and non-vaccinated flocks in a single Member State, the Commission regards the argument that vaccination may mask field virus as somewhat theoretical. Indeed, in those Member States where a significant proportion of the national flock is not vaccinated and is thus fully susceptible to Newcastle disease, the presence of the virus would undoubtedly cause outbreaks within a short space of time. Thus partial vaccination cannot mask for any appreciable length of time 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 of the United Kingdom itself, which until September 1981 had a national flock consisting of 40% vaccinated and 60% unvaccinated birds. None the less, neither country has had outbreaks of Newcastle disease for several years.

This is indeed confirmed by the information provided by the International Office of Epizootics. In fact, there has been no outbreak in France and only one in Great Britain since 1976.

The Commission comments that the United Kingdom Government has not adduced any evidence in support of the doubt which it has cast on the statistics provided. In that regard, it states that the International Office of Epizootics is an international organization which has approximately 100 member countries and whose function is to give information on outbreaks of animal diseases and issue recommendations as to their control; it is the only official international body to publish statistics on the number of outbreaks of these diseases in the member countries, which themselves provide the office with data.

Moreover, in spite of the fact that until September 1981 Great Britain imported substantial quantities of poultry products from Member States which pursued a policy of vaccination, the United Kingdom's statistics show that there has been only one outbreak in Great Britain since 1976 and it has never been reported to the Commission that that outbreak was related to imports of poultrymeat or poultry products from other Member States.

Consequently, the risk of the introduction of Newcastle disease virus into the United Kingdom is at the present time very low in respect of certain Member States and non-existent in respect of the others. Thus the Commission considers that the import ban constitutes a measure which is disproportionate to the aims pursued, in so far as it is more restrictive of imports than is necessary for the protection of animal health.

The Commission also points out that a Member State which relies on Article 36 bears the burden of showing that the

measure in dispute is justified under that provision (judgment of 8 November 1979 in Case 251/78 *Denkavit Futtermittel* v *Minister für Ernährung, Landwirtschaft und Forsten* [1979] ECR 3369).

Furthermore, the Commission considers that the import ban is incompatible with the *second sentence of Article 36 of the Treaty.*

In that regard, it contends first that the prohibition with immediate effect from 1 September 1981 of imports of poultry products from Member States pursuing a policy of vaccination constitutes arbitrary discrimination within the second sentence of Article 36, since the vaccinated part of the British poultry flock, which will continue to be present for approximately 12 months, may be marketed within the United Kingdom without restriction. The Commission does not accept that that discrimination is an inevitable consequence of the change of policy. Indeed, for the same reasons as were submitted above in relation to the absence of justification of the restrictive measures as such, that change is not such as to justify discriminatory treatment.

That view is all the more valid in regard to imports from France, since after the recent adoption of a policy of non-vaccination in that country, France and Great Britain are in a substantially similar situation with respect to Newcastle disease. It is true that, in its reply to the reasoned opinion, the United Kingdom sought to justify its continued ban on French poultry products on the ground that the French authorities had taken no comprehensive measures to deal with imports of fresh or frozen poultrymeat and eggs for human consumption. The Commission considers, however, that the French authorities cannot be required to infringe Article 30 by adopting measures identical or similar to those adopted by the United Kingdom.

The Commission also admits that there is no question of arbitrary discrimination in relation to Northern Ireland, because there the entire flock is unvaccinated and has been for some time.

In relation to exotic birds, which constitute a great potential danger to the spread of Newcastle disease, the Commission considers that the subsequent suspension of imports of exotic birds as from 1 October 1981 and the introduction of a new stringent import scheme as from 18 January 1982 constitute little more than an afterthought which confirms the arbitrary nature of the measures concerning poultrymeat and egg products.

With regard to the second sentence of Article 36, the Commission states secondly that the import ban constitutes a "disguised restriction on trade". That limb of the second sentence of Article 36 is designed "to prevent restrictions on trade based on the grounds mentioned in the first sentence of Article 36 from being diverted from their proper purpose and used in such a way as ... indirectly to protect certain national products" (judgment of 14 December 1979 in Case 34/79 *Henn and Darby,* op.cit.).

Imports of poultry, especially turkeys, into the United Kingdom have increased dramatically in recent years. As appears from reports in the British press, by 1981 British poultry producers felt particularly threatened and therefore urged the United Kingdom Government to take action. In that regard, the Commission draws attention to the fact that the new measures, announced on 27 August,

were brought into force at very short notice, on 1 September 1981, that is to say immediately before the period when contracts are normally concluded for supplying the lucrative Christmas market in turkeys. In those circumstances, it would seem to the Commission that the argument concerning the protection of animal health is being used as a means of protectionism and that the import ban therefore constitutes a disguised restriction on trade.

Finally, so far as the import *licensing system* is concerned, the Commission does not consider that "general open licences" in the sense in which that term is defined in its reply in Case 124/81, *Commission* v *United Kingdom*, at present pending before the Court, constitute measures of equivalent effect within the meaning of Article 30 of the Treaty. It considers, however, that a system of specific licences such as that established for imports of egg products which have been heat-treated, may hinder imports by causing unnecessary delays and may therefore be unjustified, particularly in so far as it provides no guarantee in addition to the health certificates issued by the authorities of the exporting Member State.

The *United Kingdom, the defendant*, states first that its policy on combating Newcastle disease is based on considerations which are universally accepted in this field, that is, the fact that Newcastle disease may be communicated to the home flock through the importation of fresh (including frozen) poultrymeat and that the danger of contamination is increased when vaccination is practised in the exporting country. For the United Kingdom, these considerations are of particular importance because of the scale on which imports enter the country and because of the size of its poultry flock (approximately 130 million birds, concentrated in large units). The appearance of the disease is therefore likely to lead to very serious and expensive consequences.

Next, the United Kingdom recalls the *historical context* of the adoption of the new measures of slaughter and non-vaccination.

In Great Britain, fowl pest, including fowl plague and all forms of Newcastle disease, is the only poultry disease which is officially notifiable. For many years, the competent ministry operated a policy of slaughter and compensation, which was in line with the measures taken against other dangerous virus diseases with serious economic consequences, such as foot-and-mouth and swine fever. However, following a large increase in the number and extent of outbreaks of the disease in the later 1950s and early 1960s (3 000 in 1962; expenditure of UKL 8.8 million in compensation), the slaughter policy was abandoned and replaced by a policy which was intended to control the disease and was based on voluntary vaccination. For that purpose, an inactivated vaccine was initially used, in accordance with the Report of the Committee on Fowl Pest Policy, 1962, (op.cit.). Later, following the Report of the Review Panel on the Newcastle Disease Epidemic, 1970-1971, (op.cit.), it was decided to authorize the use of live vaccines.

Each time, the change of policy had a good initial response in the level of voluntary vaccination, but as the

incidence of disease became less there was a tendency for vaccination to decline in spite of repeated publicity by the Government. In respect of that tendency, the reintroduction of the slaughter policy combined with a system of "ring vaccination" to apply in individual cases of outbreaks of the disease was suggested in the press of the veterinary profession as early as 1974, with a view to eradicating the disease from the United Kingdom. Until 1980 the adoption of that policy, which represented the highest standard of animal health, was impossible owing to restrictions on public expenditure which precluded the grant of compensation for compulsory slaughter.

However, on 20 July 1981, the British Poultry Federation handed to the Ministry of Agriculture a report of veterinary experts in the poultry industry which made a well-argued technical case for a change of policy and indicated that the industry itself would support the cost of compensation for slaughter. According to that report, the incidence of Newcastle disease had been low enough for a sufficient length of time to make it appropriate to move to the higher policy of eradication, provided that the admission of imports was limited to imports from countries which adopted equally high standards of protection.

In those circumstances, the question arose whether the change to the highest standard of protection from disease for the British flock, entirely justified on the grounds of animal health, ought to be prevented by the fact that such a change of policy would involve restrictions, which were, of course very welcome to United Kingdom producers, on trade with such other countries, including certain Member States, as did not apply the same standards.

In the submission of the United Kingdom, the grounds of animal health must be considered on their own merits. If the measures adopted are justified on grounds of animal health within the meaning of Article 36, they cannot constitute prohibited restrictions. In particular, the possible existence of other reasons for adopting such measures is irrelevant.

In that regard, the United Kingdom contends that by alleging that those measures amounted to a total or absolute ban, the Commission has misstated their nature. Indeed, the United Kingdom has always been willing to issue a general open licence to any country which is totally free from Newcastle disease, prohibits the use of vaccine and applies compulsory slaughter requirements similar to those adopted by the United Kingdom in the event of an outbreak of the disease, and which also prohibits imports from other countries which have less stringent provisions for the protection of their flocks. The effect of that policy is to facilitate trade for all States which apply the same standards as the United Kingdom; whether or not they will restrict trade will depend on matters within the control of the Member State concerned, not the United Kingdom.

With regard to the *justification of the contested measures under Article 36* of the Treaty, the United Kingdom claims that the standards adopted and applied by it since September 1981 are the highest

standards known for the protection of poultry from Newcastle disease and it should be the objective of all the Member States to reach that level. As is confirmed by the recent Community measures on swine fever (Official Journal 1980, L 325, pp. 1 and 11), it is common form to move, when circumstances permit, from control by vaccination to eradication by slaughter combined with prohibition of vaccination. The prohibition of vaccination is an inevitable part of any successful slaughter policy, because vaccinated birds can carry the disease without showing clinical signs of it. However, that does not preclude the use of "ring vaccination" when an outbreak of the disease threatens to get out of hand and cannot be dealt with effectively by means of slaughter alone.

Moreover, the change to a policy of eradication by slaughter combined with prohibition of vaccination can be considered only when there is good reason to believe that a country's flock is free from field virus. A fall in the level of vaccination may be a further indication that such a change should be made, for the vaccinated remnant continues to provide a source within which the presence of field virus may be masked.

Finally, if the effect of such a change is to put the whole of the flock at risk, that has the advantage that each bird is as it were a sentinel. However, it leads to the danger that every flock is vulnerable either to such field virus as there may still be in the country or to infection through imports from other countries, and this creates a potential epizootic risk which is greatest where such other countries practise vaccination and lowest where they adopt the measures adopted by the United Kingdom.

According to the United Kingdom, the justification for the new policy as such is undeniable. It further considers that it must be entitled to take reasonable measures to protect its flock against the danger of infection through imports as a result of the adoption of the highest standards. In that regard, it points out that Ireland and Denmark which apply the same rules have not had one outbreak since 1972. On the other hand, according to information provided by the International Office of Epizootics, imports from countries such as Belgium, Federal Republic of Germany, Greece and Italy constitute clear risks. In relation to France, where the level of vaccination is about the same as in Great Britain, the danger results especially from the fact that, although France has adopted the same system, it continues to expose the unvaccinated part of its flock to risks from imports from other countries.

With regard to the theory of disproportionality, put forward by the Commission, the United Kingdom Government considers that the Commission's view of the dangers of infection is over-optimistic. It has no misgivings about the authenticity of the information provided by the International Epizootic Office but considers that in the absence of any common veterinary criteria for the investigation of Newcastle disease, it is impossible to determine on what basis an "outbreak" of the disease is considered to have occurred in a particular State, for the purpose of reporting it to that office.

Accordingly, it contends that the precise position with regard to Newcastle disease within the Community is largely unknown. That state of affairs, which, moreover, indicates the need for Community harmonization on the subject, is confirmed by the fact that the Commission is unofficially circulating a proposal for a Council directive concerning *inter alia* problems of definition related to notification of Newcastle disease.

The United Kingdom contends that when there was a policy of vaccination, the question whether or not imported poultry products came from a country where vaccination was practised was relatively unimportant. Consequently, the Commission's argument that there was only one outbreak of Newcastle disease after 1978 in spite of imports from Member States with a policy of vaccination, is not relevant.

On the other hand, against the background of the combined effect of the change to the new method of non-vaccination in 1981 and the remarkable rise in imports of poultry products during 1980, the import restrictions were essential to meet a completely new situation.

Moreover, far from being theoretical, the argument that vaccination can mask a virus is based on scientific research which has demonstrated that a virus may be present for up to 12 months in a vaccinated adult bird without causing visible disease. Even on the assumption made by the Commission that in a country where vaccinated and unvaccinated flocks exist alongside one another the presence of virus would cause outbreaks within a short space of time, that short space of time might be the very period in which the imports which caused the virus to be introduced to the United Kingdom are made. Moreover, the fact that the risk is, in the Commission's view, very low, is no reason why such risk should be accepted.

Finally, in considering the proportionality of the contested measures, regard must be had not only to the likelihood of infection but also to the consequences if such infection does take place. As a result of the very considerable increase in the consumption of poultrymeat and other poultry products in recent years, the economic effects of such an outbreak today would be much more serious than those of the serious outbreak in England in 1970 which led to expenditure of UKL 20 million. Indeed, the United Kingdom authorities would have been lacking in their duty to protect animal health in their territory if they had not taken steps to ensure that the change of policy was accompanied by the appropriate import restrictions.

So far as the Commission's argument based on the *second sentence of Article 36* is concerned, the United Kingdom first contends that the allegation that the contested measures constitute arbitrary discrimination is unfounded.

In that regard, it explains the difference between, on the one hand, the normal disposal over a period estimated at 12 months of vaccinated birds which are already in the country on the entry into force of the policy of non-vaccination and, on the other, the import of poultry products from countries where vaccination is still practised. Indeed, any delay in the introduction of import restrictions would have resulted in a massive influx of poultry products into

cold-storage in Great Britain and would have thereby undermined the strategy chosen. In so far as the entry into force of the contested restrictions constitutes discrimination, it is therefore justified on the same grounds as the measures themselves.

In relation to the assertion made in the application that Great Britain and France are in an identical situation, the United Kingdom claims that that situation prevailed only from 16 September to 24 November 1981, when France reintroduced vaccination against Newcastle disease.

Concerning exotic birds, it point out that the very stringent controls which already existed allowed a short period for the consultation of those interested in the trade, before the establishment of even more stringent controls.

Secondly, the United Kingdom denies that the import ban constitutes a disguised restriction on trade between Member States within the meaning of the second sentence of Article 36. It admits that it was gravely concerned by the continuing increase in the importation of turkeys from France, and in particular by the degree of subsidization available to French producers and whether it was lawful. However, the veterinary staff in the Ministry concerned concluded that the remarkable rise in imports would inevitably increase proportionately the risk of importing the disease. It is true that the level of vaccination in France was about the same as that in the United Kingdom at that time; but the experts understood that France allowed imports of poultrymeat from Eastern Europe and Spain. In those circumstances, the apparent risk of importing Newcastle disease might materialize, notwithstanding figures which suggested a low level of the disease in certain countries, such as France.

Referring to the judgment of the Court of 7 April 1981 in Case 132/80, (*United Foods* v *Belgium* [1981] ECR 995), the United Kingdom contends that in the absence of Community harmonization, national measures on health control cannot in principle be regarded as measures prohibited by the Treaty. They may be regarded as disguised restrictions on trade within the meaning of Article 36 of the Treaty only in so far as certain aspects of such control exceed what is objectively justified in the interests of animal health.

In that regard, the defendant confirms that the provisions of Article 11 (2) to (5) of Directive No 71/118 are not relevant in this case and that moreover, Article 11 (1) of that directive cannot derogate from Article 30 of the Treaty.

Finally, in relation to the system of *import licences,* the United Kingdom states that in the case of open and general licences it is not necessary for the importer himself to request a licence, even as a formality.

In reply to certain written questions put by the Court, the Commission explains that Denmark applies, with regard to Newcastle disease, a policy of non-vaccination and compulsory slaughter. The general conditions for import of live poultry and poultrymeat are contained in Regulation No 87 of March 10, 1978

issued by the Ministry of Agriculture; they can be summarized as follows:

1. Import from Member States which are free from Newcastle disease and which do not permit vaccination against Newcastle disease: consignments of meat must be accompanied by a health certificate in accordance with Directive 71/118/EEC.

2. Import from Member States where Newcastle disease has been recorded within the past 12 months or where vaccination against that disease takes place:

   (i) *From vaccinated flocks*

   Consignments of meat must be accompanied by a health certificate in accordance with Directive 71/118/EEC and the certificate must have the additional text:

   — that flocks and poultry slaughterhouse or cutting plant, from which the poultrymeat originates, are situated in the centre of a zone with a diameter of 20 km, within which no case of Newcastle disease has occurred within the last 6 months prior to the export;

   — that in case vaccination against Newcastle disease has been carried out in the flocks, from where the poultrymeat originates, only the hitchner B1 or La Sota types of vaccines have been used;

   — that during the slaughtering procedure at least 30 heads have been collected per 5 000 animals producing the poultrymeat in the consignment and that the heads have been examined with a negative result for Newcastle disease (Swab method) at an officially approved laboratory.

   (ii) *From non-vaccinated flocks*

   Consignments of meat must be accompanied by a health certificate in accordance with Directive 71/118/EEC and the certificates must have the additional text:

   — that flocks and poultry slaughterhouse or cutting plant, from which the poultrymeat originates, are situated in the centre of a zone with a diameter of 20 km, within which no case of Newcastle disease has occurred within the last 6 months prior to the export;

   and

   — that at least 20 animals of each flock, from where the poultrymeat originates, have been examined for Newcastle disease at an officially approved laboratory within the last 6 days prior to slaughtering.

     The results from the examination must show that antibodies are not present against Newcastle disease virus;

   or

   — that during the slaughtering procedure at least 30 heads have been collected per 5 000 animals producing the poultrymeat in the consignment and that the heads have been examined with a negative result for Newcastle disease (Swab method) at an officially approved laboratory.

   The conditions under 1 and 2 refer to poultrymeat originating from domestic fowls and chickens.

The Commission considers that this import system, while it clearly involves some restrictions, is acceptable at the present time in the absence of a complete

Community regime. The Danish system permits imports, whilst ensuring the highest guarantee against the risk, albeit slight, of contagion resulting from such imports.

Particularly noteworthy is the close cooperation carried out with the veterinary authorities of the exporting Member State. In effect, poultrymeat, which is accompanied by a health certificate with the appropriate attestation, has access to the Danish market.

Analogous provisions apply to imports of eggs from other Member States into Denmark, save that the sample laboratory examinations are not required.

With regard to the measures applied in Northern Ireland, the Commission states that the Northern Irish legislation at issue is the Diseases of Animals (Importation of Poultry) Order (Northern Ireland) 1965 (SI 1965 NI No 175) as amended by an Amendment Order of 1968 (SI NI No 106) and the Diseases of Animals (Northern Ireland) Order 1981 (SI 1981/1115 [NI 22]). The 1965 Order as amended stipulates that imports of carcases of poultry and eggs (as defined in the 1968 Order) are subject to an import licensing system.

Article 4 (3) exempts from the licensing system eggs originating in and coming directly from Ireland, as well as poultry carcases originating in and coming from Ireland provided that such carcases are in transit to another destination. Moreover the Commission understands that it is the practice to grant import licences for all the other products concerned from Ireland and that such licences are also granted with respect to imports of poultry carcases and eggs from Denmark. No import licences are granted for imports from elsewhere in the Community.

Linked to this system is a slaughter and non-vaccination policy which has been in existence since before accession.

Consequently, the measures applied in Northern Ireland are the same as those now applied in Great Britain with the difference that the Northern Irish measures have been in existence since before accession. The Commission therefore claims that, as in the case of Great Britain, both the import licensing scheme and the import ban are contrary to Article 30 as regards Northern Ireland as well.

Since the Northern Irish measures, like the Irish measures, have been in existence since before accession, they do not present the same degree of urgency as those in force in Great Britain. As the action against Ireland (Case 74/82) is still at the stage of the written procedure, the Commission would accept that further discussion of the Northern Ireland measures be similarly deferred.

IV — Oral procedure

The parties presented oral argument at the hearing on 30 June 1982

The *French Republic*, intervening, considers that Article 11 (2) to (5) of Council Directive No 71/118, concerning temporary restrictions of trade which the Member States may adopt, only apply in the event of an outbreak of an epizootic disease. These provisions

limit the power of Member States to adopt trade restrictions to that particular situation, even if Member States remain at liberty to change their internal health policy in accordance with paragraph 1. In the present case, it has been argued that there is a danger that animal diseases may be spread by the introduction, in the territory of the United Kingdom, of fresh poultry meat. Consequently, the French Government submits that Article 11, (2) to (5) apply. As far as vaccination is concerned, it is correct to say that 15% of the flock in France are vaccinated, if that number relates to the total flock over a period of one year. In France, however, only breeding stock and laying hens are vaccinated, not birds reared for slaughtering purposes, to be sold when they are about eight weeks old. That implies that there are about five bird generations a year. Consequently, the situation at any given moment is that about 40-45% of the French flock are vaccinated. The French Government notes that France does not export any breeding stock or laying hens to the United Kingdom. It exports carcases of birds which normally have not been vaccinated.

In the French Government's submission the United Kingdom should have taken other measures than a total import ban, if it wanted to protect its own flock against any risk of infection. A system such as the one adopted in Denmark could have given sufficient protection.

A similar system was applied by Switzerland in 1972-73, when Newcastle disease still existed in France, but had disappeared in Switzerland. The Swiss authorities have applied a satisfactory system of health precautions, which they abandoned in 1978, when Newcastle disease had disappeared in France. Thus, the Swiss authorities have shown their willingness to accept further French imports, albeit with additional health controls, at a moment when a real risk of contamination with Newcastle disease existed.

In the view of the French Government, the 1981 measures have only been adopted by the United Kingdom in order to protect its own producers. Repeated attempts made by the French Government to negotiate with the British authorities, after the adoption of the measures, failed. It was said either that the experts were absent, or that the matter should be discussed in Brussels. However, discussions in Brussels, in the Veterinary Committee, led to nothing at all. In the meantime, France had adopted similar measures: by Order of 16 September 1981 it had prohibited vaccination against Newcastle disease and introduced a slaughter policy. These measures did not lead to any result, as the import ban remained in force against French imports, because, it was said, France did not exclude poultry imports from Spain and some Eastern European countries where vaccine was still in use. Consequently, the new French measures were withdrawn on 24 November 1981. In fact, France met the conditions for imports of poultry that the United Kingdom Government had announced (no Newcastle disease outbreaks: non-vaccination; compulsory slaughtering) as from 16 September 1981; but then the British authorities added a fourth

condition, which they had not previously announced, namely that no imports from non-member countries into France should be allowed.

Ireland, intervening, submits that the position of Northern Ireland, like that of Ireland, is a special one which derives from the special system which has long existed there. Northern Ireland, like Ireland, has adopted a policy of non-vaccination of its avian stock for very many years. In the case of Ireland, this commenced in 1938. This system was well established before British and Irish accession to the Community. Therefore, Ireland submits that the decision of the Court, if not the hearing of the Commission's case in respect of the Northern Ireland measures, should be postponed until the determination of the case against Ireland (Case 74/82). As the Commission's application was made urgent by the restriction of French turkey imports into Great Britain in September 1981, there would be no particular urgency in that part of the present proceedings which concerns Northern Ireland.

Ireland adds that, in its view, Article 11 (1) of Directive 71/118 entitles Member States to maintain in force their animal health provisions concerning live poultry and poultrymeat which were in existence when the directive came into force. For Northern Ireland, this was 1 January 1973. The basis of the justification for the measures concerning Northern Ireland is, therefore, similar to that for the measures concerning Ireland, but completely different from the basis invoked by the British Government for the measures applied to the British mainland.

The Advocate General delivered his opinion at the hearing on 7 July 1982.

Decision

1 By application lodged at the Court Registry on 4 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, the United Kingdom has failed to fulfil its obligations under Article 30 of the EEC Treaty.

I — Subject-matter of the action

2 As far as the import ban is concerned, the application states that as from 1 September 1981 the United Kingdom Government has imposed a total ban on the imports of fresh, frozen or chilled poultrymeat, eggs (other than hatching eggs) and egg products into England, Wales and Scotland from all other Member States except Denmark and Ireland.

3 According to the application, these restrictions have been imposed on the basis of the Importation of Animal Products and Poultry Products Order 1980 (SI 1980 No 14), as amended by amendment orders of 1980 and 1981 (SI 1980 No 1934 and SI 1981 No 1238), which prohibits the landing in Great Britain of poultry products, including eggs and egg products, without a general or specific licence issued by the appropriate ministry under that Order.

4 The measures imposing new restrictions on the import of poultry products with effect from 1 September 1981 were announced by a notice which was published in the "London Gazette" and in the "Edinburgh Gazette" of that date. These measures (hereinafter referred to as "the 1981 measures") were to the effect that all general licences for the import of poultry products from other Member States were revoked and that new general licences were issued for the import of such products from Denmark and Ireland. These new general licences concern eggs (not intended for hatching), fresh or refrigerated carcases and part carcases derived from chickens, turkeys, ducks, geese and guinea fowl, with or without accompanying offal, and unaccompanied offals.

5 The Commission claims that the United Kingdom Government made it known, at about the same time, that it did not intend to grant any licences at all with respect to the import of poultry products, including eggs (not intended for hatching) and egg products, if they came from Member States other than Denmark and Ireland, but that it would be prepared to grant licences for the import of heat-treated egg products from any Member State.

6 The Commission further states that, although the 1981 measures apply only to imports into England, Wales and Scotland, similar restrictions have been in force since before the United Kingdom's accession to the Community in respect of imports of poultry products into Northern Ireland. Under the Diseases of Animals (Importation of Poultry) Order (Northern Ireland) 1965 (SI 1965 NI No 175), as amended by an amendment order of 1968 (SI 1968 NI No 106), imports of carcases of poultry and eggs, except, under certain conditions, when coming from Ireland, are subject to an import licensing system. In practice, no import licences are granted for imports from other Member States than Ireland and Denmark.

7 The United Kingdom recognizes that its legislation on animal health, as far as poultry products are concerned, amounts to an import licensing system, and that it adopted the 1981 measures in the manner indicated by the Commission. It contends, however, that these measures cannot be considered as a total import ban.

8 According to the United Kingdom, the 1981 measures formed part of a number of arrangements intended to deal in a more effective way with the control of Newcastle disease in poultry. The United Kingdom Government had indeed decided to reintroduce a compulsory slaughter policy in case of any future outbreak of the disease in Great Britain, in line with the policy that was already applied in Northern Ireland. As a result, any poultry flock in which Newcastle disease was confirmed would be slaughtered as from 1 September 1981; as from that same date, the use of Newcastle disease vaccine would be stopped. The implementation of this new policy would restore the whole of the United Kingdom to the highest internationally recognized disease-free category for poultry.

9 The United Kingdom Government had been aware, however, of the extremely infectious character of Newcastle disease. With the removal of vaccine protection the British poultry flock could become totally susceptible to infections as a result of any imports from countries which might not be clear of the virus or which permitted free use of vaccine. Indeed, the use of vaccine might disguise the presence of field virus in poultry. Consequently, it was necessary to apply more stringent health requirements to imports of fresh, including frozen, poultrymeat, eggs and egg products into Great Britain, except for heat-treated egg products in which the virus cannot remain active.

10 The United Kingdom Government made it clear, therefore, that as from the date of introduction of the new policy, imports of these products could only be accepted from countries which were totally free from Newcastle disease, which prohibited the use of vaccine and which imposed compulsory slaughter requirements in the event of an outbreak of the disease.

11 Imports from any Member State meeting these three conditions would remain possible after 1 September 1981. However, the information available at the time suggested that Denmark and Ireland were the only Member States able to satisfy these requirements. As any Member State is free to adopt the same system as the United Kingdom, Ireland and Denmark, the measures in question can, in the United Kingdom's opinion, not be assimilated to a total import ban. It would, in fact, be very desirable if other Member States were to adopt the same high standards of bird health as the United Kingdom, since such a policy, if generally followed, would permit free movement of poultry and poultry products throughout the Community.

II — Summary of the legal arguments

12 The Commission submits that the restrictions on imports of poultry products from other Member States, except Ireland and Denmark, as practised by the United Kingdom, constitute an infringement of Article 30 of the Treaty which forbids quantitative restrictions on imports from other Member States and measures having an effect equivalent to such restrictions, which cannot be justified under Article 36 of the Treaty.

13 The Commission agrees with the United Kingdom that the highest levels of freedom from animal disease should be the objective of all Member States, but it adds that measures intended to reduce the incidence of animal disease must remain within the bounds laid down by the Treaty.

14 From this point of view, the Commission challenges in particular four aspects of the United Kingdom's legislation and practice. In the Commission's view:

(a) the import licensing system restricts imports more than is necessary for the protection of animal health;

(b) the import ban restricts imports more than is necessary for the protection of animal health;

(c) as regards England, Wales and Scotland, the import ban constitutes a means of arbitrary discrimination within the meaning of the second sentence of Article 36;

(d) as regards England, Wales and Scotland, the import ban constitutes a disguised restriction on trade between Member States within the meaning of the second sentence of Article 36.

15 The United Kingdom contends that the 1981 measures, far from constituting a means of arbitrary discrimination or a disguised restriction on trade between Member States, are fully justified under Article 36, as they are an essential part of a policy aimed at complete eradication of Newcastle disease among poultry. Indeed, such a policy would have the effect of facilitating, and not of restricting, trade with Member States which apply the same high standards of animal health as the United Kingdom.

16 As far as the import licensing system is concerned, the United Kingdom recalls that such a system has been accepted by the Community with regard to foot-and-mouth disease and to swine fever. In its submission, there is no reason why a different approach should be considered in the case of Newcastle disease, as a serious outbreak of this disease would have grave economic consequences comparable to those resulting from a widespread epizootic outbreak of foot-and-mouth disease or swine fever.

17 The French Republic, intervening, supports the Commission's conclusions in so far as they are directed against the 1981 measures, In its view, these measures cannot be justified under the first sentence of Article 36 and clearly constitute a means of arbitrary discrimination and a disguised restriction on imports of poultry products from other Member States, in particular from France.

18 Ireland, intervening, supports the United Kingdom's conclusions in so far as the import licensing system is concerned. In its view, such a system is, in itself, not contrary to Article 36, because the question whether import licensing is justified for the protection of animal health depends on the particular risks which imports of animal products involve for the health of livestock.

19 Moreover, Ireland makes it clear that, at the moment of the accession of Ireland and the United Kingdom to the Community, both Ireland and Northern Ireland applied a policy of non-vaccination and of compulsory slaughter. As a result, poultry products moved freely from Ireland to Northern Ireland and vice versa, whereas no poultry products could be imported, either into Ireland or into Northern Ireland, from Great Britain where vaccine was still in use.

20 For this reason, Ireland contends that the legal arguments raised by the Commission with regard to the system applied in Northern Ireland are the same as those which are at issue in the separate action which the Commission has brought against Ireland (Case 74/82). Ireland therefore asks the Court not to take a decision on the measures applied in Northern Ireland before Case 74/82 has been heard.

III — Factual background

21 Before assessing the legal arguments, the Court thinks it useful to set out a number of facts which may have a bearing on the way in which the problems at issue should be appreciated.

22 First, there is agreement among the parties that imports of poultrymeat and poultry products into the United Kingdom from other Member States showed a remarkable rise in the years preceding the introduction of the 1981 measures. This increase concerned in particular imports of slaughtered whole turkeys; in 1980 imports of whole turkeys from France showed a steep rise as compared with those in 1979.

23 It is also agreed that by mid-1981 the United Kingdom Government and British producers were gravely concerned by the continuing increase in the importation of turkeys from France, and that British poultry producers made it known that they were troubled about government subsidies which, they asserted, had been made available to French producers. In these circumstances, a certain pressure was put on the United Kingdom Government, by articles in the press and in other ways, to take action in order to reduce imports of poultry products from France.

24 Secondly, the United Kingdom does not deny that the date chosen for the introduction of the 1981 measures was such as to prevent imports of Christmas turkeys from France into Great Britain for the 1981 season, and that these imports had constituted a very substantial part of the total imports of turkeys in the preceding years.

25 It is also an established fact that France tried to retain its poultry outlets on the British market by introducing, in September 1981, a policy on Newcastle disease which was broadly similar to the one recently adopted by the United Kingdom. As from 16 September 1981, it prohibited the use of vaccine and instituted a policy of compulsory slaughter in the event of an outbreak of disease. The British authorities refused, however, to admit French poultry products to their territory on the ground that France had not restricted poultry imports from non-member countries, notably from Spain and from some East European countries, where vaccine was still in use. The French Government maintains that it had previously been able to come to arrangements with Switzerland when outbreaks of the disease occurred in France but not in Switzerland, in such a way that French imports into that country could continue, although health controls at the frontier were substantially reinforced.

26 It appears from information given by the Commission that Denmark, although applying since 1978 a policy of non-vaccination and compulsory slaughter, allows imports of fresh poultrymeat from other Member States, but that it imposes relatively strict health controls at the frontier if the imports come from Member States where Newcastle disease has been recorded within the past 12 months or where vaccination against that disease takes place.

27 According to statistics prepared by the International Office of Epizootics, the only Member States in which some outbreaks of Newcastle disease in 1981 were recorded were Italy and Greece; in 1980 the disease was found to exist in Belgium, Germany, Italy and Greece. The latest recorded outbreak was in 1978 for Great Britain, in 1976 for France and in 1973 for Northern Ireland. The Commission stresses that these figures show a steady reduction in manifestations of the disease in the whole Community over the previous five years.

28 The parties agree that Newcastle disease may have serious economic consequences, that it is a highly infectious disease and that it is combated either by a policy aimed at controlling it and reducing its effects, by means of generalized or selective vaccination, or by a policy aimed at eradicating it, under which vaccination is prohibited and any outbreak is met by compulsory slaughter of infected flocks.

29 The parties also accept that vaccination may mask the subsistence of the disease, as vaccinated birds might, without showing the symptoms of the disease, be infected with field virus carried, for example, by non-domesticated birds. For the Commission and France, however, such a risk is purely hypothetical in countries where vaccinated and non-vaccinated flocks coexist and where no outbreak of Newcastle disease has been recorded in recent years.

30 Finally, there is agreement among the parties that in August 1981 the proportion of poultry that was vaccinated under the regulations existing at the time amounted to about 40 % both in Great Britain and in France. The French Government adds that the objective of its policy at the time was to vaccinate laying hens and breeding fowl, so that exports of slaughtered chicken and turkeys from France normally involved only non-vaccinated poultry.

IV — The 1981 measures

31 Whatever view may be taken of the legal machinery used by the United Kingdom in introducing the 1981 measures, they have had the effect of preventing any imports into Great Britain of fresh and refrigerated poultry products, eggs (not intended for hatching) and egg products other than heat-treated egg products, from all other Member States except Ireland and Denmark. They are therefore to be considered as measures having an effect equivalent to quantitative restrictions, prohibited by Article 30 of the Treaty unless it is established that they are justified under Article 36 on grounds of the protection of animal health.

32 In this respect, the main argument of the United Kingdom is that the 1981 measures form an integral part of its new policy on animal health with regard to Newcastle disease and that such a change in health policy cannot be challenged under Article 36. In the division of powers between the Community and the Member States, matters of animal health remain within the exclusive competence of the Member States as long as no Community harmonization has taken place. This would still be the case, it is claimed, even though the introduction of the new policy was greeted with relief by British poultry producers, who feared competition from French poultry on the British market.

33 This argument is correct, in as far as it is for each of the Member States to determine, and, if appropriate, to alter its policy relating to animal health. Under these circumstances, Member States are, in principle, free to adopt, with regard to the risks of Newcastle disease among poultry, either a policy of vaccination or one of non-vaccination and compulsory slaughter.

34 However, the argument of the United Kingdom disregards the fact that the effects of health policy on imports from other Member States cannot exceed the limits laid down by Community law. The United Kingdom submits and the Commission accepts, that Council Directive No 71/118, of 15 February 1971, on health problems affecting trade in fresh poultry meat (Official Journal, English Special Edition 1971 (I), p. 106) merely contains, in Article 11, certain specific provisions on restriction of imports on grounds of animal health, and that these provisions do not apply to the present case. Whatever the interpretation be given to these provisions, the Court considers that paragraphs (2) to (5) of Article 11 represent only the beginning of a process of harmonization in this field. Therefore the matter is essentially to be considered under Article 36 of the Treaty, which expressly provides that restriction on imports must be justified on grounds of protection of animal health, and which adds, in the second sentence, that such restrictions are not to constitute a means of arbitrary discimination or a disguised restriction on trade between Member States.

35 In reviewing the facts of the case, the Court finds it appropriate to examine first the submissions of the Commission and the French Republic to the effect that the 1981 measures, in their effects on imports from other Member States except Ireland and Denmark, amount to a disguised restriction on intra-Community trade within the meaning of the second sentence of Article 36.

36 As the Court has already observed in its judgment of 14 December 1979 in Case 34/79 *Henn and Darby* [1979] ECR 3795, the second sentence of Article 36 is designed to prevent restrictions on trade mentioned in the first sentence of that article from being diverted from their proper purpose and used in such a way as either to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products.

37 Certain established facts suggest that the real aim of the 1981 measures was to block, for commercial and economic reasons, imports of poultry products from other Member States, in particular from France. The United Kingdom Government had been subject to pressure from British poultry producers to block these imports. It hurriedly introduced its new policy with the result that French Christmas turkeys were excluded from the British market for the 1981 season. It did not inform the Commission and the Member States concerned in good time, as the letter in which the Commission was informed of the new measures — which took effect on 1 September 1981 — was dated 27 August 1981. It did not find it necessary to discuss the effects of the new measures on imports with the Community institutions, with the Standing Veterinary Committee or with the Member States concerned.

38 It should be noted, in this context, that when the United Kingdom abandoned, in 1964, the policy of non-vaccination and compulsory slaughter conducted till then in Great Britain, in order to adopt a policy of control of Newcastle disease by vaccination, this change of policy was thoroughly prepared by an elaborate report of a committee of experts, by various studies

and by prolonged discussions among veterinary experts. The evidence available in the present case does not suggest that any comparable effort was made before the Government decided, in 1981, to reintroduce the policy which it had applied before 1964. The deduction must be made that the 1981 measures did not form part of a seriously considered health policy.

39 This conclusion is reinforced by the way in which the United Kingdom dealt with French demands that French poultry products should be readmitted to Great Britain after the French Republic had fulfilled the three conditions laid down by the United Kingdom Government, namely that the exporting country should be totally free from outbreaks of Newcastle disease, should prohibit vaccination and should apply a policy of compulsory slaughter in the event of any future outbreak of the disease. By refusing French imports on the ground that France had not closed its frontiers to poultry imports from non-member countries where vaccine was still in use, the United Kingdom added in fact a fourth condition to the three which it had previously stated in its letter to the Commission of 27 August 1981, and which it still states in its defence in the present case as the only applicable conditions.

40 Taken together, these facts are sufficient to establish that the 1981 measures constitute a disguised restriction on imports of poultry products from other Member States, in particular from France, unless it can be show that, for reasons of animal health, the only possibility open to the United Kingdom was to apply the strict measures which are at issue in this case and that, therefore, the methods prescribed by the 1981 measures for obtaining the high standards of animal health which the United Kingdom Government had in mind when it changed its policy with regard to Newcastle disease, were not more restrictive than was necessary for the protection of the health of poultry flocks in Great Britain.

41 It follows from the information given to the Court during the proceedings that there are less stringent measures for attaining the same result. Thus, the

manner in which the Danish authorities deal with imports of poultry products from other Member States — even from those where recent outbreaks of Newcastle disease have been recorded — suggests that it is possible to preserve the highest standard of freedom from Newcastle disease without completely blocking imports from countries where vaccine is still in use.

42 The United Kingdom maintains that the situation obtaining in Great Britain is so much characterized by massive poultry imports that the risks for animal health created by these imports are not comparable to those incurred in countries like Denmark which have only modest poultry imports.

43 This argument is not convincing. In a situation such as the one now prevailing in Great Britain, the only risk of infection of national flocks by imported poultry products resides in the possibility that some of the slaughtered birds, which normally come from non-vaccinated flocks, may have been vaccinated and may have subsequently been infected with field virus, which is somehow transmitted to a live flock. There are, moreover, no clear indications as to whether the appearance of field virus has been confirmed, during recent years, in the main poultry exporting Member States such as France and the Netherlands.

44 The United Kingdom insists that the consequences might be very serious if the risk of infection should materialize, but it admits that the chance of such an occurrence is slight, though not merely hypothetical. The Court considers that, in the situation actually prevailing not only in Great Britain, but in the Community as a whole, and in particular in the Member States which are the principal exporters of poultry products, the possibility of infection by imported poultry products would be so much due to sheer hazard that it cannot justify a complete prohibition of imports from Member States which admit the use of vaccine.

45 It follows from these considerations that, by applying measures which had the effect of preventing imports of fresh and refrigerated poultry products, including eggs (not intended for hatching) and egg products other than heat-

treated egg products, into England, Wales and Scotland from any Member State other than Ireland and Denmark, the United Kingdom has failed to fulfil its obligations under the Treaty.

46 As a result, it is the duty of the United Kingdom, by virtue of Article 171 of the Treaty, to take all the necessary measures to comply with this judgment. In this context the Court has taken note of the Commission's statement that it intends to contact the British authorities in order to permit, without delay, the re-establishment of trade which has been interrupted by the 1981 measures while at the same time safeguarding animal health in conformity with the Treaty.

V — Other points at issue

47 Apart from the 1981 measures, the present action raises two further issues: first, the ban on imports of poultry products into Northern Ireland from other Member States, except Ireland and Denmark; secondly, the United Kingdom legislation which constitutes the basis of the measures taken with regard to both Great Britain and Northern Ireland, inasmuch as they embody an import licensing system. In the Commission's submission, this last issue also has a bearing on the assessment of the measures adopted with regard to imports of heat-treated egg products into England, Wales and Scotland.

48 On the first point, the Court accedes to the request submitted by the Irish Government. It will not give judgment until Case 74/82, *Commission* v *Ireland*, which raises substantially the same problems, has been heard.

49 On the second point, the Court considers that it does not yet have sufficient information to be able to take a decision. By renouncing its right to lodge a reply in the written proceedings, and by concentrating its attention, during the oral proceedings, predominantly on the 1981 measures, the Commission did not fully develop its arguments on the compatibility of an import licensing system with Articles 30 and 36 of the Treaty.

50 In particular, the Commission did not elaborate its views on the United Kingdom's submission that Community directives had accepted an import licensing system with regard to animal diseases other than Newcastle disease, and on Ireland's submission that the Treaty does not forbid any import licensing system for reasons of animal health in general, as the disadvantages of such a system have to be balanced against the risks which imports of animal products involve for the health of livestock.

51 For all these reasons, it is in the interest of a proper administration of justice that the Commission should be given an opportunity to lodge its reply, within a period to be fixed by the President of the Court, on the issues which are still outstanding, that the defendant should respond to this reply and that the interveners should be given the opportunity to present such observations as they think fit.

52 The circumstance that, at present, the Court does not grant the declaration sought by the Commission with regard to the import licensing system, does not imply that this system may be used in a way leading to import restrictions substantially similar to those resulting from the 1981 measures.

On those grounds,

THE COURT

hereby:

1. **Declares that by applying measures which had the effect of preventing imports of fresh and refrigerated poultry products, including eggs (not intended for hatching) and egg products other than heat-treated egg products, into England, Wales and Scotland from any Member State other than Ireland and Denmark, the United Kingdom has failed to fulfil its obligations under the Treaty;**

2. **Reserves its judgment on the other issues involved in the present case and invites the Commission to lodge its reply on these issues, within a period to be fixed by the President of the Court;**

3. **Reserves the costs.**

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 15 July 1982.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 7 JULY 1982 [1]

Mr President,
Members of the Court,

1. By application received on 4 February 1982, the Commission requested the Court to declare that, by prohibiting imports and introducing an import licensing system in the poultry products sector, the United Kingdom had failed to fulfil its obligations under Article 30 of the EEC Treaty.

According to the United Kingdom, those measures are justified pursuant to Article 36 of the Treaty, in so far as they form part of a set of measures intended to protect the health and life of poultry threatened by Newcastle disease. Newcastle disease is a virus infection which may affect poultry, in particular chickens and turkeys, producing respiratory and other disturbances,

1 — Translated from the Italian.