Community trade of national provisions which require, even as a pure formality, import licences or any other similar procedure. Once Community provisions have established harmonized checking procedures, the exception provided for in Article 36 of the Treaty in respect of the protection of health and life of humans and animals cannot be relied upon, even temporarily, to justify the maintenance in force of such legislation and the appropriate checks may be carried out only within the framework of the Community provisions.

2. The incompatibility of national legislation with Community provisions, even directly applicable provisions, can be permanently remedied only by legally binding national provisions having the same legal force as those which must be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty.

REPORT OF THE JUDGE-RAPPORTEUR in Case C-235/91 *

I — Background to the dispute and pre-litigation procedure

A — *The Community rules*

Pursuant to Article 30 of the EEC Treaty, Regulation No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (OJ, English Special Edition 1968 (I), p. 187), stated in Article 22(1) that any quantitative restriction or measure having equivalent effect was to be prohibited in the internal trade of the Community. That prohibition was reiterated in Article 4(1) of Regulation No 827/68 of the Council of 28 June 1968 on the common organization of the market in certain products listed in Annex II to the Treaty (OJ, English Special Edition 1968 (I), p. 209). The semen of animals, which falls under tariff subheading O5.15 ex B referred to in the annex to Regulation No 827/68, as brought up to date by Article 10 of Council Regulation (EEC) No 2560/77/EEC of 7 November 1977 amending the nomenclature for certain agricultural products, various Regulations concerning these products and the Common Customs Tariff (OJ 1977 L 303, p. 1), is subject to that prohibition.

Zootechnical grounds which may give rise to restrictions on imports have been progressively regulated at Community level, in the first instance by Council Directive

* Language of the case: English.

77/504/EEC of 25 July 1977 on pure-bred breeding animals of the bovine species (OJ 1977 L 206, p. 8). Article 2 thereof states in particular that the Member States are to ensure that intra-Community trade in the semen and embryos of pure-bred breeding animals of the bovine species is not to be prohibited, restricted or impeded on zootechnical grounds. In addition, Article 3 states that provisions are to be adopted by the Council for the approval of pure-bred breeding animals of the bovine species for breeding and Article 6 provides for the adoption of measures enabling cattle's genetic value to be assessed.

Those measures have been the subject of several Commission decisions:

(a) Decision 86/130/EEC of 11 March 1986 laying down performance monitoring methods and methods for assessing cattle's genetic value for pure-bred breeding animals of the bovine species (OJ 1986 L 101, p. 37);

(b) Decision 86/404/EEC of 29 July 1986 laying down the specimen and the particulars to be shown on the pedigree certificate of pure-bred breeding animals of the bovine species (OJ 1986 L 233, p. 19);

(c) Decision 88/124/EEC of 21 January 1988 laying down the specimen pedigree certificates for the semen and embryos of pure-bred breeding animals of the bovine species and the particulars to be entered on those certificates (OJ 1988 L 62, p. 32).

The provisions referred to in Article 3 of Directive 77/504 were adopted in Council Directive 87/328/EEC of 18 June 1987 on the acceptance for breeding purposes of pure-bred breeding animals of the bovine species (OJ 1987 L 167, p. 54). That directive provides *inter alia* in Article 2(1) that a Member State may not prohibit, restrict or impede:

— the acceptance for official testing of pure-bred bulls or the use of their semen within the limits of the quantities necessary for approved organizations or associations to carry out such official tests,

— the acceptance for artificial insemination within its territory of pure-bred bulls or the use of their semen when those bulls have been accepted for artificial insemination in a Member State on the basis of tests carried out in accordance with Decision 86/130/EEC, cited above.

Lastly, restrictions on imports on veterinary and animal health grounds are governed by Article 15 of Council Directive 88/407/EEC laying down the animal health requirements applicable to intra-Community trade in and imports of deep-frozen semen of domestic animals of the bovine species (OJ 1988 L 194, p. 10). That article provides *inter alia* that if there is a danger of an animal disease spreading as a result of the introduction of semen into its territory from another Member State a Member State may temporarily prohibit or restrict the introduction of semen from the areas of that Member State where the epizootic disease has occurred and, if the

disease becomes widespread, from the whole of the territory of that Member State.

B — *The national rules*

In Ireland Article 3(1) of the Live Stock (Artificial Insemination) [No 32] Act of 1947 authorizes the Minister of Agriculture to make regulations for controlling the practice of artificial insemination of cattle, sheep, goats, swine and horses. The Act specifies, moreover, in Articles 5 and 7 that no person is to import animal semen except under a licence issued by the Minister, who may attach such conditions as he thinks fit thereto.

The 1947 Act was supplemented by various regulations, including:

— for bovines, the Live Stock (Artificial Insemination) Regulations of 1948 [S. I. No 55];

— for swine, the Live Stock (Artificial Insemination) (Pigs) Regulations of 1965 [S. I. No 255] .

Those Regulations *inter alia* provide in Articles 4 and 7 that no person is to distribute or sell bull or boar semen except under a licence and that no person, unless approved by the Minister for the purpose, is to perform the operation of artificial insemination with imported semen.

It should finally be noted out that in practice restrictive conditions are applied to the grant of import licences such as endorsement of the export certificate accompanying the imported semen by an authorized agent and the obligation to put imported semen into quarantine for one month.

C — *Pre-litigation procedure*

The Commission considered that the restrictions imposed by the 1947 Act and the 1948 and 1965 Regulations, together with administrative practice, were contrary to the relevant Community provisions set out above. On 28 December 1988 it accordingly sent a letter of formal notice to the Irish Government, inviting it to submit its observations on the matter in accordance with the provisions of Article 169 of the Treaty.

No reply to that letter was received and on 12 October 1989 the Commission addressed a reasoned opinion to Ireland pursuant to Article 169 of the Treaty, stating that Ireland had failed to fulfil its obligations and requesting it to adopt the measures necessary to comply therewith.

On 14 February 1990 the Irish authorities replied that they intended to replace the import licencing system with a new system of general authorizations in compliance with Directives 87/328 and 88/407. Until the necessary legislation was adopted, all requests to import bovine semen would be processed on the basis of whether they satisfied the Community provisions.

On 31 May 1991 the Irish authorities described the progress made towards enacting adequate legislation and assured the Commission that the concerns expressed by the Commission had already been met in a practical manner.

Finally, after a meeting organized on 8 July 1991 between Commission and Irish Government officials the Irish Government stated in a letter of 24 July 1991 its intention of preparing appropriate new legislation by the end of October 1991.

II — Written procedure and forms of order sought by the parties

The Commission's application was received at the Court Registry on 17 September 1991.

Acting on a report from the Judge-Rapporteur, after hearing the Advocate General and with the express consent of the parties, the Court decided, pursuant to Article 44(1) of the Rules of Procedure, that the procedure would not include an oral part.

The Commission claims that the Court should:

(a) declare that, by subjecting all importation of semen to a licence, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty, under Council Regulation 827/68 of 28 June 1968 concerning the common market organization for certain products which are listed in Annex II to the Treaty, and under Council Regulation 805/68 of 27 June 1968 on the common market in beef and veal;

(b) declare that, by imposing restrictive conditions upon the importation of animal semen, Ireland has failed to fulfil its obligations under Council Directive 77/504/EEC of 25 July 1977 on pure-bred breeding animals of the bovine species and under Commission Decision 88/124/EEC of 21 January 1988 laying down the specimen pedigree certificates for the semen and embryos of pure-bred breeding animals of the bovine species and the particulars to be entered on those certificates;

(c) order Ireland to pay the costs of these proceedings.

Ireland, while asking the Court to suspend the procedure pending the adoption of new regulations, requests it 'if necessary ... in any event' to

(a) dismiss the application and

(b) order the Commission to pay the costs.

III — Pleas in law and arguments of the parties

A — *The Commission's complaints*

The *Commission* considers, first, that the import licence requirement is contrary to Article 30 of the Treaty, to Article 22(1) of Regulation No 805/68 and to Article 4(1) of Regulation No 827/68.

As the Court held in its judgment in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, such a licence, which constitutes an impediment to intra-Community trade, might only be justified in exceptional cases where it is impossible in practice to replace it by a less restrictive measure.

In this case the disputed system is all the more incompatible with the Community provisions because it involves restrictive conditions which are not available for public scrutiny.

Moreover, the restrictions cannot be justified on veterinary grounds. A blanket rule imposing quarantine for all cases of importation of animal semen cannot be in accordance with the temporary veterinary measures allowed under both the Court's case-law and Directive 88/407.

Lastly, it should be borne in mind that although, pursuant to Directive 77/504, the use of semen remained subject to national legislation until the entry into force of Community provisions for the approval of pure-bred breeding animals of the bovine species for breeding, the Member States were not entitled to apply stricter zootechnical standards than those applicable to semen produced and used in their own territory. On the one hand the disputed rules manifestly do not comply with that requirement. On the other, Community provisions for the approval of pure-bred breeding animals for breeding were adopted by Directive 87/328.

B — *The Irish Government's arguments*

Ireland maintains generally that, pending the adoption of legislation which is now under preparation, all the concerns expressed by the Commission in its reasoned opinion have been rectified in a practical manner by administrative action. It states in particular in this connection that applications to import bovine and porcine semen are dealt with within a matter of days, imports are no longer quarantined nor are stricter zootechnical standards applied to imports than those provided for in the Community provisions.

The Irish authorities point out that the licencing system which must be replaced by an approval procedure does in fact operate in accordance with the relevant directives which necessarily require some measure of control (see, for instance, Article 5(2) of Council Directive 90/425/EEC of 26 June 1990). The conditions under which imports are allowed are available to interested persons on request and are, therefore, available for public scrutiny, contrary to the Commission's allegation. In justification of its tem-

porary retention of the system, Ireland refers to the case-law of the Court where it was accepted that national measures on animal health may, under certain conditions include an import licencing system (see the judgments in Case 40/82 *Commission* v *United Kingdom* [1984] ECR 283 and Case 74/82 *Commission* v *Ireland* [1984] ECR 317).

Although the Irish Government acknowledges that legislative measures must be adopted to give effect to the administrative arrangements already made, it makes the point that the Commission was kept fully informed of the steps being taken to prepare the regulations and that it does not understand why this action for a declaration that Ireland has failed to fulfil its obligations has been brought.

C — *The Commission's replies to those arguments*

The *Commission* claims, first, that Ireland cannot seek to rely on the Court's case-law in which it was accepted that a licence could be justified under Article 36 of the Treaty now that the said Community provisions on phytosanitary and zootechnical safeguards have been adopted (see, on this point, the judgment in Case 252/78 *Denkavit* [1979] ECR 3369).

It then points out that the Court has consistently held that a mere administrative practice, which may be changed at will and which has not been generally publicized, cannot be regarded as a proper fulfilment of a Member State's obligations under Community law. Ireland expressly admits, moreover, that legislative measures have to be applied to give effect to the practical arrangements referred to.

Lastly the Commission maintains that the Irish authorities, who undertook to prepare the new measures by the end of October 1991, have still not proposed a specific date for the adoption of the necessary legislation. It was for that reason that these proceedings have been brought and the Commission's claims maintained.

F. Grévisse

Judge-Rapporteur