OPINION OF ADVOCATE GENERAL ALBER

delivered on 17 October 2002 [1]

I — Introduction

1. The present reference for a preliminary ruling involves the question whether a health certificate issued pursuant to Directive 91/68/EEC for animals for fattening also covers animals intended for slaughter, for which a separate health certificate exists. Also in issue is the compatibility with Community law, in particular the provisions governing the free movement of goods, of national protective measures against the dangers posed by Transmissible Spongiform Encephalopathy ('TSE').

II — Legal framework

1. *Community law*

(a) Directive 90/425/EEC

2. Trade in live animals within the Community forms the subject-matter of Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market [2] ('Directive 90/425'). That directive imposes responsibility for veterinary checks in cross-border trade on the place of departure within the Member State of dispatch. The Member States of destination may limit themselves to veterinary spot checks at the place of final destination.

3. Article 10 governs — as a safeguard clause — the adoption of protective measures in the event of an outbreak of diseases likely to constitute a hazard to animals or to human health. The first subparagraph of Article 10(1) imposes on Member States an obligation to notify the other Member States and the Commission in the event of an outbreak of such diseases. In cases of this kind, however, the second subparagraph of Article 10(1) authorises the Member States of dispatch in particular to implement precautionary measures. The third subparagraph of Article 10(1) authorises Member States of destination or transit to adopt precautionary measures if, in the course of checks, they establish the

1 — Original language: German.

2 — OJ 1990 L 224, p. 29.

existence of such diseases. Member States of destination are empowered, pursuant to the fourth subparagraph of that provision, to adopt protective measures with regard to the holdings, centres, organisations or buffer zones pending action by the Commission under Article 10(4). The fifth subparagraph of Article 10(1) lays down an obligation to notify the Commission and the other Member States of the measures taken.

(b) Directive 91/68/EEC

4. Trade specifically in sheep is also regulated by Council Directive 91/68/EEC of 28 January 1991 on animal health conditions governing intra-Community trade in ovine and caprine animals [3] ('Directive 91/68'). Article 3 provides that sheep intended for slaughter must fulfil the conditions laid down in Article 4, while sheep for breeding and fattening must fulfil the conditions laid down in Articles 4, 5 and 6.

5. Article 4 lays down a number of basic conditions governing trade (identification and registration of sheep, absence of specified diseases). Article 5 sets out further conditions for sheep for breeding or fattening with regard to protection against brucellosis. Article 6 imposes additional requirements on trade in sheep for breeding with regard to disease protection. Concerning scrapie, Article 6(b)(i), third indent, requires that the sheep must come from a holding on which no case of that disease has been confirmed for at least *two* years. [4]

6. Article 9 provides that animals must, during transportation, be accompanied by a health certificate signed by an official veterinarian and conforming to Annex E. Annex E contains three models for health certificates: Model I for sheep intended for slaughter, Model II for sheep intended for fattening, and Model III for sheep intended for breeding. The only difference between Models I and II is that the latter contains an additional certification that the animals are eligible for entry into an (officially) brucellosis-free holding.

7. Article 10(1) refers, with regard to checks at origin, the organisation of the checks to be carried out by the Member State of destination, and follow-up and protective measures, to the abovementioned Article 10 of Directive 90/425.

3 — OJ 1991 L 46, p. 19.

4 — Emphasis added.

2. *Italian law*

8. Italian Order ('Ordinanza') No 600.3/VET/340/2/8920 of 24 December 1996, which has since been repealed but is material to the present case, made imports into Italy of live sheep for breeding or fattening from France, Portugal, Ireland and the United Kingdom subject to the condition that the accompanying health certificate contained the following declaration: 'The animals referred to in this certificate were born and raised on farms in which no case of Transmissible Spongiform Encephalopathy (TSE) has been registered in the last *six* years' ('the TSE declaration'). [5]

9. Explanatory Memorandum No 600.3/340/8/73 of 3 January 1997 made it clear that this requirement also applied to certificates for imports of animals intended for slaughter.

10. The recitals in the preamble to the order of December 1996 stated that it had been adopted in view of the alarming number of outbreaks of BSE infection in the United Kingdom, France, Portugal and Ireland. It was further stated that, in view of the different health situation existing within its own territory, Italy did not consider it necessary to adopt, in regard to its national livestock herds, measures similar to those adopted by the aforementioned States. Finally, it was explained that the measures were being taken pending the adoption of possible Community measures.

11. The order and the explanatory memorandum were notified to the Commission by fax of 10 January 1997. The Commission confirms that the measures were notified to it, but also states that, in view of its staffing situation, it is not in a position to establish whether the measures were also notified to the Member States. According to a letter from the Italian Government dated 24 July 1997, that Government notified the Member States concerned, that is to say, France, Ireland, Portugal and the United Kingdom. The United Kingdom Government has confirmed that the measures were notified to it. The Italian order of December 1996 was repealed following the adoption of Commission Decision 98/272/EC on epidemiosurveillance for transmissible spongiform encephalopathies (TSE).

III — Facts

12. The parties to the main proceedings entered in June 1997 into a contract, governed by English law, for the export of

5 — Emphasis added.

three lorryloads of live sheep from England to Italy. The High Court has established that the claimant in the main proceedings, Joseph Lennox ('Lennox'), was aware that the defendant in the main proceedings, Industria Lavorazione Carni Ovine ('ILCO'), operated an abattoir. The parties did not, however, discuss whether the sheep were intended for immediate slaughter or for further fattening prior to slaughter. The sheep were to be delivered to ILCO's place of business.

13. When the sheep arrived, ILCO informed the claimant in the main proceedings that the health certificates produced were incorrect inasmuch as they stated that the sheep were intended for fattening. It requested Lennox to send certificates to cover sheep intended for slaughter, as the animals would otherwise have to be returned to the United Kingdom.

14. The animals were subsequently sequestered by the competent veterinary office. The Italian Ministry of Health sought authorisation from the British Embassy in Rome to return the sheep to the United Kingdom. The reason given for this request was that the health certificates used were for animals intended for fattening, which, pursuant to the Italian Order No 600.3/VET/340/2/8920 of 24 December 1996, required a TSE declaration.

15. That request was refused on the ground that the requirement that a TSE declaration be provided constituted an unlawful restriction on trade. Lennox sought payment of GBP 57 254.40 from ILCO on the basis that Lennox had fulfilled its contractual obligations to deliver the sheep. ILCO counterclaimed for damages for unspecified losses.

IV — Questions submitted for preliminary ruling

16. In the dispute pending before it, the High Court of Justice, Queen's Bench Division (Commercial Court), has referred the following questions to the Court for a preliminary ruling:

'1. (a) Where a consignment of sheep is exported from one Member State to another Member State and the sheep are for slaughter on arrival, is the requirement under Article 9 of Directive 91/68/EEC complied with where the accompanying health certificate is not a Model I certificate, as in Annex E thereof, but is a Model II certificate?

(b) If the answer to Question 1(a) is No, so that the consignment must be accompanied only by a Model I

certificate, does the responsibility for identifying the correct certificate prior to export rest on the exporter or on the recipient of the sheep, or is it for the applicable national law of the contract to determine which party bears this responsibility?

(c) Where a consignment of sheep is exported from one Member State to another Member State and the sheep are for slaughter on arrival and where the accompanying health certificate is a Model II certificate, is the national law of the State of destination entitled to make the importation unlawful on the ground that the certificate is not a Model I certificate?

2. (a) In July 1997, was it compatible with Community law, in particular Articles 28 EC to 30 EC (ex Articles 30 to 36) and/or Article 152 EC (ex Article 129 of the EC Treaty) and/or Articles 6 EC and 174 EC (ex Article 130r of the EC Treaty) and Council Directives 89/662/EEC, 90/425/EEC and 91/68/EEC for a Member State to require that the health certificates required pursuant to Article 9 of Directive 91/68/EEC include the following declaration: "The animals referred to in this certificate were born and raised on farms in which no case of Transmissible Spongiform Encephalopathy (TSE) has been registered in the last six years."?

(b) If the answer to Question 2(a) is No, where the exporter has otherwise fulfilled its obligations under the applicable law of the contract to deliver the sheep to the recipient's place of business, is a national court required, in civil proceedings between the exporter and the recipient concerning their contractual rights and obligations regarding the importation of the sheep, to ignore any obligation under the national law of the Member State of destination that the accompanying health certificate include the said declaration?'

V — Submissions of the parties and appraisal

A — *The first question*

1. The correct health certificate

17. The first part of this question concerns the relationship between the different

models of health certificates set out in Annex E to Directive 91/68. The issue here is whether a health certificate for sheep intended for fattening is adequate to cover sheep intended for slaughter.

(a) Submissions of the parties

18. Lennox, the Commission and the Irish Government take the view that submission of a Model II certificate is also adequate to cover animals intended for slaughter. The purpose of Directive 91/68 is to guarantee that the animals which are the subject of trade meet specified health standards. The conditions for issuing a health certificate for animals for fattening (Model II) are stricter than those for slaughter animals (Model I) and contain all details required for slaughter animals. The reason for this is that animals intended for slaughter come into no further contact with other animals.

19. ILCO, in contrast, takes the view that Directives 89/662, 90/425 and 91/68 required animals to be accompanied by the appropriate health certificates, and thus in the present case by a Model I health certificate covering animals intended for slaughter. It bases its legal construction on the wording of Article 9 of Directive 91/68, which provides that animals 'must' be accompanied by a certificate conforming to Annex E. A contrary interpretation would make the existence of separate certificates redundant. Further, the reasons for the commercial movement of animals could be disguised. In so far as there are harmonising provisions of Community law, such as those of Directive 91/68, these must be complied with in full by the party dispatching the animals.

(b) Appraisal

20. The different models of health certificates correspond to the respective purposes for which animals are traded within the Community. This follows from the fourth recital in the preamble to and Article 3(1) and (2) of Directive 91/68. Accordingly, different inspections are to be carried out by veterinary officers in accordance with Articles 4 to 6 of the directive and different characteristics are to be certified. This argues in favour of drawing a clear distinction between the three models of health certificates and not allowing a certificate issued for sheep intended for fattening to be treated as sufficient to cover trade in sheep that are intended for slaughter.

21. This formal approach fails, however, to take account of the fact that there is a substantive overlap between the various requirements imposed on the checks to be carried out and the certificates to be issued.

They stand in a vertical relationship to one another. The least extensive requirements are those imposed on sheep for slaughter. Under Article 3(1) of Directive 91/68 they must simply comply with the requirements of Article 4 of the directive for a Model I health certificate to be issued. In contrast, stricter requirements obtain for sheep intended for fattening and breeding. Not only must they satisfy the requirements of Article 4, but sheep for fattening must also satisfy those of Article 5 and sheep for breeding those laid down in Articles 5 and 6 in order that a Model I (sheep for fattening) or Model III (sheep for breeding) health certificate can be issued for them. The fact that all animals must satisfy the requirements imposed on sheep intended for slaughter suggests that a Model II health certificate should also be allowed to suffice for sheep intended for slaughter.

22. Considered also in the light of the Directive's meaning and objective of ensuring that sheep can be traded within the Community in a manner which gives rise to no animal health concerns, there are no obvious grounds for insisting on a Model I health certificate. The requirements for sheep intended for fattening include all animal health requirements that are imposed on sheep for slaughter. In this way it can be guaranteed that all checks required for sheep intended for slaughter have been carried out.

23. The question arises as to whether this interpretation is tenable for purposes of trade. In regard to the misgivings expressed by ILCO concerning concealment of the reason for which animals are being traded, it can be stated that there is, at any rate on the facts of the present case, nothing to substantiate the fear that health protection standards may be weakened. The animals in question, after all, satisfied stricter requirements than those applicable to sheep intended for slaughter. To that extent there was no weakening, but rather a reinforcement, of the standards of protection. This ought not to have resulted in any restriction on the marketing of the animals.

24. According to the first recital in its preamble, Directive 91/68 is intended to facilitate trade in sheep and goats. In issue was the establishment of uniform animal health requirements designed to avoid the spread of infectious or contagious diseases (third recital in the preamble). The ultimate purpose for which the animals are moved, that is to say, the reason for which they are the subject of trade, is in this regard relevant only inasmuch as it determines the level of the health checks to be carried out. Propriety of trade, on which ILCO bases its argument, is not a matter which the directive is intended to protect.

25. As commercial considerations do not therefore stand in the way of the construction being put forward here, the answer to the first part of the question must be that, where a consignment of sheep is exported from one Member State to another Member State and the sheep are intended for slaughter on arrival, the requirement under Article 9 of Directive 91/68 is complied with where the accompanying health certificate is not a Model I certificate, as in Annex E to the directive, but is a Model II certificate.

2. Responsibility for the choice of the health certificate

26. The second part of the question is submitted by the High Court only if the answer to the first part is in the negative. However, as I take the view that a Model II health certificate can also be regarded as sufficient to cover trade in sheep for slaughter, the following arguments are set out only as alternative submissions in the event that the Court should disagree with the above interpretation.

27. The High Court seeks to ascertain the extent to which Community law indicates whether the exporter or the importer bears the responsibility for identifying the required health certificate or whether this is a matter to be determined by the law governing the contract.

(a) Submissions of the parties

28. ILCO infers from Directives 89/662, 90/425 and 91/68 an obligation on the consignor of the animals to take all steps to ensure that it is aware of the purpose of the consignment and accordingly obtain the appropriate health certificates. The directives established a system under which the requisite veterinary checks are carried out in the Member State of dispatch. Checks carried out in the Member State of destination can at most determine that the consignment corresponds to the accompanying health certificates but can have no bearing whatever on the choice of required certificate. The national law governing the contract may determine who is to bear the consequences of the use of an inappropriate certificate.

29. The Irish Government takes the view that responsibility for identifying the required certificate is a matter to be determined by the national law of contract. Interpretation of the contract must take account of the purpose served by the directives of minimising verifying documentation and concentrating inspections in the Member State of dispatch which are recognised in all Member States of destination.

(b) Appraisal

30. Directive 89/662 regulates veterinary checks of animal products and products of animal origin. The present case, however, concerns trade in live sheep and for that reason Directive 89/662 is not applicable in the present context.

31. Directives 90/425 and 91/68 specify the veterinary checks required for intra-Com-

munity trade and the health certificates to be issued on the basis of the intended purpose to which the animals are to be put. On the question as to who determines that purpose, the directives do not set out any, or at least no express, rules.

32. Contrary to the view taken by ILCO, it is also not evident that, in specifying the place where the checks are to be carried out, the Community legislature intended to lay down a rule as to who bears the responsibility for identifying the health certificate required for the animals. According to the fifth recital in the preamble to Directive 90/425, the concentration of veterinary checks at the place of dispatch has the purpose of dispensing with these at internal frontiers. In this way, lengthy importation procedures and veterinary checks can be avoided at the Community's internal frontiers.

33. This reading of the provisions of Directive 90/425 also finds support in the fact that neither that directive not Directive 91/68 determines who is responsible for carrying out the veterinary checks. Neither of the two directives provides that the appropriate certificate under Annex E to Directive 91/68 is to be requested by the exporter. The fact that the checks are to be carried out at the place of dispatch does, it is true, suggest that it is the exporter who must request the certificate. That is, however, not a necessary conclusion under the provisions of Community law. Those provisions do not exclude the possibility that the importer must request that the veterinary checks be carried out and the health certificates required for the consignment be issued in the Member State of dispatch.

34. The answer to the second part of the first question submitted must therefore be that Community law, and in particular Directives 90/425 and 91/68, does not determine whether the exporter or the importer is responsible for identifying the correct certificate prior to export. That question must be answered through interpretation of the contract concluded between the parties in the light of the applicable national law.

3. Legal classification of the importation under national law

35. By the third part of the first question, the High Court seeks to ascertain whether national law may declare importation to be unlawful if the animals intended for slaughter are accompanied by a Model II health certificate.

(a) Submissions of the parties

36. Lennox takes the view that a Member State may not adopt measures under which

the importation of animals for slaughter in respect of which Model II health certificates have been issued is treated as being unlawful. The provisions of Directive 91/68, it claims, are directly applicable. Citing the case-law on the adoption of legal rules in areas governed by regulations, Lennox expresses its opinion that Member States may adopt only provisions which guarantee the full effectiveness of Community law. All measures that jeopardise the uniform application of Community law in the Member States are, it submits, impermissible.

37. The Commission also takes the view that a national provision may not have the result that the importation of sheep for slaughter that are accompanied by Model II health certificates is treated as being unlawful. The Irish Government concurs with this view. According to the Commission, the resolution of this problem depends on whether or not the Community-law provisions constitute exhaustive harmonisation. It concludes that Directives 91/68 and 90/425 exhaustively regulate trade in sheep. This follows from the first two recitals in the preamble to Directive 91/68, which allude to the legislative disparities between Member States and the need to remove such disparities. It further follows from the seventh recital in the preamble that Member States are no longer entitled to adopt measures without Commission approval. The Commission also refers to the detailed rules set out in Articles 3, 4, 5 and 6 of the directive, which list precisely the requirements to be complied with. The Commission further reinforces its view by arguing that, via Article 10 of Directive 91/68, the rules laid down in Directive 90/425 apply to intra-Community trade in sheep. This holds true with particular regard to veterinary checks in the Member State of dispatch, spot checks in the Member State of destination and any protective measures to be adopted. The Commission concludes by invoking the argument that the safeguard clause in Article 10 of Directive 90/425 makes sense only on the assumption that trade has been fully harmonised. Were that not the case, Member States would remain free to adopt protective measures pursuant to Article 30 EC.

38. Against this, ILCO expresses the view that Member States are perfectly entitled to take measures designed to ensure compliance with Community law. Consignments of animals which, as it considers the situation to be here, are not accompanied by the proper documentation may be made subject to penalties and classified as unlawful. This will in particular be compatible with Community law if care has been taken to ensure that the consignment can, if necessary, be returned to the Member State of dispatch.

(b) Appraisal

39. The answer to this question follows from the answer to the first part. Where a

Model II health certificate is considered to be insufficient for trade in sheep intended for slaughter and a Model I health certificate is insisted on, it is not clear why national law should not declare illegal a certificate that does not satisfy Community law and any trade effected on foot of that certificate. In this case national law is doing no more than giving effect to the rules of Community law. To that extent the question raised by the Commission as to whether the Community-law rules are exhaustive does not arise. There is no contradiction between national law and Community law.

40. If, on the other hand, one takes the view, as expressed here, that a Model II health certificate does, under Community law, suffice for trade in sheep intended for slaughter, such trade cannot be declared unlawful under national law. National law would otherwise be placed in opposition to Community law. That is impermissible under the principle that Community law must take precedence. That principle requires that national law be disapplied to the extent to which it is incompatible with Community law.[6] If Community law thus regards trade in sheep intended for slaughter for which a Model II health certificate has been issued as being lawful for the purposes of Article 9 of Directive 91/68, the national law which declares that trade to be unlawful must be disapplied in accordance with the principle of the primacy of Community law.

41. In light of the view here taken with regard to the first part of the question, it is proposed that the answer to the third part of the question should be that where a consignment of sheep is exported from one Member State to another in which the sheep are intended for slaughter on arrival and where the accompanying health certificate is a Model II certificate, national law declaring the importation to be unlawful on the ground that the certificate is not a Model I certificate may not be applied.

B — *The second question*

1. Compatibility of the Italian measure with the free movement of goods

42. In the first part of the second question, the High Court seeks to ascertain whether Articles 28 EC to 30 EC, 152 EC, 6 EC and 174 EC and Directives 89/662, 90/425 and 91/68 are to be construed as precluding national rules which require that the health certificates issued pursuant to Directive 91/68 must also include a declaration that the animals concerned originate from a holding that has been TSE-free for six years.

6 — The most famous examples of this case-law on the primacy of Community law are Cases 6/64 *Costa* [1964] ECR 585, at p. 593 et seq., and 106/77 *Simmenthal* [1978] ECR 629, at paragraphs 17 and 18. This relates to primacy in regard to application; see Joined Cases C-10/97 to C-22/97 *IN.CO.GE.'90 and Others* [1998] ECR I-6307, paragraph 21.

(a) Submissions of the parties

43. Concerning the compatibility of the Italian measure with Article 28 EC, Lennox submits that Member States had no right to introduce unilateral measures outside of Articles 7, 8 and 15 of Directive 91/68. Citing the judgment in *Hedley Lomas*,[7] it argues that recourse to Article 30 EC is excluded if the objective pursued by the national measure is already intended to be attained by harmonising measures of Community law. Member States were no longer entitled in 1997 to require submission of a TSE declaration outwith the aforementioned provisions of Directive 91/68.

44. ILCO, in contrast, takes the view that Directives 91/68, 90/425 and 89/662 did not effect exhaustive harmonisation, with the result that Member States were free to take protective measures by invoking Article 30 EC. The directives do not cover the case of a Member State of destination which, in the absence of any threat, does not adopt precautionary protective measures in regard to its own livestock herds but has sound reasons for adopting measures to protect the health of animals and people within its territory against threats existing in other Member States. That protective measures in the form of a requirement that a TSE declaration be produced were justified is confirmed by the fact that the United Kingdom itself provided during the period in question that a *pro forma* certificate with a TSE declaration was to be issued for livestock consignments from Great Britain to Italy.

45. In any event, ILCO continues, the measures were in line with the protective purpose of the directives. They were also justified on grounds of protection of human health within the meaning of Article 30 EC. ILCO refers in this connection to the overriding importance attaching to the protection of public health, as set out in Articles 152 EC and 174 EC and recognised in the Court's case-law.

46. The Commission and the Irish Government also consider that the requirement that a TSE declaration be submitted is compatible with Community law. Although Italy could not invoke Article 30 EC, as Directives 90/425 and 91/68 had resulted in exhaustive harmonisation, the conditions governing the safeguard clause in Article 10(1) of Directive 90/425 were satisfied. Member States were entitled to adopt temporary measures on the basis of that provision.

47. The Commission points out that the provision was originally drafted to deal with outbreaks of very rapidly spreading diseases such as foot-and-mouth disease. Regard being had to the meaning and purpose of this provision, however, its

7 — Case C-5/94 *Hedley Lomas* [1996] ECR I-2553.

scope must be extended to cases in which advances in scientific knowledge have led to a re-evaluation of the risks associated with long-known diseases such as scrapie. First, Article 152 EC requires that a high level of human health protection be ensured in the definition and implementation of all Community policies. Second, there may be delays in such cases at Community level in the adoption of protective measures, for which reason Member States may, subject to compliance with the requirements of Article 10 of Directive 90/425, take interim protective measures.

48. The Commission and the Irish Government take the view that these formal and substantive requirements of Article 10 of Directive 90/425 were complied with in the present case. While the combating of scrapie is already regulated in Article 6 of Directive 91/68, that provision is not applicable here in so far as the present case does not involve the eradication of that disease in Italy. Account should be taken of the fact that the independent scientific committee advising the United Kingdom Government (the Spongiform Encephalopathy Advisory Committee (SEAC)) published a report in July 1996 which stated that it could not be ruled out that BSE might also be transmissible to sheep and might erroneously be diagnosed as scrapie. In this situation, and in the absence of appropriate Community legislation, the Italian Government was entitled to adopt interim measures. Those measures were also, to all appearances, proportionate, as not all imports of sheep were prohibited but only those from holdings on which cases of scrapie had recently occurred. The Commission and the Irish Government point out that the national measures were also repealed after the adoption of Commission Decision 98/272/EC.

(b) Appraisal

(i) Restriction of the free movement of goods

49. Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States. A measure having equivalent effect is any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade. [8] The obligation to produce a TSE declaration, in addition to the issue of a health certificate as defined in Directive 91/68, makes the importation of sheep into Italy more difficult and thus constitutes a measure having an effect equivalent to a quantitative restriction prohibited under Article 28 EC.

8 — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 11.

(ii) Justification

50. This raises the question of the extent to which the rule can be justified under Article 30 EC. According to the recitals in the preamble to the order of 24 December 1996, that legislation was intended to provide protection against BSE. It thus sought to guarantee protection of the health and life of humans and animals. Article 30 EC recognises this in principle as a ground of justification.

51. According to settled case-law, where Community directives provide for the harmonisation of the measures necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 30 EC can no longer be justified. The appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonising directives. [9] The order for reference considers Directives 89/662, 90/425 and 91/68 to be harmonising directives of this kind.

52. As already stated, Directive 89/662 is not applicable to the present case as it regulates veterinary checks on animal products and products of animal origin but not trade in live sheep.

53. The veterinary and zootechnical checks applicable to trade in live animals are in principle regulated in Directive 90/425. That directive does not envisage the submission of a TSE declaration, as required by Italy. As Advocate General Mischo stated in his Opinion in the *National Farmers' Union* case, Directive 90/425 only organises the procedures under which measures necessary for the protection of health are to be adopted but does not, of itself, prescribe those measures. [10] Adoption by Member States of health-protection measures are for that reason not excluded by Directive 90/425. The adoption of protective measures is, however, made subject in Article 10 of the directive to specified conditions.

54. For trade in sheep account must also be taken of Directive 91/68. Article 6(b)(i), third indent, imposes *inter alia* the condition on animals for breeding that they must come from a holding on which no case of scrapie has been confirmed for at least two years. To that extent protection against the dangers posed by scrapie is regulated for breeding animals. No similar

9 — Case 5/77 *Tedeschi* [1977] ECR 1555, paragraph 35; Case 251/78 *Denkavit Futtermittel* [1979] ECR 3369, paragraph 14; Case C-52/92 *Commission* v *Portugal* [1993] ECR I-2961, paragraph 17; and Case C-112/97 *Commission* v *Italy* [1999] ECR I-1821, paragraph 54.

10 — Opinion of Advocate General Mischo of 2 July 2002 in Case C-241/01 *National Farmers' Union*, Judgment of 22 October 2002, ECR I-9079, I-9082, paragraph 87.

provision, however, exists for sheep intended for slaughter and fattening, with which we are concerned in the present context. It must in that regard be held that Directive 91/68 also does not harmonise the measures necessary to guarantee protection against the dangers posed by scrapie in the case of animals intended for slaughter and fattening. Member States are thus also free under that directive to adopt protective measures. Article 10 of Directive 91/68 does, however, through its reference to Article 10 of Directive 90/425, lay down specific conditions governing the adoption of protective measures.

56. By way of interim finding, it can thus be stated that, in the absence of Community-law harmonisation of the protective measures for sheep intended for slaughter and fattening against the dangers posed by scrapie at the time when the Italian order was adopted, Member States were entitled, on grounds of the protection of the health and life of humans and animals, to adopt measures restricting the free movement of goods. The conditions laid down in Article 10 of Directive 90/425 none the less had to be complied with in this regard.

(iii) Applicability of Article 10 of Directive 90/425

55. Community-law protective measures against the dangers posed by scrapie were first adopted by way of Commission Decision 97/534/EC of 30 July 1997 on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies. [11] Its entry into operation was initially postponed because of political difficulties and in fact it ultimately never came into force. It was replaced by Commission Decision 2000/418/EC of 29 June 2000 regulating the use of material presenting risks as regards transmissible spongiform encephalopathies and amending Decision 94/474/EC, [12] which entered into force on 30 June 2000. In addition, the Commission also adopted on 23 April 1998 Decision 98/272/EC on epidemio-surveillance for transmissible spongiform encephalopathies and amending Decision 94/474/EC, [13] which came into force on 1 May 1998.

57. Two arguments have been put forward against application of Article 10 of Directive 90/425 to the facts of the present case. First, ILCO objects that Article 10 of Directive 90/425 finds no application in cases in which a Member State of destination has not adopted any precautionary measures with regard to its own livestock herds but wishes to adopt measures to afford protection against dangers potentially existing in other Member States. Second, it is pointed out that, according to its wording, Article 10 of Directive 90/425 presupposes that there has been an outbreak of disease. Scrapie, however, is not a new disease. It is simply the knowledge as to the dangers which may be posed by scrapie that is new.

11 — OJ 1997 L 216, p. 95.
12 — OJ 2000 L 158, p. 76.
13 — OJ 1998 L 122, p. 59.

58. I must agree with ILCO that, on its wording, Article 10 of Directive 90/425 is not applicable to the present case. Article 10(1) requires either that diseases must have broken out in the Member State of dispatch or have been identified in checks carried out on imported animals. Neither of those situations obtains in the present case. Italy is not the Member State of dispatch, but rather the Member State of destination with regard to the consignment of livestock between Lennox and ILCO, and the measure was not adopted by reason of a check carried out on the imported animals, having been adopted independently as a purely precautionary measure.

59. The Court has ruled, in regard to the parallel provision in Article 9 of Directive 89/662, that a Member State may prohibit imports of bovine heads containing risk material in regard to BSE by way of a precautionary measure of protection. [14] The present case also concerned action taken by the Member State of destination, not that of dispatch, and the measure was also adopted on a precautionary basis and not as the result of any check carried out. The situation in respect of which the Court ruled is thus comparable to that in the present case. The misgivings expressed by ILCO do not therefore, according to the case-law, stand in the way of application of Article 10 of Directive 90/425.

60. It still remains to be examined whether Article 10 is rendered inapplicable on the ground that scrapie is not a new disease but one that has been known for close on 300 years. Like BSE in the case of bovines and Creutzfeldt-Jakob disease for humans, scrapie is one of the transmissible spongiform encephalopathies. [15] Scrapie has been notifiable since 1993 on foot of Directive 91/68. The only new aspect is the knowledge that it cannot be ruled out that BSE may also be transmissible to sheep. Moreover, it has not been possible hitherto to distinguish scrapie from BSE by means of rapid tests. [16]

61. The Court, however, has already ruled that the existence of new information on the dangers posed by a disease known of for a long time is comparable to the outbreak of a new disease. This justifies the adoption of safeguard measures in accordance with Directive 90/425. [17] Application of Article 10 of Directive 90/425 in the present case will thus not fail on this objection either.

62. This result is in line with legislative practice and case-law to date. In the absence of a specific legal basis, the Com-

14 — Case C-477/98 *Eurostock* [2000] ECR I-10695, paragraph 79.

15 — See the BSE Vademecum, 3rd edition 1998, paragraph 6, which can be consulted on the internet page of the Commission's Health and Consumer Protection Directorate-General at www.europa/comm/dgs/health_consumer/index_en.htm.

16 — See the introduction to cited Press Notice 01/357 on 'Questions and Answers on TSE in Sheep and Goats' of 7 November 2001, which can be consulted on the internet page of the Commission's Health and Consumer Protection Directorate-General at www.europa/comm/dgs/health_consumer/index_en.htm.

17 — Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 53.

mission has based its various protective measures against the dangers posed by BSE on the legal basis of Article 10(4) of Directive 90/425 and the Court has confirmed the legality of those measures. [18]

63. This practice also appears, in its end result, to be justified. In adopting Directives 64/432/EEC, [19] 90/425 and 91/68, the Community legislature intended to adopt comprehensive and exhaustive rules on intra-Community trade in live animals and on the veterinary checks and health certification necessary to that end. This regulatory purpose and the concomitant lack of specific rules to combat the danger which scrapie poses for human and animal health argue in favour of Article 10 of Directive 90/425 also being applicable to a measure such as the TSE declaration required in the present case.

64. It is for those reasons necessary to proceed on the basis that Article 10 of Directive 90/425 is applicable to national protective measures against the dangers to the health and life of humans and animals posed by cases of scrapie which have occurred in other Member States.

(iv) Whether the conditions laid down in Article 10 of Directive 90/425 have been met

65. It is now necessary to examine whether the conditions prescribed in Article 10 of Directive 90/425 were respected when the Italian measure was adopted. On the formal level, the first requirement is that the measure is interim in nature.

66. It is clear from the recitals in the preamble to the order of 24 December 1996 that that order was adopted pending the enactment of measures of Community law. The Italian Government's letter of 24 July 1997, submitted by the Commission, emphasises expressly that the measure was taken only because there were no appropriate Community rules and was intended to apply only as a precautionary provision pending the adoption of Community legislation. The Italian legislature also kept to this undertaking, as the measure was repealed on 15 June 1998 after the Commission had adopted Decision 98/272/EC, in force from 1 May 1998. The measure was thus indeed a precautionary measure.

18 — Case C-180/96 *United Kingdom* v *Commission*, cited in footnote 17, and Case C-157/96 *National Farmers' Union* [1998] ECR I-2211, which related to Commission Decision 96/239/EC, and Case C-52/92 *Commission* v *Portugal* [1993] ECR I-2961, which concerned Commission Decision 91/237/EEC.

19 — Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine (OJ, English Special Edition 1963-1964, p. 164).

67. In addition, the measure had to be notified without delay to the Commission and the other Member States. The Commission has confirmed that it was informed by Italy on 10 January 1997 that the measure had been adopted. Italy also notified the Member States concerned by letter dated 24 July 1997, which the Commission has attached as an annex to its written observations. The United Kingdom Government has confirmed that the measure was notified to it. It must accordingly be held that the formal requirements of Article 10 of Directive 90/425 were complied with.

68. The measure will also have been lawful only if serious public or animal health grounds justified its adoption. This wording is, admittedly, more restrictive than that in Article 30 EC. The latter requires only that the measure is intended to protect the health and life of humans and animals. This difference in wording may be attributable to the fact that Article 10 constitutes a specific formulation of Article 30 EC within the context of Directive 90/425. As a matter of principle, Directives 90/425 and 91/68 determine which certificates are to be provided for intra-Community trade in sheep. More far-reaching protective measures limiting the free commercial movement of sheep therefore require justification extending beyond the general rules in Article 30 EC and taking the form of serious grounds relating to the protection of the health and life of humans and animals.

69. The question arises as to whether the Italian measure could be justified by the existence of serious public and animal health grounds. The recitals in its preamble state that the order was justified by reason of the increased incidence of BSE in the United Kingdom, France, Portugal and Ireland, as well as the plan to combat BSE in France.

70. In the present state of knowledge it can be assumed that scrapie is not transmissible to humans. If transmission were possible, scrapie would have manifested itself long ago given the length of time for which it has existed. [20] However, the SEAC report of 20 March 1996 stating that it could not be ruled out that BSE might also be transmissible to humans and its report of 10 July 1996 stating that the possibility could also not be discounted that BSE might also be transmissible to sheep justify the assumption that scrapie presents a risk to human health as well and that the introduction of precautionary measures was therefore justified. [21] The adoption of measures in late 1996 and early 1997 can consequently be regarded as justified on serious grounds concerning the protection of human and animal health against the dangers posed by scrapie.

71. Finally, the Italian measure will have been justified only if it complied with the

20 — BSE Vademecum, cited in footnote 15, paragraph 14.

21 — See section B of the Commission's press notice of 7 November 2001, cited in footnote 16.

general principles of law, in particular that of proportionality. The requirement of certification stating that the animals were from a holding that had been TSE-free for the previous six years is appropriate for protecting human health against the dangers posed by scrapie. The question is whether the measure went beyond what was necessary to attain that objective.

72. It must first be stated in this connection that the measure applied only to animals from the United Kingdom, France, Portugal and Ireland. According to the list published by the Commission setting out the legislation adopted in connection with BSE,[22] Commission decisions were adopted for these four Member States — and to date for these Member States alone — which authorised measures designed to eradicate bovine spongiform encephalopathy.[23] From this it is clear that cases of BSE were most frequent in those four Member States. It can thus be held that the Italian measure concerned only sheep from the Member States worst affected by BSE.

73. Regard must also be had to the fact that the measure did not introduce a total ban on imports but required only that a TSE declaration be submitted. The documents on file contain nothing to suggest that it was impossible to provide such a declaration at the time in question. On the contrary, the correspondence between the parties to the main proceedings, in particular the certificate of 14 July 1997 from Lennox's veterinary surgeon and Lennox's fax of the same date to ILCO,[24] make it clear that such a declaration could have been provided by a veterinary surgeon acting for Lennox. This is further confirmed by the certificate of 5 July 1997 from the United Kingdom authorities, which ILCO has placed on the case-file.[25] Point 7(c) of that document provides, with regard to sheepmeat, precisely the same declaration as that which the Italian legislation required for live sheep. To that extent also, therefore, the measure did not go beyond what was necessary, and in particular did not make imports of sheep from the United Kingdom impossible.

74. With regard to the period of six years during which there must have been no case of TSE, it should be pointed out that under Article 6(b)(i), third indent, of Directive 91/68, with regard to trade in sheep for breeding, certification must be provided that no case of scrapie has been confirmed for at least two years on the holding from which the animals come. The Italian measure clearly went beyond this in laying down a six-year period. That period, however, is not unreasonable. The ninth recital in the preamble to the basic decision, Commission Decision 94/474/EC of 27 July 1994 concerning certain protection measures

22 — This may be consulted on the internet page of the Commission's Health and Consumer Protection Directorate-General.

23 — In issue are Decision 96/381/EC of 20 June 1996 for Portugal, Decision 96/385/EC of 24 June 1996 for the United Kingdom, Decision 97/18/EC of 16 December 1996 for France and Decision 97/312/EC of 12 May 1997 for Ireland.

24 — Submitted as annexes to ILCO's written observations, pp. 30 and 31.

25 — See page 36 of the series of annexes which ILCO submitted with its written observations.

relating to bovine spongiform encephalopathy and repealing Decisions 89/469/EEC and 90/200/EEC, [26] states that the Scientific Veterinary Committee had recommended that bone-in bovine meat from the United Kingdom should be traded only if it came from herds with no case of BSE during the previous six years. Article 4 of Decision 94/424 accordingly requires the health certificate to contain the following sentence: 'Fresh bovine meat derived from bovines which have resided only on holdings on which no case of BSE has been confirmed during the previous six years.' In view of this parallel between the Italian measure under present examination and Decision 94/424, and regard being had to the significant uncertainty regarding transmissibility of BSE to sheep and humans and the difficulties in distinguishing BSE from scrapie, the imposition of an exclusion period of six years by the Italian legislature is not disproportionate.

75. A limitation of the measure so as to cover only risk material, as advocated by Lennox during the oral procedure, would not appear to be a less intrusive alternative to the Italian measure in issue. It would not be as effective as a measure relating to sheep as a whole. In view, however, of the considerable uncertainty existing in 1996 and 1997 as to whether BSE might be transmissible, it could not have been regarded as disproportionate for the Italian legislature to decide, given the significant degree of potential danger, that the measure should cover all imports of sheep.

76. This result corresponds to the fundamental tenet of Community law that a high level of protection must always form the basis underlying the safeguarding of human health. Article 152(1) EC gives expression to this. Community law also rests on the precautionary principle, as expressed in Articles 6 EC and 174 EC.

77. In the light of these considerations it must be held that, although amounting to a restriction on the free movement of goods, the Italian measure was justified on serious grounds relating to the protection of the health and life of humans and animals. The national court will, if need be, have to consider what the legal implications of this might be for the refusal by the United Kingdom Government to issue an appropriate TSE declaration with the health certificates applied for by Lennox.

78. The answer to the first part of the second question must therefore be that, on their proper construction, Articles 28 EC to 30 EC, 152 EC, 6 EC and 174 EC and Directives 90/425 and 91/68 did not, in July 1997, preclude national rules which, in addition to the health certificates issued pursuant to Directive 91/68, also required certification that the animals concerned

26 — OJ 1994 L 194, p. 96.

originated from a holding that had been TSE-free for six years.

2. Applicability of the law of another Member State that is contrary to Community law

79. The second part of the second question is posed only in the event that the requirement that a TSE declaration be provided is incompatible with Community law. As the Italian provisions are compatible with Community law, there is strictly no need to address this part of the question, which will accordingly be examined in what follows only by way of alternative submission in the event that the Court should not accept the above solution.

80. The High Court wishes to know whether the courts of a Member State may refrain from applying, in civil proceedings involving contractual obligations, a legal provision of another Member State that is contrary to Community law.

(a) Submissions of the parties

81. Lennox and ILCO take the view that a national court may not apply the law of another Member State in so far as it is incompatible with Community law. The parties to the main proceedings base this view of the law on the judgments in *Schlachtpluimvee* and *Unilever*.[27]

(b) Appraisal

82. The Court has consistently ruled that a court may not apply those provisions of its own legal system that are incompatible with Community law. So far as can be ascertained, however, the case-law to date has always involved the conflict between Community law and the law of the court before which the dispute in the main proceedings has been brought. The present case is distinguishable in so far as it relates to a conflict between Community law and the law of a Member State other than that in which the dispute is being dealt with. The question thus arises as to whether the primacy of Community law holds good also in the context of the application of foreign law, with the result that foreign law at variance with Community law must be left unapplied.

83. The application of foreign law and the regular concomitant difficulties of comprehension and interpretation of foreign legal rules cannot, however, give rise to anything

27 — Cases 96/84 *Vereniging Schlachtpluimvee* [1985] ECR 1157 and C-443/98 *Unilever* [2000] ECR I-7535.

that may stand in the way of securing the primacy of Community law. Examination of foreign legal rules is characteristic of cases involving private international law. The result is merely that the court of the State in which the legal dispute has been brought applies the provisions of the law of another State. In the dispute in the main proceedings in the present case, the English court is applying Italian law. Since the judgment in the *Granital* case, [28] it has been settled law that all Italian courts, and not only the Corte Costituzionale, are obligated to disapply Italian law to the extent to which it is incompatible with Community law. There is no obvious reason why an English court should not proceed in the same manner when applying Italian law.

84. This result, which follows from the functions and duties of a court, finds support in the argument that the primacy of Community law can best be guaranteed in this manner. The primacy of Community law holds true in both the English and the Italian legal systems. Measures of national law that are contrary to Community law cannot be applied. The fact that the law is applied by the court of another Member State does not deprive it of its link to Community law.

85. Account must also be taken of the fact that the English court is required, under its own legal system, to refrain from applying legal measures at variance with Community law. If that court were not to refrain from applying Italian legal rules that are contrary to Community law, its decision would breach Community law and give rise to an infringement of the Treaty by the United Kingdom.

86. Merely for the sake of completeness, I should point out that the question submitted does not give any cause for 'special vigilance' on the Court's part within the meaning of the *Foglia* v *Novello* decision. [29] There are no obvious reasons why the Court should be overly cautious in assessing national provisions of a Member State other than that of the referring court, which is a problem arising in *Der Weduwe*, a case still pending before the Court. [30]

87. On the basis of these considerations, the answer to the second part of the question should be that, in civil proceedings between an exporter and an importer concerning their contractual obligations regarding the importation of sheep, a national court may refrain from applying a provision of the national law of the State of destination providing that the accompanying health certificate must include a TSE declaration in so far as that provision is incompatible with Community law. This, however, is not necessary in the present case.

28 — Judgment No 170 of 8 June 1984 (*Giurisprudenza costituzionale*, 1984, I, p. 1098). Subsequently confirmed in Judgments No 389 of 11 July 1989 (*Giurisprudenza costituzionale*, 1989, I, p. 1757), No 1698 of 18 April 1991 (*Giurisprudenza costituzionale*, 1991, I, p. 1409) and No 285 of 16 June 1993 (*Giurisprudenza costituzionale*, 1993, I, p. 2026).

29 — Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 30.

30 — See the Opinion delivered by Advocate General Léger on 23 April 2002 in Case C-153/00, Judgment of 10 December 2002, ECR I-11319, I-11321, *Paul der Weduwe*, paragraph 34.

VI — Conclusion

88. In the light of the foregoing considerations, there is no need to reply to Questions 1(b) and 2(b), which were put forward by way of alternative submission. I propose accordingly that the Court reply as follows to the remaining questions referred by the High Court of Justice, Queen's Bench Division (Commercial Court):

(1) In the case of exportation of a consignment of sheep from one Member State to another, in which the sheep are intended to be slaughtered on arrival, the requirement under Article 9 of Directive 91/68/EEC is complied with even where the accompanying health certificate is not a Model I certificate, in accordance with Annex E to the directive, but a Model II certificate.

(2) Where a consignment of sheep is exported from one Member State to another, in which the sheep are intended for slaughter on arrival and where the accompanying health certificate is a Model II certificate, national law declaring the importation to be unlawful on the ground that the certificate is not a Model I certificate may not be applied.

(3) On their proper construction, Articles 28 EC to 30 EC, 152 EC, 6 EC and 174 EC and Directives 90/425/EEC and 91/68 did not, in July 1997, preclude national rules which required the health certificates issued pursuant to Directive 91/68 also to include certification that the animals concerned originated from a holding that had been TSE-free for six years.