OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 13 June 1989 *

Mr President,
Members of the Court,

1. Mr Nijman markets in the Netherlands a product called 'Improsol', which is intended for use in the construction of buildings, being injected into 'sound' wooden cladding.

2. He was found guilty at first instance by judgment of 25 February 1987 of infringing the Bestrijdingsmiddelenwet 1962 (Law on plant-protection products, hereinafter referred to as 'the 1962 Law'), on the ground that he had sold and stored the product in question without first complying with the legislative requirements concerning the approval of plant-protection products. He brought an appeal before the Gerechtshof (Regional Court of Appeal), The Hague, which has requested this Court to give a preliminary ruling.

3. Mr Nijman states in his observations to this Court that his main defence before the national court is that 'Improsol' is not a plant-protection product within the meaning of the 1962 Law.

4. The Gerechtshof considers that, in deciding the merits of that argument, account must be taken of Council Directive 79/177/EEC of 21 December 1978 prohibiting the placing on the market and use of plant-protection products containing certain active substances [1] (hereinafter referred to as 'the directive'). According to the national court, 'Improsol' is a plant-protection product within the meaning of the directive.

5. He then states that it appears that the directive must be interpreted as meaning that plant-protection products containing active substances not listed in the annex to it may be freely marketed and used, without recourse to any national authorization procedure.

6. In the present case, since the substances of which 'Improsol' is composed — ammonium bifluoride and potassium bifluoride — are not mentioned in the annex to the directive, national provisions enacted by a Member State with a view to implementing the directive, containing a prohibition of the marketing and use of a product such as 'Improsol', cannot, in his view, be applied.

7. However, the Gerechtshof considers that if it were concluded that the prohibition of sale, possession or use of a product not approved by the national law in question were incompatible with Community law the consequences would be 'extreme'. It has

* Original language: French.

1 — OJ L 33, 8.2.1979, p. 36

therefore submitted two questions for a preliminary ruling, which are set out in full in the Report for the Hearing.

8. The first question is essentially whether the 'determinant concepts' used by the 1962 Law, which is regarded as having implemented the directive, must be interpreted so as to conform with those laid down in the directive. It seems to me that, by that question, the national court seeks to establish whether in this case Community law requires the concept of a plant-protection product defined in Article 2 of the directive to be used for the purpose of applying the 1962 Law.

9. Having regard to the terms of the dispute before the national court and in order to give an interpretation which will help to resolve it, it will first be necessary to describe the state of Community law regarding plant-protection products containing substances not listed in the annex to the directive. Has the directive entirely harmonized the area of law in question?

10. Like the Commission and all the governments which have submitted observations, I am of the opinion that the purpose of the directive is to achieve limited harmonization, by prohibiting products containing *certain substances.* The Member States are simply called on to ensure that 'plant-protection products containing one or more of the active substances listed in the annex may be neither placed on the market nor used'. The directive

'merely prohibits the disposal of particularly dangerous pesticides'. [2]

11. Accordingly, as far as products not containing the substances listed in the annex to the directive are concerned, existing Community law does not impose any prohibition on, or grant any authorization to, the Member States: the area in question is not harmonized. A proposal has been submitted to the Council but has not so far been adopted. [3]

12. It appears, therefore, that the directive is not intended to harmonize *as such* the concept of plant-protection products, but to impose a prohibition on the use of products containing one or more substances mentioned in the directive.

13. Consequently, having regard to the objectives of the directive, no 'divergence of determinant concepts' as between the directive and a national law has any effect, under Community law, regarding products containing substances not listed in the annex to the directive. It seems to me that, in view of the national court's finding that 'Improsol' contains substances not listed in the annex, the foregoing analysis will provide a helpful answer to the national court's first question.

14. My observations in that regard should facilitate an answer to the second question in so far as it relates to the compatibility of a law such as the national law in question in this case with the directive. Since it is clear that the directive has not brought about any harmonization regarding products containing substances not listed in the

2 — Opinion of Mr Advocate General Mancini in Case 54/85 *Mirepoix* [1986] (judgment of 13 March 1986) ECR 1067, at p. 1069.

3 — See the proposal for a Council directive in OJ C 212, 9.9.1976, p. 3.

annex, national measures concerning the latter obviously fall outside its scope.

15. Accordingly, the prohibition — supported by penalties in criminal law — of selling, holding or using a plant-protection product not authorized by a national law clearly constitutes, in conformity with the Court's judgment in *Dassonville*,[4] a measure having equivalent effect for which justification must be sought by reference to Article 36.

16. In that regard, it is for the Member States

'to determine the level of protection which should be given to human health and life, whilst taking account of the requirements of the free movement of goods as laid down by the Treaty and, in particular, by the last sentence of Article 36'.[5]

17. It is also worth remembering — since these aspects are not discussed in the present case — the indications given in *Mirepoix* to the effect that

'the authorities of the importing Member State are obliged to review the prohibition on the use of a pesticide or a prescribed maximum level if it appears to them that the reasons which led to the adoption of such measures have changed, for example, as a result of the discovery of a new use for a particular pesticide, or as a result of further information becoming available through scientific research'[6]

and

'also allow, by means of a procedure that is easily accessible to traders, for exceptions to be made to the rules laid down, where it appears that the use of the pesticide in question for a given purpose is not dangerous to public health'.[7]

18. I shall make a last observation, prompted by the reference to directly applicable measures of commercial policy adopted under the third part of Title II, Chapter 3, of the EEC Treaty, in the light of which the national court raises the question of the possible incompatibility of the national rules.

19. That reference no doubt relates to the fact that 'Improsol' is imported from Sweden. As the Commission points out, Article 20 of the free-trade agreement with Sweden[8] is the same as Article 36 of the Treaty. Therefore, if it is assumed that a private individual can rely on a particular provision of the agreement as against the national measure at issue, it would seem that in any event Article 20 cannot be interpreted in a manner which restricts the prerogatives of States regarding public health to a greater extent than the EEC Treaty itself does.

4 — Judgment of 11 July 1974 in Case 8/74 [1974] ECR 837

5 — Case 54/85, cited above, paragraph 13, see also judgment of 19 September 1984 in Case 94/83 *Heijn* [1984] ECR 3263 and of 17 December 1981 in Case 272/80 *Frans-Nederlandse* [1981] ECR 3227, paragraph 12

6 — Ibid., paragraph 16

7 — Ibid., paragraph 17

8 — Agreement between the European Economic Community and Sweden, OJ, English Special Edition 1972 (31 December), p 99

20. Consequently, I propose that the Court rule as follows:

(i) having regard to the scope of Directive 79/117/EEC, Community law does not require the concept of plant-protection products defined in Article 2 thereof to be used with respect to products not containing substances listed in the annex to the directive;

(ii) neither Articles 30 and 36 of the Treaty nor any other provisions of Community law preclude national legislation from prohibiting, and imposing penalties in criminal law for, the selling, placing in stock or store or the use of a plant-protection product that is not authorized by that law.