OPINION OF ADVOCATE GENERAL JACOBS

delivered on 11 March 1999 *

1. In this case the applicant, which faces a fine of ITL 20 million for seeking to sell in Italy South African oranges and Argentine lemons, challenges the lawfulness as a matter of Community law of a national ban on importing from non-member countries and marketing certain citrus fruits.

The relevant Community legislation

2. As will become apparent, the relevant Community legislation comprises two principal directives, one prohibiting the introduction of certain citrus fruit into the protected zone Italy (Council Directive 77/93/EEC [1]) and the other recognising Italy as a zone protected against the introduction of organisms harmful to certain citrus fruit (Commission Directive 92/76/EEC [2]).

3. Article 4(2)(a) of Directive 77/93 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community [3] provides:

'The Member States shall provide that, from 1 January 1993, the introduction of plants, plant products and other objects listed in Annex III, Part B, into the relevant protected zones located in their territory is prohibited.'

4. Article 2(1)(a) [4] provides:

'Plants shall be considered to mean living plants and living parts thereof, including seeds.

* Original language: English.

1 — Directive 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community, OJ 1977 L 26, p. 20. Unless otherwise indicated, the Directive is cited as amended by Council Directive 91/683/EEC of 19 December 1991 amending Directive 77/93/EEC on protective measures against the introduction into the Member States of organisms harmful to plants or plant products, OJ 1991 L 376, p. 29. The Directive has been further amended on numerous occasions as will appear below. In 1997 the Commission issued a proposal for a consolidating directive (COM (97) 651 final of 5 December 1997).

2 — Directive 92/76/EEC of 6 October 1992 recognising protected zones exposed to particular plant health risks in the Community, OJ 1992 L 305, p. 12.

3 — Cited in note 1.

4 — As replaced by Council Directive 85/574/EEC of 19 December 1985 amending Directive 77/93/EEC on protective measures against the introduction into the Member States of organisms harmful to plants or plant products, OJ 1985 L 372, p. 25.

Living parts of plants shall be considered to include:

— fruit — in the botanical sense — other than that preserved by deep freezing,

...'

5. Article 2(1)(h) defines 'protected zone' as:

'a zone in the Community:

— in which one or more harmful organisms referred to in this Directive, which are established in one or more parts of the Community, are not endemic or established, despite favourable conditions for them to establish there,

— in which there is a danger that certain harmful organisms will establish themselves, given propitious ecological conditions, for particular crops, despite the fact that these organisms are not endemic or established in the Community,

and which has been recognised, in accordance with the procedure laid down in Article 16a, as fulfilling the conditions set out in the first and second indents...'

6. Article 16a [5] provides a procedure for the adoption of certain measures in certain circumstances by the Commission in conjunction with the Standing Committee on Plant Health. Where the measure proposed by the Commission is in accordance with the opinion of the Committee, the Commission is required to adopt it. The Commission is thus competent in those circumstances to enact legislation recognising protected zones.

7. Annex III [6] to Directive 77/93 lists plants, plant products and other objects the introduction of which is to be prohibited in all Member States (Part A) and certain (specified) protected zones (Part B). Part B comprises two columns. The left-hand column, which carries descriptions of the plants, plant products and other objects in respect of which the prohibition applies, includes '3. Fruits of *Citrus* L., *Fortunella* Swingle, *Poncirus* Raf., and their hybrids, except *Citrus paradisi* Macf., originating in

5 — Inserted by Council Directive 89/439/EEC of 26 June 1989 amending Directive 77/93/EEC on protective measures against the introduction into the Member States of organisms harmful to plants or plant products, OJ 1989 L 212, p. 106.

6 — As replaced by Commission Directive 92/103/EEC of 1 December 1992 amending Annexes I to IV to Council Directive 77/93/EEC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community, OJ 1992 L 363, p. 1.

third countries'. The right-hand column, which lists the protected zones in respect of which the prohibition applies, shows against that entry 'Italy'. [7] The fruits referred to are, according to the observations submitted to the Court, lemons (*Citrus* L.), oranges (*Fortunella* Swingle) and grapefruit (*Poncirus* Raf.) with the exception of a particular strain of grapefruit (*Citrus paradisi* Macf.). I will for convenience refer to them collectively as 'fruits of the *Citrus* genus'.

8. Part B of Annex III to Directive 77/93 was amended by Commission Directive 96/14/EC. [8] That amendment made no change to the above entry.

9. Article 1 of Directive 92/76/EEC recognising protected zones exposed to particular plant health risks in the Community [9] provides:

'The zones in the Community listed in the Annex are hereby recognised for a period expiring on 31 December 1994 as "protected zones" referred to in the first subparagraph of Article 2(1)(h) of Directive 77/93/EEC, in respect of the harmful organism(s) listed against their names in the Annex.'

10. Article 2 provides:

'The extension of the recognition beyond the date referred to in Article 1, and any amendment to the list of protected zones referred to in Article 1, shall be made in accordance with the procedure laid down in Article 16a of Directive 77/93/EEC...'

11. The Annex to Directive 92/76, points (a) 17, (b) 3, (c) 5 and (d) 3, includes Italy as a protected zone in respect of 'All unknown non-European organisms harmful to fruit of *Citrus* L., *Fortunella* Swingle, *Poncirus* Raf. and their hybrids'. [10]

12. Recognition of the zones listed in Directive 92/76 was expressed to be provisional only. [11] The zones were originally provisionally recognised for a period expiring on 31 December 1994. That date was changed to 1 July 1995 by Commission Directive 94/61/EC, [12] which also expressed the extended recognition as being provisional. [13] It was subsequently changed to 1 April 1996 in the case of, *inter alia*, the recognition of Italy as a protected zone

7 — Unfortunately the English text (and indeed according to the Commission all the language versions except Dutch and Spanish) shows no protected zone for this entry. The Commission states that the text it adopted showed Italy against this entry, and the point does not seem to be seriously in issue.

8 — Commission Directive 96/14/EC of 12 March 1996 amending certain Annexes to Council Directive 77/93/EEC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community, OJ 1996 L 68, p. 24.

9 — Cited in note 2.

10 — The four entries are for the categories of (a) insects, mites and nematodes, (b) bacteria, (c) fungi and (d) viruses and virus-like organisms.

11 — See the sixth recital in the preamble.

12 — Commission Directive 94/61/EC of 15 December 1994 extending the period of provisional recognition of certain protected zones provided for in Article 1 of Directive 92/76/EEC, OJ 1994 L 330, p. 63.

13 — See the third recital in the preamble.

with regard to the organisms in question [14] by Commission Directive 95/40/EC, [15] which similarly expressed the extended recognition as being provisional. [16] Article 3 of Directive 95/40 provided that that directive was to be implemented with effect from 1 July 1995.

13. Article 1 of Commission Directive 96/15/EC [17] made further amendments to the expiry date for the recognition of certain protected zones and confirmed that, as regards the recognition of Italy as a protected zone in respect of the organisms in question, [18] that date was 1 April 1996. The preamble to Directive 96/15 states:

'Whereas it should be established that the extension of the recognition beyond the dates referred to in Article 1, and any amendment to the list of protected zones referred to in Article 1, shall be made in accordance with the procedure laid down in Article 16a of Directive 77/93/EEC...

Whereas in the absence of any extension of the recognition beyond the dates referred to in Article 1, the relevant protected zones cease on these dates, to be "protected zones" within the meaning of Directive 77/93/EEC, including its Annexes.' [19]

14. Article 2 of Directive 96/15 provided that that directive required implementation with effect from 1 April 1996.

The national legislation

15. Both Directives 77/93 and 92/76 are currently implemented in Italy by the Ministerial Decree of 31 January 1996.

16. Articles 9 and 10 prohibit the introduction, marketing and holding in Italy or the relevant protected zones of the plants, plant products and other objects mentioned in its Annex III. Under (3) in Part B of Annex III, which corresponds to Annex III to Directive 77/93, appears 'Fruits of *Citrus*, *Fortunella* Swingle, *Poncirus* Raf. and their hybrids, with the exception of those of *Citrus Paradisi* Macf. Merr; originating in third countries', against the 'protected zone' Italy.

14 — Points (a) 17, (b) 3, (c) 5 and (d) 3 of the Annex to Directive 92/76.

15 — Commission Directive 95/40/EC of 19 July 1995 amending Directive 92/76/EEC recognising protected zones exposed to particular plant health risks in the Community, OJ 1995 L 182, p. 14.

16 — See the sixth recital in the preamble.

17 — Commission Directive 96/15/EC of 14 March 1996 amending Directive 92/76/EEC recognising protected zones exposed to particular plant health risks in the Community, OJ 1996 L 70, p. 35.

18 — Points (a) 17, (b) 3, (c) 5 and (d) 3 of the Annex to Directive 92/76.

19 — See the seventh and eighth recitals.

17. Annex VI to the Decree corresponds to the Annex to Directive 92/76 and indicates the protected zones in respect of specified harmful organisms. Points (a) 17, (b) 3, (c) 5 and (d) 3, which referred to Italy as a protected zone in respect of the organisms in question, were repealed with effect from 4 January 1998 by the Ministerial Decree of 27 November 1997, implementing Directives 96/14 and 96/15.

18. Article 9 of Legislative Decree No 536 of 30 December 1992 imposes an administrative penalty of a fine of ITL 10 to 60 million on anyone who introduces into Italian territory plants whose introduction is prohibited.

The facts and the main proceedings

19. In October 1996, the criminal investigation authorities in Turin reported Battital Srl for infringement of Article 10 of the Ministerial Decree of 31 January 1996 on the ground that it had for sale, in a region within Italian territory (a zone which is protected against importation from non-member countries of plants belonging to the *Citrus* genus), 250 kg of oranges from South Africa and 680 kg of lemons originating in Argentina. The citrus fruits were subsequently confiscated and destroyed and the President of the Regione Piemonte issued an order requiring Battital to pay a fine of ITL 20 million pursuant to Article 9 of Legislative Decree No 536 of 30 December 1992.

20. Battital sought annulment of that order before the Pretura Circondariale (District Magistrates' Court), Turin, arguing that by virtue of Commission Directives 95/40, 96/14 and 96/15 protected zones in respect of the importation of citrus fruits from non-member countries had been abolished with effect from 1 April 1996 and that the importation and sale of the oranges and lemons at issue had therefore to be regarded as lawful.

21. The Region of Piedmont argued that the directives cited by Battital fell to be construed in the opposite sense.

22. Doubtful as to the correct interpretation of the Community legislation, the Pretura Circondariale, Turin, referred the following questions to the Court for a preliminary ruling:

'1. Having regard to Article 1 of Directive 95/40/EC of 19 July 1995, Article 2 of Directive 96/14/EC of 12 March 1996 and Article 1 of Directive 96/15/EC of 14 March 1996, does the ban on the importation of organisms of the *Citrus* genus still apply in Italy (or in any region of Italy)?

2. Did that ban cease to apply with effect from 1 April 1996?

3. Is the Ministerial Decree of 31 January 1996 of the Ministry of Agricultural Resources, which implemented Directive 95/40/EC, incompatible, so far as the relevant provisions are concerned, with the discontinuance of the ban on imports into Italian territory (or into any part thereof) of plant organisms of the *Citrus* genus, as would appear to result from the combined effect of Directive 95/40/EC of 19 July 1995, Article 2 of Directive 96/14/EC of 12 March 1996 and Article 1 of Directive 96/15/EC of 14 March 1996?'

23. The national court's first and third questions refer to the ban on the importation of 'organisms of the *Citrus* genus' and 'plant organisms of the *Citrus* genus'. I will assume that it intended to refer to the ban on the importation of fruits of the *Citrus* genus.

24. As the Commission points out, the questions before the Court are essentially the following: (i) did the prohibition in the Community legislation on the import of certain citrus fruits into Italy expire on 1 April 1996; (ii) if so, may a national prohibition on the import of such fruit lawfully be maintained thereafter?

The interaction between the Directives

25. The parties are principally at odds over the relationship between Directive 77/93, which imposed the initial prohibition on the import of citrus fruits into Italy, and Directive 92/76, which listed Italy as a protected zone in respect of certain harmful organisms until 1 April 1996.

26. The Regione Piemonte submits that the two directives are entirely separate and that the latter has not modified, and cannot modify, the former. In its view, the prohibition on introducing citrus fruit remained in force even after recognition of Italy as a protected zone under Directive 92/76 had expired by virtue of Directive 96/15: that directive simply abolished the protected zones with respect to the organisms referred to in the Annex to Directive 92/76 (namely 'all unknown non-European organisms harmful to fruit of *Citrus* L., *Fortunella* Swingle, *Poncirus* Raf. and their hybrids'). The protected zones listed in Part B of Annex III to Directive 77/93, the introduction into which of certain fruit is prohibited, are different from those listed in the Annex to Directive 92/76 (although I should point out that, in so far as relevant to the present case, the protected zones are the same). According to the Regione Piemonte, the fact that Italy is no longer recognised as a protected zone with regard to unknown non-European organisms harmful to certain citrus *plants* simply means that it was no longer judged necessary to protect Italy against the establishment of those harmful organisms on its territory with regard to those plants. That does not however mean that the prohibi-

tion on the import of *fruits* of those plants was abolished.

27. Battital and the Commission take the contrary view. In essence they submit that the Community legislation at issue simply imposes protection against harmful organisms; once that protection has gone, the consequential prohibition on the import of host fruit falls with it. Moreover Directive 77/93 provides that only the procedure envisaged in Article 16a can lead to the recognition of a zone as protected. Such recognition ceases if there is express revocation or if the time-limits regarding the existence of a zone expires. Directive 96/15 makes it clear that the recognition of Italy as a protected zone was temporary, expiring on 1 April 1996. The prohibition on the import of citrus fruits into Italy accordingly came to an end on that date and it was not open to Italy to retain the prohibition thereafter.

28. In order better to understand the relationship between Directive 77/93 and Directive 92/76 it is helpful to consider the legislation in its historical context.

29. Directive 77/93 originally required or permitted Member States to ban the introduction into their territory from other Member States or from third countries of certain harmful organisms and certain plants and plant products. Article 4(2)(a) in its original version permitted Member States to ban the introduction into their territory of the plants, plant products and other objects listed in Annex III, Part B, against their names. Annex III, Part B, as amended by Council Directive 84/378, [20] included, against 'Italy', 'Citrus fruit plants (*Citrus* L., *Fortunella* Swingle, *Poncirus* Raf.)'.

30. The programme for the completion of the internal market by 31 December 1992 meant that it was necessary fundamentally to recast Directive 77/93: the controls on trade between Member States which it had introduced were not readily compatible with the concept of the Community as an area without internal frontiers and it was felt desirable to provide for 'protected zones', not necessarily co-terminous with national territory, exposed to particular plant health risks, to be accorded special protection under conditions compatible with the internal market. [21]

31. Directive 77/93 was accordingly amended in 1991 [22] so as to provide for the recognition of protected zones (see Article 2(1)(h), set out in paragraph 5) and for the prohibition of the introduction of

20 — Council Directive 84/378/EEC of 28 June 1984 amending the Annexes to Directive 77/93/EEC, OJ 1984 L 207, p. 1.

21 — See the preamble to Council Directive 91/683/EEC, cited in note 1, in particular the second, third and fifth recitals.

22 — By Directive 91/683, cited in note 1.

certain plants into those zones (see Article 4(2)(a), set out in paragraph 3).

32. The application of the Community plant health regime to the Community as an area without internal frontiers and the introduction of protected zones also necessitated a restructuring of the requirements laid down in the Annexes to Directive 77/93.[23] Directive 91/683[24] entrusted some of that restructuring to the Commission, assisted by the Standing Committee on Plant Health.[25] The Commission accordingly adopted Commission Directive 92/103/EEC amending Annexes I to IV to Council Directive 77/93/EEC[26] which completely restructured the Annexes to Directive 77/93, replacing them wholesale.

33. Finally, as mentioned above,[27] a list of recognised protected zones was established by Directive 92/76[28] after the definition of 'protected zone' had been inserted into Directive 77/93.

34. Thus it came about that the Community legislation regulating the introduction into the Community and the spread within the Community of organisms which are harmful to plants or plant products currently comprises two distinct directives, namely Directive 77/93 and Directive 92/76.

35. It is clear from the history of the legislation that, contrary to the submissions of the Regione Piemonte, Directive 92/76 was intended to complement Directive 77/93. Admittedly, as the Commission points out, before Directive 77/93 was amended in 1991 the mere mention of a specified plant, plant product or other object in the left-hand column of Part B of Annex III sufficed to authorise the Member State referred to in the right-hand column to prohibit the import of that item into its territory. However, the revised structure of the legislation explicitly incorporated the notion of a protected zone into, *inter alia*, Article 4(2)(a) and Annex III. Article 4(2)(a) expressly requires Member States to prohibit the introduction of the items listed in Part B of Annex III 'into the relevant protected zones located in their territory'. Part B of Annex III is headed 'Plants, plant products and other objects the introduction of which shall be prohibited in certain protected zones'. Directive 77/93 provides unequivocally that protected zones are to be recognised only in accordance with an established procedure. Once recognition of a particular protected zone has expired, there is nothing to which the prohibition in Article 4(2)(a) may attach and the residual reference to the prohibition in Part B of Annex III can similarly have no further relevance. It is thus clear from the objectives and the scheme of the legislation that the existence

23 — See the fifth recital in the preamble to Directive 91/683, cited in note 1.

24 — Cited in note 1.

25 — See the sixth recital in the preamble to Directive 91/683, cited in note 1, and Articles 3(6), 4(3) and 5(3) of Directive 77/93, inserted by Directive 91/683.

26 — Cited in note 6.

27 — See paragraph 9.

28 — Cited in note 2.

of a recognised protected zone is essential for the operation of those provisions.

36. It is perhaps unfortunate — as the Commission concedes — that the opportunity was not taken to amend Part B of Annex III so as to make it clear that, once Italy was no longer recognised as a protected zone in respect of all unknown non-European organisms harmful to the citrus fruit specified in Annex I to Directive 92/76, the prohibition in Part B of Annex III to Directive 77/93 was redundant. The Commission has indicated that it is currently considering an appropriate amendment to Part B of Annex III. The existence of a failure to correct the legislation to make it coherent cannot however provide a basis for a conclusion which is incompatible with the scheme and objective of the legislation as a whole.

37. I accordingly conclude that the ban on the importation of fruits of the *Citrus* genus into the protected zone Italy, contained in Article 4(2)(a) of Directive 77/93, ceased to apply in Italy with effect from 1 April 1996 when the recognition of Italy as a protected zone under Directive 92/76 expired by virtue of Directive 95/40.

38. I would point out that the above conclusion does not mean that, where recognition of a protected zone ceases, a Member State will be open to the uncontrolled import of possibly contaminated fruit.

39. First, it must be recalled that Part B of Annex III is only one relatively small part of the Community plant protection legislation as a whole. Directive 77/93 elsewhere lists many harmful organisms whose introduction and spread within all Member States is to be banned (Article 3(1) and Part A of Annex I) or to be banned if they are present on certain plants or plant products (Article 3(2)[29] and Part A of Annex II) and many plants, plant products and other objects whose introduction is to be prohibited in all Member States (Article 4(1) and Part A of Annex III). In addition Part A of Annex IV lists numerous special requirements which must be laid down by all Member States for the introduction and movement of plants, plant products and other objects into and within all Member States (Article 5(1)) and Annex V lists numerous plants, plant products and other objects which must be subject to a plant health inspection before being permitted to enter the Community (Article 6(1)).

40. Secondly, the Directive lays down a procedure for the amendment of the Annexes which provides *inter alia* for

29 — As amended by Directive 85/574, cited in note 4.

Member States to request certain additional headings to the Annexes. [30]

41. Finally, Article 15 [31] provides for Member States to take unilateral measures in certain circumstances in respect of harmful organisms. Article 15(1) requires a Member State immediately to notify the Commission and the other Member States of the presence in its territory of certain harmful organisms listed in Annexes I and II, to take all necessary measures to eradicate them or to inhibit their spread and to inform the Commission and the other Member States of those measures. Article 15(2)(a) and (b) contain analogous provisions concerning harmful organisms not known hitherto to be present in the territory of the Member State concerned. Article 15(2)(c) provides:

'Where a Member State considers there is an imminent danger other than that referred to in (b), it shall immediately notify the Commission and the other Member States of the measures which it would like to see taken. If it considers that these measures are not being taken in sufficient time to prevent the introduction or spread of a harmful organism in its territory, it may temporarily take any additional measures which it deems necessary, as long as the Commission has not adopted measures pursuant to paragraph 3.'

42. Article 15(3) provides for the adoption of measures by the Commission, and concludes: 'Until a measure has been adopted under the aforesaid procedure, the Member State may maintain the measures that it has employed.'

The effect of the ban's ceasing to apply

43. Once it is accepted that the ban on the importation of citrus fruits into the protected zone Italy, contained in Article 4(2)(a) of Directive 77/93, ceased to apply in Italy with effect from 1 April 1996 when the recognition of Italy as a protected zone under Directive 92/76 expired by virtue of Directive 96/15, it is clear that Italy cannot maintain such a ban in its national legislation. To do so would run counter to the Community plant health legislation as a whole and, to the extent that it applied as between Member States, would obstruct the free movement of goods. Since plant protection has been harmonised at Community level, a Member State may not rely on Article 36 of the EC Treaty to justify such obstruction.

30 — Article 13 of Directive 77/93 as amended by Directive 85/574, cited in note 4.

31 — As amended by Council Directive 90/168/EEC of 26 March 1990 amending Directive 77/93/EEC on protective measures against the introduction into the Member States of organisms harmful to plants or plant products, OJ 1990 L 92, p. 49, and by Directive 91/683, cited in note 1.

Conclusion

44. I accordingly conclude that the questions referred by the Pretura Circondariale, Turin, should be answered as follows.

(1) The ban on the importation of fruits of the *Citrus* genus into the protected zone Italy, contained in Article 4(2)(a) of Council Directive 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community, as amended, ceased to apply in Italy with effect from 1 April 1996 when the recognition of Italy as a protected zone under Commission Directive 92/76/EEC of 6 October 1992 recognising protected zones exposed to particular plant health risks in the Community, as amended, expired by virtue of Commission Directive 95/40/EC of 19 July 1995 amending Directive 92/76/EEC recognising protected zones exposed to particular plant health risks in the Community.

(2) National legislation maintaining such a ban after that date is contrary to Community law.