JUDGMENT OF THE COURT
19 SEPTEMBER 1984 [1]

Criminal proceedings against Albert Heijn BV (reference for a preliminary ruling from the Arrondissementsrechtbank, Haarlem)

(Prohibition of pesticides for apples — Measures having equivalent effect)

Case 94/83

Free movement of goods — Derogations — Protection of public health — Rules governing the presence of pesticides not covered by Community provisions — Powers of the Member States — Prohibition on the importation of apples — Vinchlozoline content in excess of the prescribed limits

(EEC Treaty, Arts 30 and 36)

In so far as the relevant Community rules do not cover certain pesticides, Member States may regulate the presence of residues of those pesticides on foodstuffs in a way which may vary from one country to another according to the climatic conditions, the normal diet of the population and their state of health. In that context, they may permit different levels of the same pesticide in respect of different foodstuffs.

Articles 30 and 36 of the EEC Treaty do not therefore prevent a Member State from prohibiting the importation of apples from another Member State on account of the presence in or on those apples of a quantity of vinchlozoline greater than that authorized by the legislation of the first Member State, even though the maximum permitted vinchlozoline content laid down in that Member State differs from that laid down for other kinds of food and drink.

In Case 94/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Economische Politierechter [magistrate dealing with commercial offences] at the Arrondissementsrechtbank [District Court], Haarlem, for a preliminary ruling in the criminal proceedings pending before that court against

1 — Language of the Case: Dutch.

ALBERT HEIJN BV, 2 Ankersmidplein, Zaandam, Municipality of Zaanstad,

on the interpretation of Articles 30 and 36 of the EEC Treaty, in connection with the national legislation regarding residues of pesticides on foodstuffs intended for human consumption,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), A. O'Keeffe, U. Everling and C. Kakouris, Judges,

Advocate General: C. O. Lenz
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the written observations may be summarized as follows.

I — Facts and written procedure

1. Albert Heijn BV [hereinafter referred to as "Heijn"] is the owner of a chain of supermarkets in the Netherlands, whose distribution centre is in Zaandam. During the period from September 1980 to March 1981, Heijn purchased in Italy from Mazzoni SpA, which produces and markets both fruit and vegetables, a consignment of "Granny Smith" apples, a variety not produced in the Netherlands.

On 16 January 1981, the Keuringsdienst van Waren [product control department] carried out a check at the Heijn distribution centre, following which a sample of the apples in question was taken and the stock available was temporarily seized because of the alleged presence of vinchlozoline on the apples. On 30 January 1981, the consignment of apples seized on 16 January 1981 was released for sale.

The analysis carried out by the Keuringsdienst van Waren showed that

a quantity of 1.0 mg per kg of vinchlozoline was present on the apples, and under the applicable Netherlands legislation the presence of that substance on or in apples is not authorized.

The public prosecutor for the district of Haarlem then summoned Heijn to appear before the Economische Politierechter at the Arrondissementsrechtbank, Haarlem, for infringement of the applicable legislative provisions.

2. At the sitting on 11 April 1983 before the Economische Politierechter, the accused maintained that the national legislative and administrative provisions on which the charge was based were contrary to Articles 30 to 36 of the EEC Treaty.

3. Having ascertained that the case raised a question of interpretation of Community law, the Economische Politierechter stayed the proceedings and submitted the following questions to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Does a prohibition on the marketing in one Member State of apples imported from another Member State on the ground that those apples contain, contrary to the applicable national legislative provisions under which it is prohibited to market food and drink containing residues of pesticides unless the quantity of those residues is below a maximum limit fixed per product and per pesticide, residues of a pesticide not mentioned in Annex II to Council Directive No 76/895/EEC of 23 November 1976 constitute a measure having an effect equivalent to a quantitative restriction on imports which is prohibited under Article 30 of the EEC Treaty?

2. To what extent does the answer to the first question depend on the answer to the question whether the apples referred to therein were produced and marketed in the Member State from which they originated in accordance with the legislation applying there?

3. (a) If the first question must be answered in the affirmative can the national legislative provisions referred to therein be regarded as a necessary means of protecting public health as contemplated by Article 36 of the EEC Treaty?

(b) In order to answer Question 3 (a) must it be established that the prohibition specifically applying to the use of a particular pesticide on apples is justified as a necessary means of protecting public health or may that prohibition also be regarded as justified if it is adopted pursuant to a general policy which is designed to reduce as far as possible the presence of residues of pesticides in food and drink and under which tolerance limits are fixed for residues only where a particular pesticide is required for a particular product and from the point of view of public health — taking into account national dietary habits — there are no serious objections to adopting such limits?

4. (a) Is it relevant to Question 3 (a) and (b) that the national

legislation of the importing country does not permit residues of a particular pesticide on or in particular kinds of food and drink but fixes a maximum permissible residual quantity of the same pesticide for other kinds of food and drink?

(b) Or, more specifically, is it relevant that in the Netherlands a residue of vinchlozoline is not permitted on apples but is permitted on other agricultural and market-garden produce and that the maximum residual quantity of vinchlozoline permitted in the case of some of those products is even higher than the quantity found on the lot of apples in question?"

II — The applicable national provisions

1. The Bestrijdingsmiddelenwet [Law on Pesticides] 1962 is intended to deal with all aspects of the problem of pesticides, with the exception of production. The Law contains rules prohibiting the sale, possession, storage and use of any pesticide not authorized thereunder (Article 2 (1)).

A pesticide is approved only if it satisfies the requirements regarding composition, packaging and so forth laid down by the Minister, if analyses have shown that it is suitable for the use for which it is intended and if it has no secondary harmful effects and, finally, if the proportion of the active substance does not exceed what is necessary to achieve the desired aim.

A similar general prohibition — exceptions to which may be authorized by the competent authorities — concerning the presence of pesticides in and on foodstuffs is laid down in Article 16 of the same Law.

According to that provision:

"Foodstuffs or beverages containing a quantity of one or more pesticides, components of pesticides or products deriving from pesticides in excess of the level fixed by a public administrative regulation or by the provisions adopted for implementation thereof shall automatically be regarded as not being of the required quality within the meaning of Article 6 of the Warenwet [Law on Products]."

2. The public administrative regulation referred to in Article 16 of the Bestrijdingsmiddelenwet is the Residubesluit [Residues Decree] of 25 July 1984. That order is in fact merely an enabling measure authorizing the competent Ministers to lay down the appropriate rules by ministerial order. Those rules were laid down in the Residubeschikking [Residues Order] 1965, as last amended by an order of 9 February 1983.

3. Under the Residubeschikking no residue is allowed (*inter alia* on fruit and vegetables) of a pesticide not included in Column I of Annex I thereto, whilst on the other hand a maximum quantity of residues is allowed in accordance with the rules laid down in Column II for the pesticides mentioned in Column I, subject to the provisions applicable to products specifically named in Column III.

As regards vinchlozoline, the level of residues usually allowed under Column II of the Annex is zero: however the following exceptions are laid down in Column III:

Strawberries	10
Chinese gooseberries	10
Other fruit	0
Endives	5
Lettuce	5
Chicory	2
Other vegetables	1
Milk and milk products	0.05
Meat and meat products	0.05

For the category "other fruit", which includes apples, the tolerance of vinchlozoline residues is zero.

4. The procedure by which the maximum permitted quantities of pesticide are laid down in the Residubeschikking is as follows:

(a) By authorizations granted in respect of pesticides fulfilling the conditions laid down in Article 3 of the Bestrijdingsmiddelenwet.

(b) Upon application by a pesticide manufacturer or an importer of foodstuffs or beverages, the granting of which entails an amendment to the Residubeschikking. The Netherlands Government has stated that the reason for which no vinchlozoline residues on or in apples are allowed is that the competent authorities have never received an application from producers or importers inviting them to approve the pesticide in question on those products.

(c) By means of measures adopted to ensure that the Netherlands complies with its international obligations (Community directives and Codex Alimentarius proposals).

III — The applicable Community legislation

The Community rules relating to the fixing of maximum levels for pesticide residues in and on fruit and vegetables are contained in Council Directive No 76/895/EEC of 23 November 1976 (Official Journal, L 340 of 9. 12. 1976, p. 26), which was last amended, as regards Annex II thereof, by Council Directive No 81/36/EEC of 9 February 1981 (Official Journal, L 46 of 19. 2. 1981, p. 33).

The aim of the directive is to eliminate disparities between the legislative provisions of the Member States with regard to the maximum permissible levels of pesticide residues. It is also intended to reconcile the requirements of plant production and the need to protect human and animal health.

The 11th recital in the preamble indicates that the directive represents merely a first stage of the harmonization which must take place in that area. It states that initially maximum levels should be fixed for the residues of certain pesticides. Article 5 makes express provision for extending the scope of the directive by means of amendments to the annexes thereto.

Article 3 of the directive provides that Member States may not prohibit or impede the putting on the market within their territories of the products referred to in Article 1 on the ground that they contain pesticide residues if the quantity

thereof does not exceed the maximum levels laid down in the directive. The Member States may on the other hand, if appropriate, authorize higher levels.

As is apparent from Annex I to the directive, it certainly applies to apples. However, Annex II, which contains the list of pesticide residues and the maximum levels thereof, mentions only a limited number of pesticides, and does not to date include vinchlozoline.

IV — Procedure before the Court

The order making the reference was received at the Court Registry on 25 May 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 25 July 1983 by the Government of the Italian Republic, represented by its Agent Oscar Fiumara, Avvocato dello Stato, on 26 July 1983 by the Commission of the European Communities, represented by Auke Haagsma, a member of its Legal Department, on 22 August by the Government of the Federal Republic of Germany, represented by Martin Seidel and Peter Rohland, acting as Agents, on 26 August 1983 by the Netherlands Government, represented by I. Verkade, Secretary General, Ministry of Foreign Affairs, and, on 27 August 1983, by the respondent in the main proceedings, A. Heijn BV, represented by O. W. Brouwer, Advocate with right of audience before the Arrondissementsrechtbank, Amsterdam.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

V — Written observations submitted to the Court

The first question

The first question for a preliminary ruling asks essentially whether the prohibition on the marketing of apples originating in another Member State, on the ground that there are pesticide residues on the apples for which no provision is contained in the Community rules, is contrary to Article 30 of the EEC Treaty.

The *Commission* proposes an affirmative reply, since the prohibition is applied to trade with the other Member States and thus constitutes a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

The same view is expressed in the observations of *A. Heijn BV* the *Government of the Federal Republic of Germany* and the *Netherlands Government*, although the latter appears to state, in general terms, that its rules are compatible "with Articles 30 to 36 of the Treaty" as being "necessary for the protection of public health". The arguments in that respect are set out in the section in which the answer to be given to the third question is considered.

The second question

In this question the Court making the reference wishes to know how the answer to the first question might be affected by the fact that the product concerned was produced and marketed legally in the Member State of origin.

In that connection, the *Italian Government* states that the use of vinchlozoline for apples is not authorized in Italy. Consequently, it considers that the questions submitted by the Netherlands court are devoid of purpose since they are merely theoretical. The Italian Government has submitted no further observations.

The *Commission* states that this question is manifestly inspired by the *Cassis de Dijon* judgment (judgment of 20. 2. 1979 in Case 120/78 *Rewe* [1979] ECR 649) in which the Court held that certain rules applied by a Member State were to be regarded as constituting a measure having an effect equivalent to quantitative restrictions on imports in the case of the importation of a product lawfully produced and marketed in another Member State.

According to the Commission, the question appears to be asking essentially whether the prohibition contained in Article 13 still applies if the products have not been lawfully produced and marketed in another Member State. Although in general terms the Commission is inclined to think that a Member State is entitled to prohibit, prevent or impede the marketing of a product which has not been lawfully produced and marketed in the Member State from which it comes and does not satisfy the requirements applicable on its own territory, it deals with that problem in connection with the third question.

Likewise relying upon the judgment in *Cassis de Dijon*, cited above, and on the principles formulated by the Commission following that judgment (Official Journal, C 256, 30. 10. 1980, p. 2), Heijn proposes that the second question be answered to the effect that goods produced in accordance with the provisions of the exporting country or in accordance with procedures traditional in that country must in principle be allowed into the territory of every other Member State.

However, it adds that it cannot be admitted *a contrario* that a Member State may as a matter of course stop at its frontier a product not produced in accordance with the provisions of the State of origin. In those circumstances, it is appropriate also to consider the interest in ensuring the free movement of goods and to assess whether the interest upon which the State of destination relies to justify the existence of the barrier to trade is more important than ensuring the free movement of goods.

On the contrary, the *Government of the Federal Republic of Germany* claims that the fact that imported products conform to the rules of the Member State of origin can have no influence on the assessment of the rules of the importing Member State in relation to Article 30 of the Treaty. It considers however that that aspect may be of importance when the national rules of the importing Member State are considered in relation to Article 36 of the Treaty.

In its observations, the *Netherlands Government* does not make particular reference to this question. However, it points out that in its judgment in *Biologische Producten* (judgment of 17. 12. 1981 in Case 272/80 [1981] ECR 3277), the Court acknowledged, in interpreting Articles 30 and 36 of the Treaty, that a Member State is not prohibited from requiring prior authorization of disinfectant products, even if those products have already been

approved in another Member State. It appears that the Netherlands Government proposes that that decision should be applied to the present case.

The third question

The third question, which is divided into two subquestions, is intended essentially to determine (Question 3 (a)) whether the national rules in question may be justified in relation to Article 36 of the Treaty and (Question 3 (b)) whether it is necessary in those circumstances for the fixing of the permissible residue level to be justified in each case on the grounds set out in Article 36 of the Treaty or whether justification therefor may also be found in the fact that the level is fixed within the framework of a general policy intended to prevent as far as possible the presence of residues in foodstuffs and beverages and where there are no major objections from the point of view of public health.

By way of preliminary, the *Commission* makes two observations:

In the first case, in principle the Member States are authorized, in the absence of applicable Community rules, to adopt measures regarding the maximum permissible levels for vinchlozoline residues, but are nevertheless obliged to comply with Articles 30 to 36 of the EEC Treaty.

In the second place, the need to protect public health against the harmful effects of pesticides has already been clearly recognized in the Community by the adoption of Directive No 76/895 by virtue of which, in principle, prohibitions or restrictive measures adopted by Member States may be justified by the concern to protect public health.

Then, with a view to replying specifically to the question whether the contested measures are in fact justified, the Commission considers that it must be ascertained on the one hand whether vinchlozoline as such is to be regarded as a substance which may have harmful effects upon public health and, on the other, whether it is justified for the Netherlands to have fixed at zero the maximum permissible level of vinchlozoline on or in apples in view of the fact that higher levels of residues of the same substance have been authorized for various other fruit and vegetables.

The latter aspect falls within the fourth question submitted by the national court, but the Commission deals with the third and fourth questions together.

The Commission considers that the concern to protect public health justifies the taking of great care with regard to authorizing the use of pesticides, and in particular vinchlozoline, and likewise with regard to the presence of residues of those pesticides on fruit and vegetables.

As regards the appropriate maximum permissible level for pesticide residues, the Commission points out that in the 10th recital in the preamble to Directive No 76/895/EEC the Council has already stated that "the requirements of plant production and the need to protect human and animal health must be reconciled".

In that directive, which was adopted on 23 November 1976, that concern for a balanced approach has in general resulted in the fixing of overall maximum levels for all varieties of fruit and vegetables covered by the directive,

although certain exceptions were provided for. The subsequent amendments to that directive reflect the progress of scientific knowledge regarding pesticides in that, to a greater extent than before, they are intended effectively to fix maximum permissible levels for different products where there are valid reasons for doing so.

Those reasons are, according to the Commission, the dangers for public health to which pesticides give rise and the need to combat parasites and plant diseases. The permissible residue level also depends on the eating habits of the population. The Commission also submits that there is no reason to fix a level in excess of the lowest limit of sensitivity, thereby accepting a certain risk for public health, if the protection of plants does not so require, for example because a particular pesticide is not intended to be used on a particular variety of fruit or vegetables.

The Commission concludes that there may be good reasons for fixing different maximum permissible levels for different varieties of fruit and vegetables, as the Netherlands has done for vinchlozoline. There may even be good reasons for fixing the maximum permissible level as zero if for example it is not known whether vinchlozoline is appropriate for the varieties in question.

However, that means that if it nevertheless subsequently proves to be the case that the pesticide in question is or may be used on varieties of vegetables and fruit for which the maximum permissible level has hitherto been fixed as zero (or the lowest limit of sensitivity) the competent authorities would be obliged to review the question and to ascertain whether the balance between the two above-mentioned requirements has changed and whether therefore it might be appropriate to adjust the maximum permissible level accordingly.

The Commission emphasizes that national authorities must take the initiative to obtain the necessary information on the advance of scientific knowledge and the use of pesticides without leaving it to the individuals concerned to do so. In other words, if Heijn had submitted an application to the Netherlands authorities, they would not have been entitled to refuse to consider the application or to review the situation, or to ask the company for the necessary information. In such a case the Netherlands authorities would have had to adopt an active approach, for example by contacting their Italian counterparts.

However no such application seems to have been submitted in this case and therefore in the Commisssion's view the Netherlands authorities cannot be expected to adjust the maximum permisssible level of vinchlozoline on or in apples.

To summarize, the Commission proposes the following answers to the questions submitted:

"Articles 30 and 36 of the EEC Treaty do not prevent a Member State from prohibiting the importation of apples coming from another Member State on the ground that there is a quantity of vinchlozoline on or in those apples

which exceeds the quantity prescribed by law in the first Member State, even if the apples concerned have been lawfully produced and marketed in the Member State of origin and even if the maximum permissible level of vinchlozoline prescribed in the first Member State differs from the levels prescribed for other foodstuffs or beverages.

The authorities in the importing Member State are nevertheless obliged to review the maximum prescribed level if it seems to them that the reasons on the basis of which it was fixed have changed, for example as a result of the discovery of a new use for a particular pesticide."

Heijn claims in the first place that the toxicity of the vinchlozoline residues found on the apples cannot constitute a ground for preventing their importation.

The toxicity of vinchlozoline is lower than that of Captan, for example, a pesticide which is also used for apples. According to Directive No 76/895, the tolerance for Captan is 15 ppm on apples, and that level is adopted in the Residubeschikking.

Moreover, the apples imported by Heijn contained a maximum residue of 1.0 ppm, which is thus clearly lower than the level allowed in the case of Captan.

In the second place, Heijn maintains that the "expected consumption", which in the Netherlands constitutes a second criterion for assessing the tolerance of a pesticide on food products normally consumed, is likewise not capable, in the case of apples, of constituting a danger to public health and therefore cannot constitute a ground such as to justify a prohibition of importation.

The criterion for assessing the danger to public health which may be presented by a pesticide is the "Acceptable Daily Intake" (ADI), that is to say the quantity of a product which may be absorbed each day by a consumer without danger to his health. That quantity should be based exclusively on the fruit and vegetables consumed since vinchlozoline is used only for fruit and vegetables.

Heijn claims that whilst the actual average consumption of fruit and vegetables amounts in total to some 400 grams per day in the Netherlands it is clear that, in view of the tolerance adopted for other fruit and vegetables, the consumption of Italian apples containing 1.0 ppm of vinchlozoline could never constitute a danger to health. If the tolerance for strawberries is taken as an example (10 ppm of vinchlozoline), it follows that even 400 grams of strawberries per day containing that quantity of vinchlozoline residue could not be damaging to health. Moreover it should not be forgotten that in most cases a consumer peels the apples he eats.

According to Heijn, in view of the foregoing the national rules requiring an importer to apply in those circumstances to the national authorities for an amendment to the rules (in this case the Residubeschikking) are not justifiable, are exorbitant and involve disproportionate burdens.

As regards the application of Article 36 of the Treaty, Heijn maintains that that provision does not provide *a priori* justification for rules adopted by Member States which impede trade, in respect of which one of the grounds mentioned in the first sentence of Article 36 might be invoked. The decisions of the Court have laid down other criteria which must be satisfied for the purpose of justification under Article 36.

In view of those decisions (judgment of 20. 5. 1976 in Case 104/75 *de Peijper* [1976] ECR 613, paragraph 16 of the decision; judgment of 8. 11. 1979 in Case 215/78 *Denkavit* [1979] ECR 3369, paragraph 21 of the decision), the national measure should be necessary for the protection of the interest in question. Thus, the restrictive effect of the national rules on intra-Community trade in goods ought to be reasonable in relation to the objective pursued (principle of proportionality) and is not justified if the same objective may be attained by measures which impede trade to a lesser extent (principle of subsidiarity).

Heijn also cites paragraphs 18 and 22 of the judgment of 14 July 1983 (in Case 174/82 *Sandoz* [1983] ECR 2445), which may be used as a basis for a reply to the third question as follows:

The possibility that national legislative provisions may be justified under Article 36 of the EEC Treaty must be assessed specifically in each instance. In the present case, it should be specifically established that the prohibition applicable to apples is rendered necessary by imperative requirements of protection of the health of humans.

The Netherlands rules, which require prior approval even though it is established that vinchlozoline is already known to the national authorities and that the residues thereof found on the apples in question were particularly sparse, are disproportionate and therefore constitute a measure disproportionate to the objective pursued and a concealed obstacle to trade between Member States. The latter conclusion is confirmed by the judgment of the Court of 17 December 1981 (Case 272/80 *Biologische Producten*, cited above).

The *Netherlands Government* states that the national measures in question are justified on the basis either of Article 36 of the Treaty or by virtue of the criteria indicated in the decisions of the Court (Case 120/78 *Rewe* [1979] ECR 649; Case 113/80 *Commission* v *Ireland* [1981] ECR 1625; Case 6/81 *Industrie Diensten Groep* [1982] ECR 707), since those measures apply indiscriminately to national and imported products. In each case the grounds of justification include the protection of public health and it is of no legal importance which of the categories is applicable in this instance.

The Netherlands Government's assertion, it maintains, is further confirmed by the fact that there are no Community rules in that area and the pesticide in question is harmful.

Moreover, the Netherlands Government maintains that effective protection of public health against the harmful residues of pesticides is possible only by means of an approval system which enables the competent authorities to assess to what extent residues of a pesticide are permissible on a given foodstuff. Consequently, such a system of approvals must necessarily be based on a prohibition to which exceptions may be authorized subsequently.

The Netherlands Government also draws a comparison between the system of approvals permitted by the Community directives concerning colorants and preservatives which may be used in foodstuffs intended for human consumption. Those directives were interpreted by the Court in its judgment of 14 July 1983 (Case 174/82 *Sandoz*

[1983] ECR 2445) in which the Court recognized that the Member States have an extensive power of appraisal regarding additives and declared that national rules prohibiting, subject to prior approval, the marketing of foodstuffs to which vitamins have been added is in principle justified.

All the foregoing considerations apply *a fortiori* to pesticides. Pesticide residues are very harmful and absorption of them by humans should be limited as far as possible. The Netherlands Government consequently considers that the application of a limitative list of harmful substances, together with details of the maximum levels authorized in foodstuffs, is necessary to enable consumers' health to be properly protected.

In the opinion of the Netherlands Government, the central issue is not whether vinchlozoline must be included in the limitative list after examination by the competent authorities but rather it is a question of ensuring that those authorities are able to carry out an examination of that kind at the request of a producer or importer. An examination of that kind is also required for the marketing and utilization of pesticides and the Court recognized in Case 272/80 (cited above) that a Member State is not precluded from requiring prior approval for disinfectants, even if such products have already been approved in another Member State.

Finally, the Netherlands Government is of the opinion that the system of approvals which it applies with regard to pesticide residues present in foodstuffs is not unfair in its effects and does not give rise to improper barriers to trade. In fact, the system of approvals makes it possible to react flexibly and effectively to the needs which come to light in practice. The only practical condition to be met is that the producer or importer should make known his requirements to the competent authorities.

On the basis of the foregoing, the Netherlands Government considers that the system of approvals which it applies to pesticides and pesticide residues found on foodstuffs is necessary for the protection of public health and is not, therefore, incompatible with the Community rules on the free movement of goods, in particular Articles 30 to 36 of the EEC Treaty.

The *Government of the Federal Republic of Germany* maintains that for so long as the legal provisions relating to maximum levels of pesticide residues in and on foodstuffs are not harmonized, it is for the Member States to take the measures necessary for protection of the health of their nationals.

Since the maximum levels authorized in the various Member States depend on the habits of the consumer and the actual amounts to which the consumer is exposed in his own country, divergences in national rules are often inevitable. In fact, in the opinion of that government, the difficulties associated with the fixing of maximum levels for residues in foodstuffs within the framework of harmonization of legislation do not derive from a divergent toxological assessment. Rather, irrespective of any toxological assessment of the pesticide in question, they arise for the following reasons:

the pesticide is used in the various Member States in different quantities or in connection with the production of different foodstuffs;

the foodstuffs concerned therefore have a different content of pesticide residues;

the quantity of such foodstuffs which is consumed may vary from one Member State to another;

the total quantity of the pesticide which the consumer absorbs with the food may, for those reasons, display very significant differences as between the various Member States.

Those differences, which exist even where there is complete agreement regarding the assessment of the pesticide in question from the health point of view, may entail the consequence that a Member State is obliged to fix the permissible level of residues for one or more foodstuffs at a level lower than that fixed in other Member States. That lower level must make it possible to ensure that the consumer in a particular country does not absorb more than the total quantity of pesticide residues which is permissible from the health point of view when he consumes foodstuffs which are available in his country in the quantities customary there. That is why the various rules regarding maximum levels adopted by the Member States do not, in the opinion of the Federal German Government, constitute arbitrary measures.

This problem exists also with respect to pesticides covered by Directive No 76/895/EEC. For that reason the directive takes account of the different situations obtaining in the various Member States.

For those reasons, the rules regarding maximum levels adopted by the country of origin for a given foodstuff cannot serve as a reference criterion for assessment of the need and justification for the legislation of an importing country which takes a different view.

Moreover, the Government of the Federal Republic of Germany is of the opinion that the prohibition of residues of a given pesticide in apples does not require to be justified for reasons of public health in each individual case. What is important for an assessment from the health point of view is the total quantity of the pesticide residues concerned which is absorbed by the consumer at the same time as his food, that is to say with all the foodstuffs consumed by him.

The fourth question

In the fourth question, the court making the reference asks essentially whether the fact that vinchlozoline, although prohibited for apples, is authorized for other foodstuffs and beverages is significant with regard to the reply to be given to the third question.

Since the *Commission* answered the two questions at the same time, reference should be made to its observations which are summarized above in connection with the third question.

Heijn refers in its reply to the third question and considers that the position of the Netherlands authorities, whereby they cannot as a matter of course adopt the foreign levels regarding residues, takes no account of the circumstances of this case.

According to Heijn it is not sought that a particular level for residues should be allowed as a matter of course, even though there is no obstacle thereto since the Italian legislation adopts a tolerance of 1.5 ppm for fruit and vegetables and the Netherlands legislation allows a

residue of 5 ppm of vinchlozoline on lettuce and endives for example, products which are not imported or at least are imported only in negligible quantities.

What is sought, states Heijn, is the right freely to import a product desired by the Netherlands consumer, without irrelevant obstacles being placed in the way of such importation.

The observations of the *Netherlands Government* on this question have already been given in connection with the third question. The Netherlands Government considers that the system of approvals which it applies for pesticides and pesticide residues on foodstuffs is necessary for the protection of public health and consequently is not incompatible with the Community rules relating to the free movement of goods.

The *Government of the Federal Republic of Germany* is of the opinion that, for the reply to the third question, it is immaterial whether the national legal provisions of the importing country prohibit the presence of residues of a given pesticide in certain foodstuffs but authorize a limited presence of similar residues in other foodstuffs, even if the quantities concerned are greater.

VI — Oral procedure

The defendant in the main proceedings, A. Heijn, represented by O. W. Brouwer, of the Amsterdam Bar, the Netherlands Government, represented by D. J. Keur, acting as Agent, the Italian Government, represented by O. Fiumara, Avvocato dello Stato, acting as Agent, and the Commission, represented by A. Haagsma, a member of its Legal Department, presented oral argument at the sitting on 3 April 1984.

The Advocate General delivered his opinion at the sitting on 7 June 1984.

Decision

1 By a judgment of 25 April 1983, which was received at the Court Registry on 25 May 1983, the Economische Politierechter [magistrate dealing with commercial offences] at the Arrondissementsrechtbank [District Court], Haarlem, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 30 and 36 of the EEC Treaty concerning the free movement of goods within the Community.

2 Those questions were raised in the context of criminal proceedings brought against Albert Heijn BV, of Zaandam, for having in stock for sale, or at any rate for supply to others, a quantity of apples intended for human consumption which constituted a potential danger to health by virtue of the presence of 1.0 milligram of the pesticide known as vinchlozoline per kilogram of apples.

3 Article 16 of the Netherlands Law on Pesticides [Bestrijdingsmiddelenwet] 1962 provides that "foodstuffs or beverages containing a quantity of one or more pesticides ... in excess of the level fixed by a public administrative regulation or by the provisions adopted for implementation thereof" are to be regarded as not being of the required quality to enable them to be marketed.

4 In particular, the Residubeschikking [Residues Order] 1965, adopted in implementation of the Residubesluit [Residues Decree] 1964, by virtue of the enabling power contained in the Law on Pesticides 1962, lays down the maximum permissible pesticide residues for foodstuffs and beverages.

5 With regard to vinchlozoline, the level of residues generally allowed under the Order in question is zero. Exceptionally, a precisely defined level of residues is tolerated in the case of certain fruits and vegetables designated by name, but apples are not among them.

6 Before the national court, Albert Heijn BV contended that the apples found in its stock with residues of vinchlozoline had come from Italy, where they had been legally placed on the market, and that consequently the prohibition on their being marketed in the Netherlands was contrary to the provisions of the EEC Treaty on the free movement of goods.

7 Considering that its decision depended on whether or not the aforementioned Netherlands rules were compatible with Articles 30 and 36 of the EEC Treaty and that an interpretation of those provisions was therefore necessary before he could give judgment, the Economische Politierechter stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

"1. Does a prohibition on the marketing in one Member State of apples imported from another Member State on the ground that those apples contain, contrary to the applicable national legislative provisions under which it is prohibited to market food and drink containing residues of pesticides unless the quantity of those residues is below a maximum limit fixed per product and per pesticide, residues of a pesticide not mentioned in Annex II to Council Directive No 76/895/EEC of 23 November 1976 constitute a measure having an effect equivalent to a

quantitative restriction on imports which is prohibited under Article 30 of the EEC Treaty?

2. To what extent does the answer to the first question depend on the answer to the question whether the apples referred to therein were produced and marketed in the Member State from which they originated in accordance with the legislation applying there?

3. (a) If the first question must be answered in the affirmative can the national legislative provisions referred to therein be regarded as a necessary means of protecting public health as contemplated by Article 36 of the EEC Treaty?

(b) In order to answer Question 3 (a) must it be established that the prohibition specifically applying to the use of a particular pesticide on apples is justified as a necessary means of protecting public health or may that prohibition also be regarded as justified if it is adopted pursuant to a general policy which is designed to reduce as far as possible the presence of residues of pesticides in food and drink and under which tolerance limits are fixed for residues only where a particular pesticide is required for a particular product and from the point of view of public health — taking into account national dietary habits — there are no serious objections to adopting such limits?

4. (a) Is it relevant to Question 3 (a) and (b) that the national legislation of the importing country does not permit residues of a particular pesticide on or in particular kinds of food and drink but fixes a maximum permissible residual quantity of the same pesticide for other kinds of food and drink?

(b) Or, more specifically, is it relevant that in the Netherlands a residue of vinchlozoline is not permitted on apples but is permitted on other agricultural and market-garden produce and that the maximum residual quantity of vinchlozoline permitted in the case of some of those products is even higher than the quantity found on the lot of apples in question?"

8 In raising those questions, the national court seeks essentially to ascertain whether, in the light of Articles 30 and 36 of the Treaty, legislation in a Member State which prohibits the marketing of apples coming from another Member State on the ground that the quantity of vinchlozoline on or in those apples exceeds the maximum level permitted by the law of the first Member State can be justified as being necessary for the protection of public health.

9 Before replying to the questions raised, it should be noted, as the order for reference correctly states, that the use of the pesticide in question is not regulated by Council Directive No 76/895 of 23 November 1976 relating to the fixing of maximum levels of pesticide residues in and on fruit and vegetables (Official Journal 1976, L 340, p. 26).

10 With regard to those questions, the German and Netherlands Governments contend that the prohibition in question is justified in the interests of the protection of public health, because pesticides are very dangerous substances *per se*, and that it is not necessary, before taking protective measures, to establish whether vinchlozoline on apples is dangerous.

11 Albert Heijn, BV contends that such a prohibition is disproportionate in relation to the objective of protecting public health, since the pesticide in question is known to the national authorities and is tolerated on certain fruits and vegetables.

12 In the Commission's view, it is necessary to reconcile the requirements of fruit and vegetable growing with the need to protect human and animal health, whilst taking account of the progress of scientific knowledge regarding pesticides and of the dietary habits of the population. It is for the national court to consider, in the present case, the reasons for the prohibition of vinchlozoline on or in apples.

13 It is not disputed that pesticides constitute a major risk to human and animal health and to the environment; this has moreover been recognized at Community level, in particular in the fifth recital in the preamble to the aforementioned Council Directive No 76/895, which states that "pesticides do not have only a favourable effect on plant production, since they are generally toxic substances or preparations with dangerous side effects".

14 Since vinchlozoline is not covered by that directive, Member States are in principle authorized to make regulations regarding the maximum permissible level of residues of that pesticide, bearing in mind however that the scope of that authorization is limited by the Treaty, and in particular, by the last sentence of Article 36.

15 When making such regulations, Member States must take account of the fact that pesticides are substances which are both necessary to agriculture and dangerous to human and animal health. The fact that the quantities absorbed by the consumer, in particular in the form of residues on foodstuffs, can neither be predicted nor controlled justifies strict measures intended to reduce the risks faced by the consumer.

16 In so far as the relevant Community rules do not cover certain pesticides, Member States may regulate the presence of residues of those pesticides on foodstuffs in a way which may vary from one country to another according to the climatic conditions, the normal diet of the population and their state of health. In that context, they may permit different levels of the same pesticide in respect of different foodstuffs.

17 National rules of that nature may thus form part of a general policy designed to prevent the presence of pesticide residues on foodstuffs.

18 The authorities of the importing Member State are however obliged to review the prescribed maximum level if it appears to them that the reasons which led to its being fixed have changed, for example, as a result of the discovery of a new use for such and such a pesticide.

19 The reply to the questions raised by the national court must therefore be that Articles 30 and 36 of the EEC Treaty do not prevent a Member State from prohibiting the importation of apples from another Member State on account of the presence in or on those apples of a quantity of vinchlozoline greater than that authorized by the legislation of the first Member State, even though the maximum permitted vinchlozoline content laid down in that Member State differs from that laid down for other kinds of food and drink.

Costs

20 The costs incurred by the Italian, German and Netherlands Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Economische Politierechter at the Arrondissementsrechtbank, Haarlem, by a decision of 25 April 1983, hereby rules:

Articles 30 and 36 of the EEC Treaty do not prevent a Member State from prohibiting the importation of apples from another Member State on account of the presence in or on those apples of a quantity of vinchlozoline greater than that authorized by the legislation of the first Member State, even though the maximum permitted vinchlozoline content laid down in that Member State differs from that laid down for other kinds of food and drink.

Mackenzie Stuart Koopmans Bahlmann

Galmot O'Keeffe Everling Kakouris

Delivered in open court in Luxembourg on 19 September 1984.

For the Registrar

D. Louterman
Administrator

A. J. Mackenzie Stuart
President