OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 18 May 1994 *

Mr President,
Members of the Court,

1. In this action for a declaration that a Member State has failed to fulfil its obligations the Commission is asking the Court to declare that by adopting rules which prohibit the importation for commercial purposes of live European freshwater crayfish which originate from another Member State or a non-member country but which have already been imported into the Community (hereinafter referred to as 'the rules'), Germany has failed to fulfil its obligations under Articles 30 and 36 of the EC Treaty.

The national legislation in question

2. By the first regulation amending the Bundesartenschutzverordnung (Federal Regulation on the Protection of Species, hereinafter referred to as 'the BArtSchV'), [1] that regulation having been adopted on 24 July 1989 and having entered into force on 1 August 1989, Germany made the importation of all species of live crayfish subject to the issue of an import licence by the competent German authorities pursuant to Paragraph 21(b) of the Bundesnaturschutzgesetz (hereinafter referred to as 'the BNatSchG'). [2] According to that provision, an import licence can only be issued for research or teaching purposes. On the other hand, the importation of live crayfish for commercial purposes, in particular for consumption or for release into private waters, is in principle prohibited, subject to Paragraph 31(1) of the BNatSchG, according to which the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry, hereinafter referred to as 'the Bundesamt') may on application grant a derogation from that prohibition if application of the relevant provision 'could lead to unintended hardship'.

3. According to the Commission's written submissions, the background to the case is as

* Original language: Dutch.

1 — *Bundesgesetzblatt* (*BGBl*) I 1989, p. 1525. The full title of the Bundesartenschutzverordnung is 'Verordnung zum Schutz wildlebender Tier- und Pflanzarten' ('Regulation on the Protection of Wild Animal and Plant Species'; for the relevant version, see *BGBl* I 1989, p. 1677.

2 — The full title of this Law is 'Gesetz über Naturschutz und Landschaftspflege' (Law on the Protection of Nature and the Countryside); see the version published in *BGBl* I 1987, p. 889.

follows. In Germany, as in other central European countries, because of water pollution and, above all, crayfish plague, or aphanomycosis — which is mainly due to the importation of infected crayfish from North America — there are hardly any natural stretches of water in which wild crayfish are to be found. Under the BArtSchV native species were therefore treated as specially protected or endangered species. Since stocks of native species (Edelkrebs, Steinkrebs and Dohlenkrebs) were not sufficient to cover its needs, Germany had for years imported some tens of thousands of kilograms of live freshwater crayfish every year.

4. Through the entry into force of the new rules in August 1989 the eight to ten German firms specializing in the importation of live crayfish suffered considerable damage and their turnover fell to the point that their very existence was endangered. These undertakings therefore brought an action before the German courts with the result that the Bundesamt temporarily applied to them the exemption provided for in Paragraph 31 of the BNatSchG. This allowed the undertakings concerned to obtain until the present time licences to import crayfish which are valid for only six months at a time and which must indicate the precise quantity imported, the country of origin and the name of the species concerned. To those licences are attached conditions to ensure, in particular, that the imported crayfish are sold only to the final purchaser and not to wholesalers and retailers. Furthermore, final purchasers are required to take all adequate measures of precaution and disinfection, so as to prevent imported crayfish from being released into the wild and to ensure that the water used to keep the crayfish is disinfected before being disposed of. A licence may be revoked if those conditions are not observed.

Incompatibility of the rules with Article 30 of the EC Treaty

5. The Commission submits that the rules are incompatible with Articles 30 and 36 of the EC Treaty, which are the foundation of the common organization of the market in fishery products established by Regulation (EEC) No 3796/81, [3] in so far as it relates to *European species of crayfish* which originate from Member States or are imported from non-member countries and are in free circulation. In the Commission's view, the restriction on the importation of live crayfish introduced by the German rules is a directly discriminatory measure having equivalent effect, which is prohibited by Article 30 of the EC Treaty. Furthermore, according to the Commission, the rules are not justified under Article 36 of the EC Treaty owing to their disproportionate character and they amount to a disguised restriction of trade.

3 — Council Regulation (EEC) No 3796/81 of 29 December 1981 on the common organization of the market in fishery products (OJ 1981 L 379, p. 1).

The German Government submits in reply that (i) in view of the derogations granted by the authorities, the Commission has wrongly analysed the effects of the rules, (ii) the rules are in any event justified until the end of 1992 in accordance with Article 36 of the EC Treaty and are proportionate, and (iii) they do not form a disguised restriction of trade.

6. There can be no doubt that in principle the rules fall foul of the prohibition laid down in Article 30 of the EC Treaty. According to settled case-law, that prohibition — which, whilst not expressly incorporated in Regulation No 3796/81, is nevertheless applicable to fishery products [4] — extends to 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. [5] Moreover, the prohibition laid down in Article 30 of the EC Treaty applies without distinction to products originating in the Community and to those which were put into free circulation in any one of the Member States, irrespective of the actual origin of those products. [6]

However, it is clear — and the German Government does not contradict this — that the rules amount to a direct, actual restriction of the importation into Germany of crayfish from other Member States and of crayfish originating from non-member countries and in free circulation, which directly discriminates against those products. This is all the more so since, except where crayfish are imported for research or teaching purposes, the ban in question is an *absolute ban on importation* for commercial purposes of live crayfish, whether for consumption or for release into private waters.

7. It makes no difference that, as the German Government explains, from January 1989 to June 1993 significant derogations from the ban, amounting in total to 961 400 kilograms, were allowed, which the undertakings concerned have not used to the full. Even if as a result of such a practice of granting exemptions importation is not entirely impossible and the market-screening effect is reduced, the case-law of the Court is still wholly applicable:

'Article 30 precludes the application to intra-Community trade of national provisions which require, even as a pure formality, import licences or any other similar procedure.

4 — See the judgment in Joined Cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279, paragraphs 53 and 54, confirmed by the judgment in Case C-228/91 *Commission* v *Italy* [1993] ECR I-2701, paragraph 11.

5 — Judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

6 — See, *inter alia*, the judgment in Case 41/76 *Donckerwolcke* [1976] ECR 1921, paragraph 18, and the judgment in Case C-128/89 *Commission* v *Italy* [1990] ECR I-3239, paragraph 12.

The Court has consistently held ... that provisions caught by the prohibition laid down in Article 30 of the EEC Treaty do not escape that prohibition simply because the competent authority enjoys a discretionary power in the application of those provisions. Freedom of movement is a right whose enjoyment may not be dependent upon a discretionary power or on a concession granted by the national authorities.' [7]

The fact that the number of licences issued increased between 1989 and 1993 and that the importing undertakings did not use them to the full is not, in my view, a tenable argument, especially since the Bundesamt's practice regarding the issue of licences is contrary to the prohibition of imports laid down in the statutory rules and may therefore be altered at any time pursuant to those rules. This seems hardly compatible with the consistent case-law of the Court, according to which:

'... the principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed.' [8]

Are the rules justified on one of the grounds mentioned in Article 36?

8. The question to be examined is, accordingly, whether the rules may nevertheless be regarded as permissible under Article 36 of the EC Treaty, according to which Article 30 does not preclude prohibitions or restrictions on imports justified on the grounds of, *inter alia*, 'the protection of health and life of ... animals ...'.

It is established that at the time when the Commission's reasoned opinion was issued on 19 December 1990 the Community had still not adopted any measures to deal with the problem of intra-Community trade in

7 — Judgment in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraphs 9 and 10.

8 — Judgment in Case 257/86 *Commission* v *Italy* [1988] ECR 3249, paragraph 12; see also the judgment in Case C-307/89 *Commission* v *France* [1991] ECR I-2903, paragraph 13, in which the Court held that 'the maintenance of national legislation which is in itself incompatible with Community law, even if the Member State concerned acts in accordance with Community law, gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law. This uncertainty can only be reinforced by the internal character of the purely administrative directions to waive the application of the national law.'

freshwater crayfish which might carry crayfish plague. It was not until 28 January 1991 that the Council adopted Directive 91/67/EEC. [9] That directive introduced a general system of animal health conditions for the breeding, transport and placing on the market of aquaculture animals and products which applies to both deliveries from the Member States and imports from non-member countries. The German Government has accepted that, since 1 January 1993, the date by which Directive 91/67 had to be transposed (see Article 29(1)), the rules no longer have any *raison d'être* as regards the risk of epizootic disease. [10]

Since the Community still had no common or harmonized rules at the relevant time, it was, according to consistent case-law, for the Member States,

'... to decide on the level of protection which they wish to accord to the protection of the health and life of humans [in this case, animals], whilst taking account of the requirement of the free movement of goods within the Community.' [11]

9. The German Government claims that the aim of the rules is to protect native crayfish in Germany from crayfish disease. Since European species may also carry this disease, an import ban limited to non-European species would not, in its view, exclude the risk of transmission of the disease. It also maintains that the purpose of the rules is to restrict the spreading of non-indigenous crayfish in natural German waters in order to protect the genetic identity of local crayfish stocks from faunal distortion arising from the presence of the same species but originating from other areas.

The Commission does not deny the risk of crayfish plague and accepts that protection

9 — Council Directive 91/67/EEC of 28 January 1991 concerning the animal health conditions governing the placing on the market of aquaculture animals and products (OJ 1991 L 46, p. 1).

10 — In its rejoinder the German Government explains that the procedure to amend the Bundesartenschutzverordnung has been commenced. Attached to its rejoinder is a draft second regulation to amend the Bundesartenschutzverordnung.

11 — Judgment in Case C-228/91, cited in footnote 4, paragraph 16 (words added by me); see also the judgment in Case C-205/89 *Commission* v *Greece* [1991] ECR I-1361, paragraph 8; and the judgment in Case 178/84 *Commission* v *Germany* [1987] ECR 1227, paragraph 41. For an application of this case-law to national measures for the protection of the health and life of animals, see the judgment in Case 40/82 *Commission* v *United Kingdom* [1982] ECR 2793, paragraphs 33 and 34.

of native fauna is a legitimate aim. However, crayfish plague is present throughout Europe, including the Federal Republic of Germany. In its view, an absolute import ban cannot be justified on one of the grounds specified in Article 36 of the EC Treaty since the measure goes further than the protection of native fauna requires.

10. Putting aside the complaint that there is a disguised restriction of trade (see point 16 below), I assume that the Commission, too, considers that the rules were introduced for the purpose of protecting the health and life of animals, which is a justified aim under Article 36. Consequently, the rest of my analysis will focus on the *question of proportionality*. The Court has consistently held that it is not sufficient for a Member State to rely on an aim justified under Article 36 of the EC Treaty: it must also be examined whether

'the machinery employed in the present case ... constitutes a measure which is disproportionate in relation to the objective pursued, on the ground that the same result may be achieved by means of less restrictive measures, or whether ... such a system is necessary and hence justified under Article 36'. [12]

If a national rule goes further than is appropriate and necessary for achieving the aim in view, the Court will hold it to be incompatible with the Treaty. [13]

11. Let me briefly summarize the arguments of the parties. According to the Commission, in order to achieve the aims pleaded, Germany could have merely placed a ban on imports of non-European species of crayfish, such as *procambarus clarkii* from North America. Therefore, the action is directed only against the ban on the importation of European species of crayfish. [14] In the case of these species, the Commission considers that an absolute import ban goes too far. As an example of a country with acceptable rules it mentions France, which is in a similar situation regarding the protection of native freshwater crayfish but prohibits only imports of crayfish from non-member countries. [15]

12 — Judgment in Case 124/81, cited in footnote 7, paragraph 16.

13 — See the judgment in Case C-128/89, cited in footnote 6, paragraph 18, and the judgment in Case C-228/91, cited in footnote 4, paragraph 18.

14 — The Commission makes it quite clear that it has no objection to national protective measures which concern the importation of non-European crayfish, which often carry crayfish plague but are resistant to it.

15 — Referring to Article 413-1° of the Code Rural and Decree No 85-1189 of 8 November 1985, the Commission mentions in particular *procambarus clarkii*, *pacifastacus leniusculus* and *orconectes limosus*. It also points out that, for the purpose of determining which live crayfish may be imported, the French Ministry of Agriculture has laid down the essential characteristics and distinguishing criteria in a circular of 30 November 1988.

The Commission also points out that in fighting crayfish plague Member States are obliged to set up research programmes instead of imposing a general ban on imports.

Finally, according to the Commission, Germany could have confined itself to regulating internal trade in crayfish by subjecting to the issue of a licence the release into certain inland waters of species which might carry crayfish plague or by prohibiting their release in areas in which native species live. The conditions to which import permits issued to German importers are now subject (see above, point 3) show that it is possible to apply less restrictive provisions to intra-Community trade for the purpose of protecting German crayfish stocks.

12. The German Government points out that even European species of crayfish may carry crayfish plague and that the importation of European species could also lead to faunal distortion. It also claims that the conditions for the application of Article 15 of Council Regulation (EEC) No 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora were fulfilled. [16]

13. Let us consider the last point first. It is true that Article 15*(3)* of Regulation No 3626/82 allows Member States, for the purpose of protecting the life and health of animals and plants, to take 'measures similar to those provided for in the regulation' in respect of species not covered by the regulation — such as the freshwater crayfish concerned here. However, as the Commission rightly points out, Article 15*(1)* of the regulation must be observed in this regard. That provision allows Member States, in particular for the purpose of conserving native species, to maintain or take stricter measures than those provided for by the regulation, on condition, however, that 'they comply with the Treaty, and in particular Article 36 thereof'. [17] In other words, even where a Member State relies on this regulation when taking more far-reaching measures to protect its native species, the requirement attaching to Article 36 that such measures should be proportionate applies in full.

14. However, when considering the question of proportionality here, I conclude that the

16 — OJ 1982 L 384, p. 1, as last amended by Commission Regulation (EEC) No 1534/93 of 22 June 1993 (OJ 1993 L 151, p. 22).

17 — See also the ninth recital of the preamble to Regulation No 3626/82.

rules are not in proportion to the aim in view. As regards the prevention of the spreading of *crayfish plague*, the German Government, in imposing an absolute import ban, is using a very heavy weapon indeed. The adoption of rules like the French rules mentioned by the Commission or the laying down of conditions governing the handling of, and trade in, live freshwater crayfish on national territory for the purpose of preventing the spreading of crayfish plague in Germany seem to me to be an appropriate, non-discriminatory alternative which is much less restrictive of intra-Community trade. Proof of this is to be found in the current administrative practice in Germany, which is confined to prohibiting the release of crayfish into the wild and the re-stocking of private waters and to imposing a duty to take precautions when disposing of water in which crayfish have been kept.

15. Nor does the policy aim of preventing *faunal distortion* seem to me to justify a total import ban. Paradoxically enough, in its defence submissions the German Government indicates a less restrictive alternative by citing, as justification for the rules in question, the second subparagraph of Paragraph 20(d) of the BNatSchG:

'Animals and plants of non-regional origin ("gebietsfremde") may be released into the wild or grown in the wild only with authorization from the authority having competence under the laws of the Land. This rule does not apply to the growing of plants for agricultural or forestry purposes. Authorization shall be refused if the risk of distortion of native flora or fauna or a threat to the existence or propagation of native species of plants and animals or populations of such species cannot be excluded.'

Since, as the German Government points out, the expression 'of non-regional origin' ('gebietsfremd') covers all species which do not naturally occur in the area concerned, it includes, in the case of freshwater crayfish, not only foreign crayfish but also all native crayfish which do not belong to that area. A provision of the kind mentioned above seems to me to be at least as effective as, if not more effective than, a total ban on imports of live freshwater crayfish for the purpose of protecting native fauna. Furthermore, the provision offers a non-discriminatory alternative which is less restrictive of intra-Community trade since a licensing system is imposed only for the *release of freshwater crayfish into the wild* and does not interfere with the importation and marketing of them.

Is there a disguised restriction of trade?

16. At the pre-litigation stage the Commission had the impression that the German rules had not been adopted for the purpose of protecting native species of crayfish but for economic reasons, namely to protect German breeders of these species against imports from other countries and that they therefore amounted to a disguised restriction of trade within the meaning of the second sentence of Article 36 of the EC Treaty. After the German Government had clarified this issue, the Commission stated that it was prepared to withdraw this complaint. However, it did require the German Government to explain one point which it had not included in its application, namely the existence of trade in so-called American freshwater crayfish (Kamberkrebse) originating from the new Länder.

In its defence submissions the German Government explained that only small quantities of the aforementioned crayfish had been traded in since the reunification of Germany and that this trade was not taken into account when the regulation in question was adopted in 1989 so that it could not have had the intention of protecting trade in this species against imports.

Despite that explanation the Commission has maintained its complaint of a disguised restriction of trade. It bases its view on an analysis of the applicable German provisions, which, in its view, shows that the ban on keeping and marketing freshwater crayfish applies only to wild crayfish and then only to the Edelkrebs and Steinkrebs species. According to its analysis, all the other species of crayfish, including bred crayfish, are freely marketed in Germany whilst their importation for commercial purposes is prohibited.

17. These last findings — which the German Government did not challenge in its rejoinder [18] — again illustrate the disproportionate character of the German rules. However, in my view, they do not show that the rules constitute a disguised restriction of trade between Member States, within the meaning of the second sentence of Article 36 of the EC Treaty. As the Court has repeatedly held, the aim of that provision is to

'prevent restrictions on trade based on the grounds mentioned in the first sentence of Article 36 from being diverted from their

18 — The German Government admits that at the federal level the two other native species of crayfish, namely Dohlenkrebs and the American crayfish, are not subject to protective measures. The explanation it gives is that the first of those two species is not marketed commercially and is not therefore threatened whilst the second was not a native species in the old Länder.

proper purpose and used in such a way as either to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products'. [19]

It has not been sufficiently demonstrated, however, that the German rules actually represent an *improper use* of the grounds of justification set out in Article 36 and that they only serve protectionist purposes. The Commission's concerns relate only to American crayfish originating from the new Länder. Since the rules in question were adopted on 24 July 1989, when there was still no question of German reunification, it is inconceivable that they were adopted in order to protect that production category.

Conclusion

18. In view of the foregoing observations I propose that the Court should grant the Commission's application and order the Federal Republic of Germany to pay the costs.

19 — Judgment in Case 34/79 *Regina* v *Henn and Darby* [1979] ECR 3795, paragraph 21; judgment in Case 40/82, cited in footnote 11 above, paragraph 36; and judgment in Case C-317/91 *Deutsche Renault* [1993] ECR I-6227, paragraph 19.