JUDGMENT OF THE COURT (Sixth Chamber)
13 July 1994 *

In Case C-131/93,

Commission of the European Communities, represented by J. L. Iglesias Buhigues, Legal Adviser, and A. Bardenhewer, of its Legal Service, both acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, Bonn, acting as Agent,

defendant,

APPLICATION for a declaration that by prohibiting imports of live European freshwater crayfish from Member States or from non-member countries in free circulation in other Member States, in so far as they are not for the purpose of research and teaching, the Federal Republic of Germany has failed to fulfil its obligations under Articles 30 and 36 of the EEC Treaty,

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, C. N. Kakouris, F. A. Schockweiler (Rapporteur), P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: W. Van Gerven,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 May 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 31 May 1993, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by prohibiting imports of live European freshwater crayfish from Member States or from non-member countries in free circulation in other Member States, in so far as they are not for the purpose of research and teaching, the Federal Republic of Germany had failed to fulfil its obligations under Articles 30 and 36 of the EEC Treaty.

2 By the first regulation amending the Bundesartenschutzverordnung (Federal Regulation on the Protection of Species, hereinafter 'the BArtSchV', BGBl I 1989, p. 1525), which it adopted on 24 July 1989 and which entered into force on

1 August 1989, the Federal Republic of Germany made the importation of all species of live crayfish subject to the grant of a licence issued in accordance with Paragraph 21b of the Bundesnaturschutzgesetz (Law on the Protection of Nature, hereinafter 'the BNatSchG', in the version published in the BGBl I 1987, p. 889). Under that provision, a licence may be granted only for the purposes of research or teaching. The importation of live crayfish for commercial purposes, in particular for restocking private pools or for consumption is in principle prohibited, subject to the provisions of the first subparagraph of Paragraph 31 of the BNatSchG, according to which the Bundesamt für Ernährung und Forstwirtschaft (Office for Food and Foresty, hereinafter 'the Bundesamt') may, on application, derogate from that prohibition where application of the provision 'would, contrary to the legislature's intention, lead to excessive hardship'.

3 It appears from the Commission's application that, as a result of water pollution and, above all, crayfish plague (aphanomycosis), the spreading of which is essentially attributable to the importation of infected crayfish from North America, there are practically no natural stretches of water containing crayfish in the Federal Republic of Germany, or indeed in other European countries. For that reason the BArtSchV treats native crayfish as species subject to particular protection, or as threatened with extinction. Since native crayfish are not sufficient to cover its needs, the Federal Republic of Germany has for years imported many tonnes of live freshwater crayfish each year.

4 The entry into force of the abovementioned rules was alleged to have harmed the activities of a number of German undertakings specializing in the importation of live crayfish whose turnover dropped so much that their existence was allegedly threatened. Those traders therefore brought actions before national courts as a result of which the Bundesamt applied to the importers, on a transitional basis, the derogation provided for in Paragraph 31 of the BNatSchG, allowing them to obtain until the present time licences to import crayfish which are valid for 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 ensuring, in particular, that the imported crayfish are sold only to the final purchaser (to the exclusion of wholesalers and retailers) who must be required to take all adequate measures of precaution and disinfection, so as to prevent imported crayfish from being released into the wild and 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.

5 In support of its application, the Commission submits in substance that the German rules in question were incompatible with Articles 30 and 36 of the Treaty on the grounds that they impeded imports of live freshwater crayfish originating from other Member States or in free circulation there and that the rules went beyond what was needed for the effective protection of native species of crayfish against disease and the risks of faunal distortion.

6 The German Government contends, however, that since significant derogations from the prohibition in question had been granted to importers, the rules in question had not had the effect of stopping all imports of crayfish or of screening off the German market. In any event, the rules were justified until the end of 1992 under Article 36 of the Treaty since the measure in question was indispensable for providing effective and lasting protection against disease for crayfish stocks in the Federal Republic and for preserving their genetic identity. However, the Federal Government recognized that, since 1 January 1993, the date by which 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) had to be transposed, the prohibition of importation of crayfish was no longer justified for the purpose of preventing epizootic disease. Consequently, the procedure for amending the BArtSchV was initiated and, pending its completion, instructions were given to the competent authority to exempt the traders concerned upon request from the obligation to have a licence to import live crayfish into the Federal Republic.

7 In assessing whether the Commission's complaint is well founded, it should be noted first of all that Articles 30 and 36 of the Treaty form an integral part of the common organization of the market in fishery products established by Council Regulation (EEC) No 3796/81 of 29 December 1981 (OJ 1981 L 379, p. 1).

8 Although the provisions of that regulation do not expressly lay down a prohibition of quantitative restrictions on imports and of measures having equivalent effect on intra-Community trade, it is clear from the combined provisions of Articles 38 to 46 and Article 8(7) of the Treaty that, once the transition period expired, that prohibition arose automatically from the provisions of the Treaty, as, moreover, the 30th recital of the preamble to Regulation No 3796/81 emphasizes (see, to this effect, the judgment in Case C-228/91 *Commission* v *Italy* [1993] ECR I-2701, paragraph 11).

9 It must be found, next, that the German measure in question has the effect of impeding intra-Community trade in that it prohibits imports for commercial purposes of live freshwater crayfish from another Member State or from a non-member country in free circulation in the Community.

10 Consequently, in accordance with the settled case-law of the Court of Justice, those rules are caught by the prohibition laid down in Article 30 of the Treaty which is applicable without distinction to products originating in the Community and to those which have been put into free circulation in any one of the Member States, irrespective of the actual origin of those products (see the judgment in Case 41/76 *Donckerwolcke* [1976] ECR 1921, paragraph 18).

11 That conclusion is not affected at all by the fact that, as the Federal Government points out, the competent national authorities have made great use of the possibility of granting a derogation provided for by the German rules, having granted, between January 1989 and June 1993, import licences relating to a total quantity

of 961 400 kg of crayfish, which the importers concerned have not in fact used to the full.

12 As the Court has already held (see, for example, the judgment in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraphs 9 and 10), Article 30 of the Treaty precludes the application to intra-Community trade of national legislation which maintains a requirement, even as a pure formality, for import licences or any other similar procedure, and a measure adopted by a Member State does not escape that prohibition simply because the competent authority enjoys a discretionary power to grant derogations.

13 Since the German Government has sought to justify its rules on the importation of live freshwater crayfish by referring to considerations concerning the protection of the health and life of animals and the preservation of native species, it is also necessary to consider whether the rules in question fall within the powers which the Member States have for achieving those objectives.

14 Directive 91/67 was adopted after the Commission had issued a reasoned opinion in this case. The period for its transposition into the national law of the Member States did not expire until 31 December 1992.

15 Thus, at the time when the subject-matter of these proceedings was defined in the pre-litigation procedure the Community still did not have common or harmonized rules on health conditions for aquaculture animals, including crayfish.

16 In those circumstances, it was for the Member States to decide upon the level at which they wished to protect the health and life of animals in this field, whilst tak-

ing account of the requirements of the free movement of goods within the Community.

17 It is not disputed that the purpose of the national measure in question is to protect the health and life of native crayfish so that the measure is accordingly covered by the exception provided for in Article 36 of the Treaty.

18 However, rules restricting intra-Community trade are compatible with the Treaty only in so far as they are indispensable for the purposes of providing effective protection for the health and life of animals. They cannot therefore be covered by the derogation provided for in Article 36 if that aim may be achieved just as effectively by measures having less restrictive effects on intra-Community trade.

19 The question to be examined, therefore, is whether the German restrictions in question satisfy the principle of proportionality as so expressed.

20 In this regard, the Federal Government submits that a total ban on importing live freshwater crayfish was the only way of effectively protecting native crayfish against aphanomycosis since not only animals from non-member countries but also species originating from other Member States are capable of carrying the crayfish plague virus. Furthermore, the rules in question were necessary to limit as much as possible the proliferation of non-indigenous species in natural stretches of water in Germany so as to protect the genetic identity of local populations of crayfish against faunal distortion which occurs upon the introduction in national territory of animals of the same species but of different origin. The prohibition of importation of live freshwater crayfish is, in its view, also justified by 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 (OJ 1982 L 384, p. 1).

21 That argument must be rejected forthwith.

22 As the Commission has rightly pointed out, Article 15(1) of Regulation No 3626/82 expressly provides that if a Member State, for the purpose, in particular, of conserving native species, maintains or takes stricter measures than those provided for by that regulation, it must comply with the Treaty and, in particular, Article 36 thereof.

23 It is not disputed that the total import ban in force in the Federal Republic of Germany constitutes a measure which is stricter than those provided for by Regulation No 3626/82.

24 As far as the prevention of the risks of crayfish plague and of faunal distortion is concerned, the Commission submits that this objective could have been achieved by measures having less restrictive effects on intra-Community trade.

25 For example, instead of simply prohibiting imports of all species of live freshwater crayfish, the Federal Republic of Germany could have confined itself to making consignments of crayfish from other Member States or already in free circulation in the Community subject to health checks and only carrying out checks by sample if such consignments were accompanied by a health certificate issued by the competent authorities of the dispatching Member State certifying that the product in question presented no risk to health, or instead confined itself to regulating the marketing of crayfish in its territory, in particular by subjecting to authorization only the restocking of national waters with species likely to be carrying the disease and restricting release of animals into the wild and restocking in areas in which native species are to be found.

26 However, the Federal Government has not convincingly shown that such measures, involving less serious restrictions for intra-Community trade, were incapable of effectively protecting the interests pleaded.

27 Moreover, the conditions which importers are required to observe under the authorization system applied by the German authorities so as to mitigate the harshness of the import ban laid down by the Federal legislation, which require the traders concerned to comply with all health measures, to use imported crayfish in a way which prevents them from being released into the environment and to ensure that the water in which they are kept is disinfected, show that the defendant Government itself considers that those means, less restrictive of intra-Community trade than a total import ban, are sufficient for achieving the objective of protecting native crayfish against crayfish plague and faunal distortion.

28 It follows that the Commission's complaint is well founded.

29 In those circumstances, it must be declared that the Federal Republic of Germany is in breach of its obligations in the terms of the order sought by the Commission.

Costs

30 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that by prohibiting imports of European species of live freshwater crayfish from Member States or non-member countries in free circulation in other Member States in so far as they are not for the purpose of research and teaching, the Federal Republic of Germany has failed to fulfil its obligations under Articles 30 and 36 of the EEC Treaty;**

2. **Orders the Federal Republic of Germany to pay the costs.**

Mancini Kakouris Schockweiler

Kapteyn Murray

Delivered in open court in Luxembourg on 13 July 1994.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber