OPINION OF ADVOCATE GENERAL LENZ
delivered on 28 September 1993 *

Mr President,
Members of the Court,

A — Introduction

1. The Commission has brought the present Treaty infringement proceedings against the Italian Republic on the ground of the introduction and maintenance by the Italian Ministry of Agriculture and Forestry of a requirement of *prior authorization* for the importation of certain plants from other Member States.

2. The Commission's view is that the defendant Member State is thereby in breach of its obligations under Article 30 of the EEC Treaty in conjunction with Article 10(1) of Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, [1] which specifically prohibits any quantitative restriction or measure having equivalent effect, along with its obligations under the second sentence of Article 11(1) of Directive 77/93/EEC on protective measures against the introduction into the Member States of harmful organisms of plants or plant products. [2]

3. The Italian Government argues that prior authoriz-ation is necessary in order to counter the danger of the entry and spread of *Erwinia amylovara*, a bacterium capable of infecting plants with fire blight. In its opinion, the measure is consistent with Article 36 of the EEC Treaty and with Articles 5(2) and 11 of Directive 77/93/EEC.

4. Against this, the Commission contends that the requirement of authorization is not covered by the provisions of Directive 77/93/EEC and also that Member States, in an area of full harmonization, are not allowed to adopt measures which go beyond the provisions of Community law.

* Original language: German.

1 — OJ, English Special Edition 1968 (I), p. 26.

2 — Council Directive of 21 December 1976 (OJ 1977 L 26, p. 20), as most recently amended by Council Directive 89/439/EEC of 26 June 1989 (OJ 1989 L 212, p. 106), which is the version applicable to the present proceedings.

5. The Commission claims that the Court should:

(i) declare that, by requiring prior authorization for the introduction into Italian territory of plants susceptible to fire blight (*Erwinia amylovara*), the Italian Republic has failed to comply with its obligations under

— the second sentence of Article 11(1) of Council Directive 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products, and

— Article 30 of the EEC Treaty in conjunction with Article 10(1) of Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage; and

(ii) order the Italian Republic to pay the costs.

6. The Italian Republic contends that the Court should:

(i) dismiss the application; and

(ii) order the Commission to pay the costs.

7. I would refer to the Report for the Hearing for the detailed facts of the case, the legal framework and pleas in law of the parties.

B — Opinion

8. The Commission does not object to the ban on the importation of certain plants susceptible to infection by *Erwinia amylovara* imposed every year between 16 April and 31 October pursuant to Article 4(2)(a) of Directive 77/93/EEC in conjunction with Annex III, Part B(10) thereto, as amended by Directive 84/378/EEC. [3] Directive 84/378/EEC was, *inter alia*, expressly adopted to improve the protective measures against harmful organisms such as *Erwinia*

3 — Council Directive 84/378/EEC of 28 June 1984 amending the annexes to Directive 77/93/EEC (OJ 1984 L 207, p. 1).

amylovara. [4] In addition to the possibility of imposing a temporary import ban, a number of Member States (of which Italy was one) were authorized to require additional official statements. [5] Article 5(2)(b) of Directive 77/93/EEC refers to these additional requirements in the following terms:

'Member States may:

...

(b) ban the introduction into their territory of the plants listed in Annex IV, Part B, against their names unless the relevant special require-ments indicated in that part of the annex are met ...'.

9. In order to ensure compliance with the special requirements, Article 6 of the directive provides as follows:

'1. Member States shall lay down, at least in respect of the introduction into another Member State of the plants, plant products and other objects listed ..., that the latter and their packaging shall be meticulously examined on an official basis, either in their entirety or by representative sample, and that, if necessary, the vehicles transporting them shall also be officially examined ...:

(a) ...

(b) ...

(c) ...

2. Member States shall lay down the inspection measures referred to in paragraph 1 in order to ensure compliance with ... Article 5(2), where the *Member State of destination* [6] avails itself of one of the options listed ...

3. ...'.

4 — See the second recital in the preamble to Directive 84/378/EEC.

5 — Annex IV, Part B(7a), to Directive 77/93/EEC.

6 — Emphasis added.

As evidence of the inspections carried out, *Article 7* provides that:

'Where it is considered, on the basis of the examination laid down in Article 6, that the conditions therein are fulfilled, a phytosanitary certificate shall be issued ...'.

Article 9 of the directive provides that the phytosanitary certificate required pursuant to Article 7 in the case of plants listed in Annex IV, Parts A and B, must be issued in the *country of origin*. Subheading B of Annex IV, Part B(7a), requires the plants and the certificate provided for under Article 7 to bear a special official distinctive mark.

10. With regard to the inspections which may be carried out by the Member State in which the plants are imported, Article 11 of the directive sets out a complex system of rules. In the version applicable to the present proceedings, [7] Article 11 reads as follows:

'1. Without prejudice to the provisions of paragraph 3, Member States may lay down that plants, plant products and other objects and their packaging and the vehicles transporting them be subject, *in the event of their introduction into their territory from another Member State*, [8] to an inspection to ascertain compliance with the prohibitions and restrictions laid down in Articles 3, 4 and **5.** [9] Member States shall ensure that these plants, plant products and other objects, where their introduction is not prohibited under Article 3, 4 or 5, are not subjected to prohibitions or restrictions relating to plant-health measures except where:

(a) the certificates referred to in Article 4, 5, 7, 8 or 9 [10] are not produced;

(b) [deleted] [11]

(c) the plants, plant products or other objects are not submitted as laid down in the regulations to an official inspection permitted in accordance with paragraph 3;

(d) these prohibitions or restrictions are laid down on the basis of Article 18;

7 — With particular regard to the amendments to Article 11 resulting from Council Directive 88/572/EEC of 14 November 1988 (OJ 1988 L 313, p. 39) and from Council Directive 89/439/EEC of 26 June 1989, cited above.

8 — Emphasis added.

9 — Emphasis added.

10 — Emphasis added.

11 — Deleted by Article 1(4) of Directive 89/439/EEC. Member States were required under Article 2 to bring into force by 1 January 1990 the laws, regulations or administrative provisions necessary to comply with that directive. Article 11(1)(b) of Directive 77/93/EEC had previously read as follows: 'the plants, plant products or other objects are not introduced at one of the prescribed entry-points;'.

(e) they are necessary to check the identity of the declared plants, plant products or other objects. ...

2. They shall not require any additional declaration on the certificates referred to in Article 4, 5, 7, 8 or 9.

...

3. Member States may not supplement the measures permitted under *the second sentence of paragraph 1* by *systematic official checks on compliance* with the provisions adopted pursuant to *Articles* 3 and 5, *except* [12] where:

(a) there is serious reason to believe that one of these provisions has not been complied with;

(b) the plants referred to above originate in a non-member country ...

12 — Emphasis added.

In all other cases, only occasional official phytosanitary inspections including identity checks shall be carried out, by sampling. ... Member States shall take the appropri-ate steps to ensure that the carrying-out of *these inspections at the border* [13] is progressively reduced, save in cases specified in accordance with the procedure laid down in Article 16. They shall be carried out either at the place of destination of the plants, plant products or other objects, or at another designated place instead, provided that the routing of the plants, plant products or other objects is interfered with as little as possible. [14]

4. ...

5. Member States shall lay down that the phytosanitary certificates ... produced when the plants, plant products or other objects are introduced into their territory shall bear an entry stamp from the competent organization showing at least the name of the organization and the date of entry.

6. ...'

13 — Emphasis added.

14 — The last two sentences were only added to the second subparagraph of Article 11(3) of Directive 77/93/EEC by Directive 88/572/EEC, Article 2 of which required Member States to bring into force the laws, regulations or administrative provisions necessary to comply with the directive by 1 January 1989 at the latest.

11. So far as inspections by the Member State of destination are concerned, the original recitals in the preamble to Directive 77/93/EEC themselves provided as follows:

'... if a plant-health check carried out in the consignor Member State constitutes a guarantee that the products are free from harmful organisms, it is possible to dispense with the systematic checks carried out in the Member State of destination ...'.

A fundamental objective of the harmonization provisions is thus to dispense with inspections in the Member State of destination. The question whether the Member State of destination can require *prior* ministerial authorization for the importation into its territory of specified plants must be answered by reference to the rules contained in the directive, which are not entirely free from ambiguity in that regard.

12. It is possible to start from the premiss that the aim of full harmonization is to ensure the free movement of goods at Community level. This also applies in particular to the protective measures against harmful organisms such as *Erwinia amylovara*, in respect of which Annex IV, Part A(15), to Directive 77/93/EEC in its original version imposed *compulsory* special requirements for the importation of plants and plant products. Directive 84/378/EEC extended considerably the scope for adopting protective measures by authorizing specified Member States to impose temporary *import bans* and to require *special guarantees* during periods in which trade in those plants is permitted.

13. Under the structural principles of full harmonization, Member States may as a rule introduce derogations from or create exceptions to the Community provisions only within the limits of the authorization contained in the harmonization provisions themselves. It is common ground that the defendant Member State was entitled to impose special requirements on the basis of Article 5(2) in conjunction with Annex IV, Part B(7a). The only question arising concerns the manner in which it may monitor compliance with those requirements. As failure to meet the special requirements entitles the Member State in question to 'ban the introduction' into its territory of the plants, plant products and other objects, [15] there would appear to be no doubt that the inspection in question must be effective and carried out in good time.

14. The system of control established by the directive is based primarily on the premiss that physical inspections are carried out in the Member State of dispatch (Article 6 of the directive) and that official phytosanitary certificates in respect of those inspections are subsequently issued (Articles 7 and 9 of the

15 — See the wording used in the first part of Article 5(1).

directive). The inspections of the plants, plant products and other objects permitted in the Member State of destination may be carried out 'in the event of their introduction' into its territory (first sentence of Article 11(1)).

15. In interpreting Article 11 of the directive, care must be taken to draw a clear distinction as regards permissible inspections between those which are physical and those which are formal in nature. The first sentence of Article 11(1) allows physical inspections to be carried out in order to ascertain compliance with the prohibitions and restrictions concerning plants, plant products and other objects and their packaging and the vehicles transporting them, as laid down, *inter alia*, in Article 5. The scope of the permissible inspections is determined by reference to Article 11(3), which provides that systematic official checks are to be allowed (under indent (a), which alone is relevant to the present proceedings) only where there is serious reason to believe 'that one of these provisions has not been complied with'. In all other cases, only occasional inspections may be carried out by way of sampling.

16. On the other hand, formal checks may *systematically* [16] be carried out on the basis of the second sentence of Article 11(1). If such checks reveal specific defects listed in that provision, the Member State in question may in that case (and only in that case) impose prohibitions and restrictions on the goods in question. The prototype of formal checks is the examination of the certificates referred to in Article 11(1)(a). Importation may be prohibited if those certificates are not produced.

17. In my opinion, several factors argue in favour of a finding that such checks may be carried out *only* once the goods have been introduced into the territory of the Member State and not, for instance, at some time previously through the medium of the disputed authorization. In the first place, one must proceed according to the wording of the first sentence of Article 11(1), which in this regard is unambiguous. Another factor is the provision repealed by Directive 89/439/EEC, [17] which authorized prohibitions and restrictions in the case where plants, plant products and other objects were not brought into the territory of the Member State through the prescribed entry-points. The underlying requirement that the prescribed entry-points be used enables, and indeed compels, effective supervi-sion to be carried out at the borders and, if necessary, imposes a ban on the introduction of the

16 — The permissibility of systematic checks follows from the wording of the first subparagraph of Article 11(3): 'Member States may ... supplement the measures permitted under the second sentence of paragraph 1 by *systematic* official checks ...'.

17 — To be transposed into national law by 1 January 1990.

goods into the territory in the event of failure to comply with certain provisions. To my mind, the provision formerly contained in Article 11(1)(b) also implies that there can be no filter mechanism *prior to* the introduction of the goods.

18. Finally, in my view, the last two sentences of the second subparagraph of Article 11(3), added by Directive 88/572/EEC, also argue in favour of the view that hitherto border inspections alone were available, inasmuch as provision is made for their progressive reduction and the transfer of inspections to the place of destination. Admit-tedly, there is some tension between this (no longer new) second subparagraph of Article 11(3) and effective monitoring through which, if necessary, an import ban could be imposed on the ground of failure to comply with the separate requirements. In my opinion, however, that problem can be resolved if, while in principle the transfer of inspections is pursued, exceptions remain possible in specific cases determined in accordance with the procedure laid down in Article 16 of Directive 77/93/EEC.

19. In conclusion, therefore, my opinion is that the Italian Government was not entitled, on the basis of the directive, to require prior authorization (obtainable on request) as all necessary inspections are possible and permiss-ible when the goods are imported.

20. The unlawful requirement of authorization is thus not only to be treated as a breach of Directive 77/93/EEC but also constitutes a measure having an effect equivalent to a quantitative restriction [18] within the meaning of Article 30 of the EEC Treaty and Article 10 of Regulation (EEC) No 234/68. The Court has consistently held [19] that Article 36 of the EEC Treaty cannot be relied on in areas of the law which have been fully harmonized. Instead, the Member State in question can rely only on the exemptions deriving from the harmonization provisions.

Costs

21. The decision on costs should be in accordance with Article 69(2) of the Rules of Procedure.

18 — Judgment in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203; judgment in Case C-235/91 *Commission* v *Ireland* [1992] ECR I-5917.

19 — Judgment in Case 5/77 *Tedeschi* v *Denkavit Commerciale* [1977] ECR 1555; judgment in Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR 1629; judgment in Case 251/78 *Denkavit Futtermittel* v *Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen* [1979] ECR 3369; judgment in Case 190/87 *Oberkreisdirektor des Kreises Borken and Another* v *Handelsonderneming Moormann* [1988] ECR 4689.

C — Conclusion

22. In the light of the above, I propose that the Court should:

(1) declare that, by requiring prior authorization for the introduction into Italian territory of plants susceptible to fire blight, the Italian Republic has failed to comply with its obligations under

— the second sentence of Article 11(1) of Council Directive 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products, and

— Article 30 of the EEC Treaty in conjunction with Article 10(1) of Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organiz-ation of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage.

(2) order the Italian Republic to pay the costs.