eral scheme of the said regulation if such licences are automatically issued to every applicant free of charge and without delay.

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 15 December 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 7 DECEMBER 1971[1]

Mr President,
Members of the Court,

The cases referred for a preliminary ruling to be dealt with today, which were submitted to you by the College van Beroep voor het Bedrijsleven, a Netherlands court of last instance having jurisdiction in economic matters, and which were joined for the purposes of the oral procedure by a decision of the Court of 10 November 1971, have their origin in events which were in part dealt with in Joined Cases 41 to 44/70 ([1971] ECR 411). I can accordingly refer, so far as the essential matters are concerned, to the account of the facts given at the time in the opinion and in the judgment and at this point I need only recall certain aspects or elaborate upon them.

The measures at issue in the main action were adopted under the common organization of the market in fruit and vegetables. As the Court is aware that organization of the market was established by Regulation No 23 of the Council of 4 April 1962 (OJ, English Special Edition, 1959-1962, p. 97), as supplemented by Regulation No 159/66 of 25 October 1966 (OJ No 192 of 27 October 1966, p. 3285) and that by means of Regulation No 2513/69 of the Council of 9 December 1969 (OJ 1969, L 318, p. 6) it effected a comprehensive harmonization of the rules governing imports from third countries. Accordingly, from 1 March 1970 a complete liberalization was effected in principle with regard *inter alia* to dessert apples, that is to say, there was a prohibition on the application to imports of the relevant products from third countries of quantitative restrictions or measures having equivalent effect. However, Regulation No 2513 also introduced a safeguard clause relating to trade with third countries. The conditions for its application and the details of the measures to be adopted are set out in Regulation No 2514/69 of 9 December 1969 (OJ 1969 L 318, p. 8). At the request of the French Government this safeguard clause was applied in the spring of 1970 on the ground that at that time a difficult situation prevailed on the market in apples in the Community. Accordingly a system of licences for the import of dessert apples from third countries was established for the period from 1 April to 30 June 1970 by Regulation No 549 of the Commission of 11 March 1970 (which entered into force on 15 March 1970 [OJ 1970, L 57, p. 20]). The details of its operation may be recalled from Cases 41-44/70. At present I only

1 — Translated from the German.

wish to mention that on the basis of this regulation and subsequent regulations (in particular Regulation Nos 565, OJ 1970 L 69, p. 33, 686, OJ 1970, L 84, p. 21 and 983/70, OJ 1970, L 116, p. 35) applications for a licence made in the week ending on 22 May 1970 might only be granted to the extent of 80% of a reference quantity. Consequently it was necessary to dismiss the applications made on 19 May 1970 by four import firms established in Rotterdam, the plaintiffs in the main action. This was notified to the importers on 2 June 1970 by decision of the Produktschap voor groenten en fruit, a Netherlands body governed by public law responsible for economic management in the sector of the organization of the market in fruit and vegetables.

As the Court knows, the importers concerned thereupon brought the matter before the Court. Nevertheless the applications which they made in Joined Cases 41-44/70 for the annulment of the measures taken by the Commission proved unsuccessful: the applications were dismissed as unfounded in a judgment of 13 May 1971. Furthermore, the importers concerned contested the said decision before the College van Beroep voor het Bedrijsleven. Even after delivery of the judgment in Cases 41-44/70 these proceedings were continued since the plaintiffs considered that they could succeed on the basis of various arguments which were not discussed in the proceedings which took place before the European Court of Justice, in particular on the basis of the argument that the defendant Netherlands authority had acted without being competent to do so. In this connexion it is necessary to know the following details of Netherlands law. It is provided in the 'In- en Uitvoerwet' ('Law on Imports and Exports') of 5 July 1962 that the executive may issue rules with respect to imports and in particular rules containing a prohibition on imports without an authorization from the Minister. It is provided in Article 2 of the In- en Uitvoerbesluit landbouwgoederen 1963 (order governing the important exports of agricultural products) that the importations of the goods listed in Annex A (including apples) is prohibited without a licence from the Minister for Agriculture and Fisheries. The order further provides in Article 12 that the said Minister may also lift this prohibition. This was done in the Vrijstellingsbeschikking landbouwgoederen EEC 1968/1 which entered into force on 1 November 1968. It authorized an individual exemption from the prohibition of Article 2 of the decision of 1963 with regard to the importation of the products listed at B in Annex II to decision II of 1968 on the system of agricultural levies and refunds ('Beschikking landbouwheffingen en restitutieregime 1968') and in addition for the other goods referred to by the regulations issued by the Council listed in Annex I to the Beschikking (in particular, Regulations Nos 23 and 159/66) for which, in accordance with those regulations, it was laid down that an import certificate need not be submitted so far as they were not freely marketed in the Community (this was applicable *inter alia* to dessert apples). An amending regulation which entered into force on 1 April 1970 further supplemented the first decision of 1968 in that the words 'or import licence' were inserted after the word 'import certificate'. In addition, it should also be stated that in pursuance of Article II of the Law on Imports and Exports the Minister may delegate certain of his powers to the management of a Produktschap. What is now relevant in this respect is that, pursuant to the Overdrachtsbeschikking In- en Uitvoerwet 1968 the Minister for Agriculture and Fisheries delegated to the Produktschap voor groenten en fruit the powers conferred on him under the In- en Uitvoerbesluit landbouwgoederen 1963 relating to the issue of licences for goods coming under Regulation No 23 and Regulation No 159/66 and imported

after 31 October 1968. It should finally be mentioned that pursuant to Article 5 of this Overdrachtsbeschikking the board of the Produktschap, in exercising the powers delegated to it, is bound to observe the provisions of the regulations issued and to be issued by the Council of Ministers of the EEC on the trade in goods falling under Regulations Nos 23 and 159/66, as well as the corresponding provisions on exports.

The arguments of the plaintiffs in the main action were formulated with reference to those provisions. On the one hand they take the view that under the EEC rules on licences laid down by Regulation No 459 of the Commission it was mandatory that administrative authorities should be entrusted with their implementation by means of an express, special delegation. On the other hand neither the authorization of the Minister for Agriculture under the national licence system of 1963 and subsequent implementing measures nor the Minister's delegation to the Produktschap was sufficient for this purpose. Furthermore the plaintiffs consider that since 1 March 1970 (when Article 1 of Regulation No 2513 entered into force) the Netherlands licensing system established by the 1963 rules (prohibition of imports without a licence) was, as from 1 March 1970 (entry into force of Article 1 of Regulation No 2513), no longer compatible with the prohibition on quantitative restrictions set out in that provision and was consequently invalid at that time. On these grounds it could properly be found that the Produktschap had no jurisdiction to implement the protective system established by the Commission.

The court to which the parties applied apparently takes the view that questions have been raised on the interpretation of Community law which are relevant to the decision in the proceedings. Consequently by a judgment of 30 July 1971 it stayed the proceedings and submitted the following questions for a preliminary ruling:

'1. Does the fact that the provisions of the Treaty establishing the European Economic Community together with those of the regulations based on this Treaty conferring powers or imposing obligations "upon the Member States" with regard to the implementation of the Treaty or of regulations imply, on a correct interpretation of those provisions, that the Member States may only transfer such powers or obligations to their authorities by means of an express provision?

2. Must the words "quantitative restrictions on imports together with all measures having equivalent effect", appearing in Article 30 of the EEC Treaty, "quantitative restriction(s) or measures having equivalent effect", appearing in Article 31 of the Treaty, in Article 13 of Regulation No 159/66/EEC and in Article 1 of Regulation No 2513/69/EEC, "quotas and measures having equivalent effect", appearing in Article 32 of the EEC Treaty and "quantitative restrictions on exports, and all measures having equivalent effect", appearing in Article 34 of the EEC Treaty be interpreted as applying also to legal rules of the Member States prohibiting imports and exports without a licence, but which in fact are not applied because exemptions are granted from the prohibition and where they are not, because the licence is always issued on request?'

Let us now consider what is to be said regarding these questions on which written observations were lodged by the plaintiffs in the main action, the Netherlands Government and the Commission of the European Communities, but on which only the Commission submitted oral observations.

1. In the first question the court making the reference manifestly had in mind Article 1 of Regulation No 459 according to which the Member States shall issue import licences, after the Commis-

sion has taken an appropriate decision upon being informed of the application made for licences, of the quantities mentioned in them and of the import months to which they relate. If it is asked in this respect whether Community law implies that the Member States may delegate these powers and duties to administrative authorities solely by express provisions the answer to be given can be relatively short.

It is in fact clear that in cases of this nature the Member States as such are the subjects of rights and duties. It is not particular national authorities but the Member States as entities, with all their agencies, to which reference is made. In other words, the sole duty under Community law is to produce a specific result. On the other hand there is no room in Community law for the view that the Member States' powers regarding the fulfilment of their duties under Community law can only be transferred to national administrative authorities by special, express provisions. There is no such requirement, whether it is considered that in certain spheres the Member States have transferred their sovereign rights to the Community law can only be transferred to national administrative authorities by special, express provisions. There is no such requirement, whether it is considered that in certain spheres the Member States have transferred their sovereign rights to the Community and that these have been redelegated to the States or whether one takes the view that there is a division of powers. It may thus be considered that in principle it is left to the Member States to determine how they fulfil under national law the duties devolving upon them under Community law. The Member States must consider whether there already exist rules on jurisdiction in respect of the relevant field or whether provisions already in existence may be applied or whether new rules must be created. In this respect they are guided by the structure of their national legal systems and the particular constitutional system determines which authorities shall participate in discharging duties under Community law.

As the Commission has rightly emphasized in this respect reference may be made in particular to the case-law of the Court in proceedings which were directed to obtaining a declaration of an infringement of the Treaty. It is indeed worthy of remark that on a number of occasions (Cases 77/69 ECR and 237 80/70 ECR 445) the Court has based itself on analogous arguments and found that duties under the Treaty are incumbent upon the States as such (Case 8/70, [1970] ECR 961) and a Member State still liable under Article 169 irrespective of which State authority has through its act or omission occasioned the infringement (Case 77/69, [1970] ECR 237; Case 8/70, [1970] ECR 961). Accordingly, as was unanimously suggested by all the participants in the proceedings (the plaintiffs, too, rightly say that this is a problem of national law), the first question should be answered in the negative and it should be found that there is no requirement in Community law that the duties of the Member States are to be fulfilled by delegation through express national provisions to particular national authorities.

2. In the second question the court making the reference inquires as to the relevant definition of the concept 'quantitative restrictions and measures having equivalent effect' which is contained in several articles of the Treaty in very similar wording and also in relation to exports and in Community regulations, especially in Article 1 of Regulation No 2513/69. In this connexion the court wishes to know whether the concept is to be understood in the sense that national rules are included which prohibit imports and exports without a licence if their rules are not in fact applied, or, because provision is made for exemption

from hem, or licences are always issued on request (the so-called 'toute licence accordée' system).

The parties to these proceedings are not all agreed upon the answer to be given to these questions. The Netherlands Government considers that the sole important point is the actual application of a national system of licences and the effects accompanying it. It appears to it particularly important whether express provision is made for exceptions from such a system. On the other hand the plaintiffs maintain that actual application cannot constitute the decisive factor. Further, it is of no significance that temporary exemptions from a system of licences are granted under provisions of inferior status, as the Member States have lost all jurisdiction in this sphere. Finally, the Commission has expounded at length a relatively complex view. It thus appears that the answer to this question is less simple than that to the first question.

It must be agreed that the Commission is correct in its view that the basis for consideration of the problems raised is that all the said articles of the Treaty and regulations are founded on the same concept, as the same wording is employed everywhere (with the sole exception of Article 32 of the EEC Treaty in which the word 'quota' admittedly appears as the classic expression for a restrictive policy on imports). It is thus for the time being irrelevant that the decision in the main action, which is concerned with the legal position obtaining as from 1 March 1970 and with imports from third countries, exclusively turns on the meaning of Article 1 of Regulation No 2513.

It is then relatively simple to ascertain what is generally to be understood by 'quantitative restrictions on imports'. In fact this is a concept from the liberalizing code of the Organization for European Economic Cooperation and in the General Agreement on Tariff and Trade (GATT). According to those provisions it encompasses national measures which wholly or in part preclude *direct* imports which are not based on technical features (which also apply to the marketing of domestic products), but rather solely relate to the number and quantity of the products in question.

With regard to the concept 'measures having equivalent effect', which represents a necessary supplement to the prohibition on quantitative restrictions on imports, many instructive indications relating to the concept 'measures having equivalent effect'—in this respect too, one must agree with the Commission—may be obtained from the case-law of the Court as developed in Cases 2 and 3/62 ([1962] ECR 425), 90 and 91/63 ([1964] ECR 625), and 10/65 ([1965] ECR 469), and 52 and 55/65 ([1966] ECR 195). It follows from the foregoing that this additional concept indicates the intention of the authors of the Treaty 'to prohibit not only measures which obviously take the form of the classic customs duty but also all those which, presented under other names or introduced by the indirect means of other procedures, would lead to the same discriminatory or protective results as customs duties' (Joined Cases 2 and 3/62, [1962] ECR 425). The same is true of the concept of 'measures having an effect equivalent to quantitative restrictions on imports' and it may accordingly be stated that the important factor is the comparability of the *effects*. Therefore such measures exist when imports are prevented in whole or in part and by reference to the number and quantity of goods, provided that there is an *indirect* impediment to imports which makes them more difficult and expensive than the marketing of comparable domestic products. This must be qualified however, by noting that this does not cover measures coming under particular provisions of the Treaty (such as those regarding customs duties, taxation and subsidies).

In addition it is necessary to exclude

measures, which, whilst having an inherent restrictive effect, are compatible with the Treaty because their adoption falls within the competence reserved to the States. This relates to certain commercial rules and the related prohibition —affecting both domestic and foreign products—on the sale of goods displaying certain characteristics. In this respect the restrictive effect on imports arises from differences in national rules and only the approximation of national laws in pursuance of Article 100 of the EEC Treaty can provide a remedy for this. This is likewise true of the rules regarding customs-clearance formalities which continue to be obligatory so long as national frontiers retain their significance. These exceptions must, however again be qualified—and in this matter too the Commission is correct—by saying that the restrictive effects inherent in the national measures can only be recognized as compatible with the Treaty to the extent to which they are essential to the attainment of the objectives sought by the measures.

Proceedings from these considerations of principle, in my view it may definitely be stated that a system like that introduced in the Netherlands in 1963, that is to say, a prohibition on imports without a licence, does not constitute a quantitative restriction on imports or a measure having equivalent effect to the extent to which general and abstract provisions provide for exceptions from the necessity to grant a licence. This holds good even if the legislation implementing the rules governing exceptions are of a lower juridical order, provided that their efficacy under national law cannot be doubted and that therefore there can be no question that system of licences will not be applied. This is clearly the case regarding the previously mentioned Vrijstellingsbeschikking EEG 1968 I (and is, of course, ultimately a question to be settled by the national court). Thus we have an answer to the part of the second question and one may even take the view that this finding is sufficient for the national court, since the said Vrijstellingsbeschikking appears to have taken effect from 1 November 1968 with regard to imported apples from third countries.

Nevertheless, if it is desired in addition to answer the second part of the question put, that is, to inquire whether restrictions on imports may be involved when licences are always issued (the so-called 'toute licence accordée' system) the following remarks must be made. As the Court is aware, the Commission wishes to draw a distinction in this connexion. It considers that in cases where licences are only issued *de facto* the restrictive character of the system of licences is undeniable because the sole essential factor is the *potential* effects of such a measure. On the other hand if it is expressly *provided* that licences must always be issued, there cannot be said to be any direct impediment to imports, but at most a measure having equivalent effect. In this connexion I would first of all say that I find it hard to understand the need for such a distinction. I do not see how the argument for the general criterion of a potential effect, of the potential restriction of imports, can be deduced from Article 33(4) of the EEC Treaty under which unused quotas were to be abolished. In my view, it should not be forgotten that this arrangement is justified on the ground that in such cases *real* restrictions on imports were not to be excluded in future, whereas *an actual and constant practice* on the issue of licences, effects of this nature are not to be feared. Consequently, in considering the question whether there were restrictions on imports, nothing can turn on the potential effects of a national measure and that it is the actual effects which must be taken into consideration. In this connexion the case-law of the Court on the levying of charges having equivalent effect in particular provides an argument of substantial importance. Furthermore, in the

situation to be considered now it must be borne in mind that the Overdrachtsbeschikking In- en Uitvoerwet 1968 expressly obliged the Produktschap to observe Community law, so that in this way alone, that is to say, without an express national rule that licences were always to be issued, provision was made for a certain and uniform practice in this sense.

If one considers on this basis how to judge under the provisions of Community law a prohibition on imports without a licence, when in practice licences are constantly issued, if such issue is delayed or made subject to conditions then it must indeed be held that there are restrictive effects. This can of course lead to discouraging importers and thereby to impeding imports. On the other hand I should consider as in accordance with the Treaty a prompt and automatic issue if licences for imports from third countries, even if importers are burdened with administrative formalities, since customs clearance formalities are unavoidable in external trade. Referring to the previously-mentioned considerations submitted by the Commission, it is in fact undeniable that the maintenance of a national system of licences guaranteeing a constant survey of the developments in imports appears appropriate, not least because Article 3 of Regulation No 2514 allows unilateral national protective measures (for example the suspension of imports). It is thus difficult to regard this as constituting a quantitative restriction on imports or a measure having equivalent effect.

The reply which the Court must give to the second question is thus clear, always assuming that the Court considers that there is any need to reply to the question in its entirety.

3. I accordingly suggest the following answer to the questions which have been put:

(a) Where the provisions of the Treaty or of derived Community law impose obligations on the Member States Community law does not imply that the Member States can delegate corresponding powers to their authorities only through express provisions. If the legal orders of the Member States do not contain the necessary rules, these States are merely obliged to create them for the purpose of implementing Community law;

(b) The concept 'quantitative restrictions on imports and measures having equivalent effect' does not include national provisions prohibiting imports without licences provided that express provision is made for exceptions to such rules. This is also the case where licences are automatically issued without delay provided always that the difficulties involved are justified by reference to a lawfully pursued objective, such as surveying imports with a view to the possible application of permissible national protective measures of a unilateral nature.