JUDGMENT OF THE COURT
25 May 1993 *

In Case C-228/91,

Commission of the European Communities, represented by Antonio Aresu and Maria Blanca Rodríguez Galindo, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nichola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Department for Legal Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by prohibiting in practice, on the basis of national legislation which is applicable without distinction, and of the corresponding specific administrative measures for its implementation, the importation of consignments of fish from the other Member States and from the Kingdom of Norway solely on the ground that they contain nematode larvae, and by requiring such consignments to undergo systematic inspections, the Italian Republic has failed to fulfil its obligations under Articles 30 and 36 of the EEC Treaty, inasmuch as they form an integral part of Council Regulation (EEC) No 3796/81 of

* Language of the case: Italian.

29 December 1981 on the common organization of the market in fishery products (OJ 1981 L 379, p. 1), as amended, Council Directive 83/643/EEC of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States (OJ 1983 L 359, p. 8), as amended, and Council Regulation (EEC) No 1691/73 of 25 June 1973 concluding an Agreement between the European Economic Community and the Kingdom of Norway and adopting provisions for its implementation (OJ 1973 L 171, p. 1),

THE COURT,

composed of: C. N. Kakouris (President of Chamber), acting for the President, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 January 1993,

after hearing the Opinion of the Advocate General at the sitting on 17 March 1993,

gives the following

Judgment

1 By application lodged at the Court Registry on 11 September 1991, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by prohibiting in practice, on the basis of national legislation which is applicable without distinction, and of the corresponding specific administrative measures for its implementation, the importation of consignments of fish from the other Member States and from the Kingdom of Norway solely on the ground that they contain nematode larvae, and by requiring such consignments to undergo systematic inspections, the Italian Republic has failed to fulfil its obligations under Articles 30 and 36 of the Treaty, inasmuch as they form an integral part of 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), as amended, Council Directive 83/643/EEC of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States (OJ 1983 L 359, p. 8), as amended, and Council Regulation (EEC) No 1691/73 of 25 June 1973 concluding an Agreement between the European Economic Community and the Kingdom of Norway and adopting provisions for its implementation (OJ 1973 L 171, p. 1).

2 Under Italian Law No 283 of 30 April 1962 (GURI No 139, p. 2194), as amended, it is prohibited, subject to criminal sanctions, to use in the preparation of food, sell, hold with a view to selling, supply, distribute for consumption or introduce into the territory of the Italian Republic, foodstuffs which are 'deprived, even partly, of their nutritive elements, mixed with substances of lower quality, contaminated, infested with parasites, spoiled or harmful, or which have undergone treatment designed to mask earlier impairment'. Under that law, the health authorities may at any time carry out inspections and take samples of foodstuffs and order them to be seized and destroyed if their investigations suggest that such a step is necessary for the protection of public health.

3 Ministerial Order No 454 of 8 October 1988 (GURI No 253, p. 7), as amended by Ministerial Order No 47 of 15 February 1990 (GURI No 61, p. 3), provides that,

in the case of edible products of animal origin, at least 10% of the consignments presented or expected to arrive in any one week must be subjected to health checks. The proportion inspected 'shall be increased if, in the opinion of the veterinary surgeon at the frontier or the Ministry of Health, there is any doubt or if precautions need to be taken to protect public or animal health'.

4 Pursuant to Law No 283 of 1962 (cited above), the Italian Ministry of Health sent several telegrams to the frontier veterinary services, as from July 1987, instituting systematic inspection of certain species of fish on importation, on the ground that a growing number of consignments of fish had been found to be infested with nematode larvae. A subsequent telegram extended the inspections to Italian fishery products.

5 Following complaints from Denmark and Norway, and from traders exporting fish to Italy, the Commission found that from July 1987 the Italian authorities had applied new frontier control measures, mainly affecting imports of mackerel, herring, salmon and cod from the other Member States and non-member countries. It was alleged that those fish had been subjected to systematic health inspections even where the consignments in question had already been inspected in the State of dispatch and were accompanied by a proper health certificate, and had been turned back at the frontier, or even destroyed, if the Italian authorities found a single — even devitalized — larva.

6 In support of its application, the Commission submits essentially that the Italian restrictions on the importation of fish go beyond what is required for the effective protection of public health.

7 In the Commission's view, the presence of nematode larvae in fishery products is a natural phenomenon affecting fish caught in all Community waters and the only danger to human health arises from consuming fish infested with live larvae, whilst

the findings of international scientific research confirm that the ingestion of fish containing dead or devitalized larvae, even in large quantities, does not constitute a risk factor for health.

8 Since live larvae are likely to be found only in fish that are consumed raw and those parasites can be devitalized by various simple, inexpensive and widely used processes, such as heating or freezing, the Italian authorities could have protected public health effectively by measures less restrictive of intra-Community trade by prohibiting the consumption of raw fish, an eating habit that is moreover extremely rare in Italy, by requiring appropriate treatment to be carried out in order to devitalize the larvae and by informing the consumer by means of appropriate labelling classifying fish infested with deactivated nematodes in a lower freshness category than usual.

9 For its part, the Italian Government contends that the mere presence in fish of nematode larvae, even devitalized, renders it unfit for human consumption. Moreover, the alternative measures proposed by the Commission would be ineffective. In those circumstances, it considers that the measures at issue are essential for the effective protection of human health.

10 Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant legislation, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Articles 30 and 36 of the Treaty

11 In order to assess the merits of this complaint, it should be noted in the first place that, even though the provisions of Regulation No 3796/81, cited above, do not expressly prohibit quantitative restrictions on imports and measures having

equivalent effect as regards intra-Community trade, it follows from the combined provisions of Articles 38 to 46 and Article 8(7) of the Treaty that this prohibition arises out of the Treaty provisions automatically, from the expiry of the transitional period at the latest, as was stressed moreover in the 30th recital in the preamble to Regulation No 3796/81 (see to this effect Joined Cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279, paragraph 53/54).

12 Moreover, the measures at issue are caught by the prohibition set out in Article 30 of the Treaty. As the Court has consistently held (see, in the first place, Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5), the prohibition of measures having equivalent effect to quantitative restrictions within the meaning of Article 30 of the Treaty covers all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

13 However, it should be determined whether, as the Italian Government maintains, the restrictions in question can be justified under Article 36 of the Treaty on grounds of the protection of health and life of humans.

14 It must be noted in the first place that Council Directive 91/493/EEC of 22 July 1991 laying down the health conditions for the production and the placing on the market of fishery products (OJ 1991 L 268, p. 15) was adopted after the Commission delivered its reasoned opinion in this case, and that the period prescribed for transposing it into the law of the Member States did not expire until 31 December 1992.

15 Accordingly, the Community did not yet have any common or harmonized rules relating to health controls on fish when the subject-matter of the present dispute was defined by the pre-litigation procedure.

16 In those circumstances, it was for the Member States to decide on the level of protection which they wished to accord to the protection of health and life of humans in this sector, whilst taking account of the requirements of the free movement of goods within the Community (see in particular Case C-205/89 *Commission* v *Hellenic Republic* [1991] ECR I-1361, paragraph 8).

17 It is not disputed that the purpose of the national measures in question is to protect public health and that they therefore in principle come within the exception provided for in Article 36 of the Treaty.

18 However, it must also be borne in mind that rules which restrict intra-Community trade are only compatible with the Treaty to the extent to which they are necessary for the effective protection of health and life of humans, and consequently do not fall within the exception specified in Article 36 if the health and life of humans can be as effectively protected by measures which do not restrict intra-Community trade so much (see in particular Case 104/75 *De Peijper* [1976] ECR 613, paragraphs 16 and 17).

19 It must therefore be considered whether the Italian restrictions at issue in this case are in keeping with the principle of proportionality so enunciated.

20 The Court has already held on several occasions that a double check on products on importation, which consists, on the one hand, of the requirement of a certificate from the competent authority of the country of dispatch to the effect that the goods have been subjected to a process intended to eliminate certain parasites and, on the other hand, of a systematic inspection at the frontier following which importation is only permitted after the health authorities of the State of destination have confirmed that the goods are free from the parasites in question, exceeds what Article 36 of the Treaty permits (see Case 251/78 *Denkavit Futtermittel* v *Minister für Ernährung, Landwirtschaft und Forsten* [1979] ECR 3369, Case 132/80 *United Foods and Van den Abeele* v *Belgian State* [1981] ECR 995, Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277 and Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203).

21 Thus, according to the case-law, in cases where the product has already undergone a health check in the State of dispatch affording guarantees equivalent to those resulting from the inspection on importation, the second check must not duplicate that carried out in the Member State of dispatch and must therefore, in all cases, be limited to measures designed to counter the risks arising from transportation or from any handling following the check carried out on dispatch (see *United Foods and Van den Abeele* v *Belgian State*, paragraph 29).

22 Likewise, the Court has held that, where cooperation between the authorities of the Member States makes it possible to facilitate and simplify frontier checks, the authorities responsible for health inspections must ascertain whether the substantiating documents issued within the framework of that cooperation raise a presumption that the imported goods comply with the requirements of domestic health legislation, thus enabling the checks carried out upon importation to be simplified (see in particular *Denkavit Futtermittel* v *Minister für Ernährung, Landwirtschaft und Forsten*, paragraph 23, and *Commission* v *United Kingdom*, paragraph 30).

23 Thus, for the State of destination to impose a health inspection on goods that have already undergone such a check in the State of dispatch and are accompanied by a health certificate issued by the competent authorities of that State to the effect that the products in question are not dangerous to health, exceeds the requirements of the effective protection of public health, with the result that the authorities of the State of destination of the products are not entitled to carry out any checks other than spot checks in order to ensure that the documents drawn up by the authorities of the State of dispatch are in order, to prevent fraud and to prevent the entry of consignments recognized as not being in conformity.

24 Accordingly, the authorities of a Member State may not, without infringing the principle of proportionality underlying Article 36 of the Treaty, subject to systematic health inspections products from other Member States that are duly accompanied by a health certificate issued by the competent authorities of the Member State of dispatch to the effect that the product in question presents no risk to public health.

25 The Italian Government has argued that the inspections at issue were not systematic and that the consumption of fish containing nematode larvae, even devitalized, constituted a risk to human health.

26 As far as the first argument is concerned, suffice it to say that the telegrams sent by the Italian Ministry of Health to the frontier veterinary services on 18 July and 4 September 1987 provided for the systematic inspection on importation of mackerel, herring, salmon and cod, irrespective of whether or not the fish was accompanied by a health certificate drawn up by the competent authorities of the State of dispatch of the product.

27 As for the second point, it must be borne in mind that, as the Court has consistently held (see in particular Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 40), it is for the Member States to demonstrate in each case that their rules are necessary to give effective protection to the interests referred to in Article 36 of the Treaty and, in particular, to show that the marketing of the product in question creates a serious risk to public health.

28 The Italian Government has failed to establish that the consumption of fish containing nematode larvae that are dead or devitalized as a result of appropriate treatment is dangerous to human health. It merely alleged that fishery products containing deactivated larvae must be prevented from being marketed for human consumption, not only because it is unhygienic but also because it is toxic to a not insignificant degree. It has not adduced any actual evidence to refute the Commission's argument that the findings of international scientific research confirm that the ingestion of dead or devitalized nematode larvae constitutes no risk to health.

29 Moreover, as the Advocate General observed in point 29 of his Opinion, the opinion of the Italian Superior Health Council, to which the Italian Government refers in its reply of 13 March 1989 to the Commission's request for observations, confirms the need for a certificate to the effect that the fish 'is free from parasites or has undergone the necessary treatment to inactivate the parasite', which presupposes that the presence of dead larvae in fish does not affect public health.

30 Likewise, it appears from Circular No 10 adopted by the Italian Ministry of Health on 11 March 1992 (GURI No 62), the purpose of which is to relax the procedure for the health inspection of fish, that dead larvae do not constitute a danger to public health.

31 Accordingly, the Italian Government has failed to demonstrate in this case that systematic health inspections of consignments of fish imported from other Member States and duly accompanied by a certificate that the products are not infested with live larvae were essential in order to protect public health.

32 It must therefore be held that the Italian Republic has failed to fulfil its obligations under Articles 30 and 36 of the Treaty in so far as it imposed systematic health inspections on imported consignments of fish that were duly accompanied by a health certificate issued by the competent authorities of the Member State of dispatch of the product, to the effect that they were free from live nematode larvae.

33 However, for imports of fishery products not accompanied by such a certificate, the Italian authorities were justified in requiring such products to undergo a health inspection in order to check whether they constituted any risk to public health. The Commission's complaint must therefore be dismissed in so far as it relates to inspections carried out by the Italian authorities on imported products in those circumstances.

34 Where, on completion of such an inspection, the imported fish was found to contain only nematode larvae that were dead or devitalized as a result of prior treatment, the Italian authorities could not, without infringing Community law, prohibit the importation of such products or order them to be turned back or destroyed. It follows from paragraphs 28 to 31 above that, in the present case, the Italian Government has not proved that such obstacles to the importation of fish containing deactivated nematode larvae were essential to protect public health.

35 In contrast, where the inspections carried out on consignments of imported fish not accompanied by a health certificate from the Member State of dispatch revealed the presence of live nematode larvae, the Italian authorities were entitled to prohibit the importation of such products.

36 It is not disputed that the consumption of fish infested with larvae that have not been devitalized entails dangers to public health. Moreover, as the Italian Government argued, the measures less restrictive of trade suggested by the Commission are not capable of guaranteeing effective protection of public health. Labelling intended to inform consumers of the presence of live nematodes in fish is not a satisfactory solution where, as in this case, a product is involved which constitutes a risk factor for human health. No more is a prohibition on consuming raw fish an effective measure for protecting public health, as it would be impossible to ensure that it was complied with in practice. This is also true of a requirement imposed on consignees of the products in question that fish infested with nematodes must be subjected to appropriate treatment to ensure that the larvae are devitalized.

37 In those circumstances, the Italian Republic has also infringed Articles 30 and 36 of the Treaty in so far as its authorities prohibited the importation of consignments of fish not accompanied by a health certificate from the Member State of dispatch for which the inspections carried out by the Italian authorities revealed only dead or devitalized nematode larvae.

38 In contrast, the Commission's complaint is unfounded with respect to the prohibition on importing fish not accompanied by a health certificate from the Member State of dispatch which were infested with live parasites.

Directive 83/643

39 The purpose of Directive 83/643, cited above, is to lay down various rules for the carrying out of physical inspections of goods and the completion of the required administrative formalities upon crossing a frontier with a view, according to its preamble, to reducing the waiting time at frontiers and ensuring a smoother flow of goods traffic between Member States (see Case 190/87 *Oberkreisdirektor des Kreises Borken* v *Moorman* [1988] ECR 4689, paragraph 26).

40 To that end, Article 2 of that directive requires Member States to take the necessary measures to ensure that inspections and formalities are carried out with the minimum of delay necessary and that inspections are carried out by means of spot checks, except in duly justified circumstances.

41 It follows that measures for the inspection of goods on importation from other Member States may not exceed spot checks unless they are justified by a general interest, such as the need to safeguard the health and life of humans, and do not go beyond that which is essential in order to achieve the intended objective.

42 However, it follows from paragraphs 28 to 31 of this judgment that the Italian Government has failed to prove that systematic health inspection of consignments of fish imported from other Member States duly accompanied by a certificate to the effect that the products were not infested with live larvae was essential to protect public health.

43 Accordingly, it must be held that the Italian Republic has also failed to fulfil its obligations under Directive 83/643, by imposing systematic health inspections on consignments of imported fish that were duly accompanied by a health certificate issued by the competent authorities of the Member State of dispatch of the products to the effect that they were free from live nematode larvae.

44 The remainder of the Commission's complaint must, however, be rejected on the grounds set out in paragraph 33 above.

The Agreement between the European Economic Community and the Kingdom of Norway

45 Article 15(2) of the Agreement between the European Economic Community and the Kingdom of Norway annexed to Regulation No 1691/73 provides as follows:

'The Contracting Parties shall apply their agricultural rules in veterinary, health and plant health matters in a non-discriminatory fashion and shall not introduce any new measures that have the effect of unduly obstructing trade'.

46 According to Article 20 of the Agreement,

'The Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, law and order or public security, the protection of life and health of humans, animals or plants, the protection of national treasures of artistic, historic or archaeological value, the protection of industrial and commercial property, or rules relating to gold or silver. Such prohibitions or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.'

47 It follows that the Agreement prohibits the adoption by the Contracting Parties of new measures restricting trade between the Member States and the Kingdom of Norway unless such barriers are essential, *inter alia*, on grounds of the protection of public health.

48 Accordingly, the Agreement contains with respect to trade between the Contracting Parties rules identical to those of Articles 30 and 36 of the Treaty and there are no grounds in this case for interpreting those rules differently from those articles of the Treaty.

49 It follows from paragraphs 32, 37 and 43 of this judgment that the Italian Republic has infringed the principle of proportionality by subjecting to systematic health inspections consignments of fish from other Member States which had been duly inspected in the State of dispatch and were accompanied by a health certificate issued by the competent authorities of that State to the effect that the products were free from live nematode larvae and by prohibiting the importation of consignments of fish not accompanied by a health certificate from the Member State of dispatch but in which inspections in the State for which the goods were intended revealed only dead or devitalized nematode larvae.

50 Accordingly, since the principle of proportionality also underlies the abovementioned provisions of the Agreement annexed to Regulation No 1691/73, the Italian Republic has also failed to fulfil its obligations under that regulation on the same grounds as described above by imposing systematic inspections on consignments of fish which had already been inspected in Norway and were accompanied by a health certificate issued in that country to the effect that the fish was free from live nematode larvae and by prohibiting the importation of consignments of fish from Norway which were not accompanied by a health certificate but contained only deactivated nematode larvae.

51 However, on the same grounds as set out in paragraphs 33, 38 and 44 above, the Commission's complaints are unfounded with respect to the inspections carried out by the Italian authorities on Norwegian fishery products that were not accompanied by a health certificate issued by the competent Norwegian authorities and with respect to the prohibition on importing such products in cases where the inspections carried out in Italy revealed the presence of live nematode larvae.

52 It follows from all of the foregoing that, by imposing systematic inspections on consignments of fish from other Member States and from the Kingdom of Norway duly accompanied by a health certificate from the State of dispatch to the effect that the product was free from live nematode larvae and by prohibiting the importation of consignments of fish from other Member States and from the Kingdom of Norway not accompanied by a certificate from the State of dispatch when the inspections carried out in the State of destination had not revealed the presence of live nematode larvae, the Italian Republic has failed to fulfil its obligations under Articles 30 and 36 of the Treaty, Directive 83/643 and Regulation No 1691/73.

Costs

53 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, the first subparagraph of Article 69(3) provides that the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads.

54 As the Commission has succeeded only on some heads, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by imposing systematic inspections on consignments of fish from other Member States and from the Kingdom of Norway duly accompanied by a health certificate from the State of dispatch to the effect that the product was free from live nematode larvae and by prohibiting the importation of consignments of fish from the other Member States and from the Kingdom of Norway not accompanied by a certificate from the State of dispatch when the inspections carried out in the State of destination had not revealed the presence of live nematode larvae, the Italian Republic has failed to fulfil its obligations under Articles 30 and 36 of the EEC Treaty, Council Directive 83/643/EEC of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States, and Council Regulation (EEC) No 1691/73 of 25 June 1973 concluding an Agreement between the European Economic Community and the Kingdom of Norway and adopting provisions for its implementation;**

2. **Dismisses the remainder of the application;**

3. **Orders each of the parties to bear its own costs.**

Kakouris Zuleeg Murray

Mancini Schockweiler Moitinho de Almeida

Grévisse Diez de Velasco Kapteyn

Delivered in open court in Luxembourg on 25 May 1993.

J.-G. Giraud C. N. Kakouris

Registrar For the President
President of Chamber