**phytosanitary inspections of imported products if effective measures are taken in order to prevent the distribution of contaminated domestic products and if there is reason to believe, in particular on the basis of previous experience, that there is a risk of the harmful organism's spreading if no inspection is held on importation.**

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 8 July 1975.

A. Van Houtte — Registrar

R. Lecourt — President

## OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 27 MAY 1975 [1]

*Mr President,*
*Members of the Court,*

Any person who wishes to import into the Federal Republic of Germany certain plants or plant products which are or may be carriers of certain harmful organisms must submit them to an official phytosanitary examination at the frontier. This results from the German Regulation of 23 August 1957 on measures for the prevention of the introduction of pathogenic organisms or pests which are dangerous to cultivated plants, known as the regulation on phytosanitary inspection ('Pflanzenbeschauverordnung'), in the version existing on 11 May 1970. This requirement also applies in particular to the import of apples and is intended, *inter alia,* to prevent the introduction of San José Scale, a particularly dangerous and persistent pest, the conditions for whose existence are present throughout the whole Community and which has already spread through Italy and France, as well as Southern Germany.

The question before us in the present action is whether certain provisions of Community law affect the legality of this requirement, at least as far as concerns imports from other Member States. Rewe, the applicant in the main action which gave rise to this reference, considers this to be the case.

1 – Translated from the German.

In October 1973 Rewe sought to import apples from France into the Federal Republic of Germany. For the batch in question it was able to submit the official French certificate of conformity with the phytosanitary regulations required under Article 7 of the 'Pflanzenbeschauverordnung'. When Rewe refused to submit the goods to a phytosanitary examination permission to import was refused by decision of 29 October 1973. It is the legality of this decision which is at issue in the contentious administrative proceedings which were promptly initiated by Rewe. The fact that it later submitted the batch for phytosanitary examination in order to allow the importation to take place is of no further interest to us in this instance.

In justification of its point of view that the compulsory phytosanitary examination is unlawful, Rewe relies on the prohibition on measures having effect equivalent to quantitative restrictions on imports contained in the Treaty (Article 30) and in Article 22 of Regulation No 1035/72 of the Council of 18 May 1972 on the common organization of the market in fruits and vegetables (OJ 1972, L 118, p. 1). It considers that the phytosanitary examination prescribed by German law constitutes an obstacle to imports within the meaning of the abovementioned provisions and the established case-law thereon. It is also unjustified under Article 36 of the Treaty, that is, under the provision that Articles 30 to 34 shall not preclude restrictions on imports justified on the ground of the protection of the health of plants. In fact, examinations such as those carried out in this case are unnecessary, *inter alia* because the pathogenic organisms controlled are to be found both in France and in Germany and also because such an inspection constitutes arbitrary discrimination within the meaning of the second sentence of Article 36, as home-grown apples are not similarly subject to an examination governed by legislation specifically designed with reference to certain plant diseases.

In the light of these grounds of complaint, by order of 24 October 1974, the court hearing the action brought by Rewe stayed the proceedings and referred to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty the following three questions:

1. Do 'quantitative restrictions on imports and all measures having equivalent effect' within the meaning of Article 30 of the EEC Treaty include the obligation to have plant products (here, apples) inspected on import, at the importer's expense, to see if they are carriers of certain harmful organisms, if refusal to allow the phytosanitary examination means that import of the goods will be prohibited?
2. Is the first sentence of Article 36 of the EEC Treaty to be interpreted in such a way as to make phytosanitary examinations imposed at the frontier under domestic law to prevent the introduction of San José Scale 'justified' within the meaning of the first sentence of Article 36 of the EEC Treaty even after the issue of the Council Directive of 8 December 1969 on the control of San José Scale (69/466/EEC, OJ Special Edition 24. 12. 1969, L 323, p. 5)?
3. Is the obligatory phytosanitary inspection on the importation of foreign apples 'arbitrary discrimination' within the meaning of the second sentence of Article 5 of the EEC Treaty if apples produced in the Federal Republic of Germany are not subject to a similar requirement of inspection when despatched within the country?

I consider that the following reply must be given to these questions:

*1. The first question*

The first question refers in part to 'quantitative restrictions on imports'. However, as in the EEC Treaty quantitative restrictions on imports are

synonymous with quotas — as the Commission has pointed out — and as, in this instance, it is clear that no direct quantitative restriction on imports exists, I need give no further explanation of this concept, as the question must be examined solely from the point of view of a 'measure having equivalent effect'.

In the light of what has been said on this first point in the proceedings, I do not consider its examination to present any particular difficulties.

The judgment in Case 8/74 (Judgment of 11 July 1974, *Procureur du Roi* v *Benoît and Gustave Dassonville,* ECR [1974] 837) is of primary importance here. According to this case 'all trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions'. Similar terms were also used in the Court's judgment in Case 190/73 (Judgment of 30 October 1974, *Officier van Justitie* v *J. W. J. van Haaster,* ECR [1974] 1123). This definition is clearly extremely rigorous and far-reaching, since it does not refer to the actual effects of the measures in question. Moreover, according to another judgment, the *extent* of the consequences of trading rules of this kind is not decisive. This may be inferred from what was laid down in Cases 51 to 54/71 (Rec. 1971, p. 1107, *International Fruit Company NV and Others* v *Produktschap voor groenten en fruit,)* according to which in intra-Community trade, the purely formal maintenance in force of a licensing system ('toutes licences accordées') constitutes a measure having equivalent effect. Moreover, in this connexion there must be taken into account the judgments in which it was emphasized that the basic principle of the Treaty is the abolition of *all* obstacles to the free movement of goods between the Member States (cf., for example, Case 29/72, Judgment of 14 December 1972, *SpA Marimex* v *Italian Finance Authorities,* Rec. 1972 p. 1318 and Case 190/73). I can therefore state with certainty that the concept of a 'measure having equivalent effect' also applies in principle to rules which subject each batch of imported plants or plant products — including the packing and the method of transport used — to an obligatory phytosanitary inspection, even where the importation is not refused. It must not be forgotten that such rules result in certain delays, in particular because they impose the use of certain frontier crossing points, and that they also give rise to expenses which the transporter charges in respect of submitting the products to the plant health authorities.

In my opinion, as a result of this finding it is superfluous to consider within the context of the first question Commission Directive No 70/50 of 22 December 1969 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports (OJ Special Edition (I) 1970, L 13) and the definitions contained therein, to which the Court has already had recourse in other cases (cf., for example, Case 155/73, Judgment of 30 April 1974, *Guiseppe Sacchi,* ECR [1974] 409). At all events, the significance of this Directive with regard to the questions which concern us may be left open for the moment, since certain decisive criteria under that Directive — the equal treatment of home-grown and imported products and the requirement that the rules be in proportion to the object pursued — will have to be considered during the examination of Article 36 of the Treaty, that is, in relation to the second and third questions.

Furthermore, my above conclusion clearly demonstrates the indefensible nature of the restrictive point of view of the Federal Government, which maintains that there must be an *appreciable* impediment to trade and that one could not speak of an obstacle

to trade where, as in the present case, the effects of a body of rules are only insignificant.

In this connexion it must be acknowledged — as the Commission has done — that procedures at the frontier which have no effect on the importation, such as normal inspections by the police or statistical declarations, clearly cannot constitute measures having equivalent effect. For this purpose, however, it is not necessary to resort to a concept which is so difficult to define and, therefore, dangerous, as that of 'appreciability'. This concept was developed in the case-law on competition law, that is, in relation to matters which are governed essentially by private law. On the other hand, as regards the removal of obstacles of a public law nature to the movement of goods, which is governed by other objectives of the Treaty, the case-law soon specified, for example, in relation to certain charges having an effect equivalent to customs duties or as regards the formal maintenance in force of a licensing system — that this subject is governed by strict principles and that there is no room for a margin of discretion such as that advocated by the Federal Government. Moreover, it is beyond doubt that even where such procedures as the phytosanitary inspection at the frontier are carried out during the normal hours of opening and then only in the form of random checks, where, consequently, they do not as a general rule prevent expeditious clearance at widely-separated posts designated for this purpose, it is still difficult for them to be regarded as totally insignificant impediments to importation.

Such procedures cannot, therefore, be justified on the ground that the insignificance of their effects renders Article 30 of the EEC Treaty inapplicable, but, at the most — if no recourse is had to the abovementioned Commission Directive No 70/50 — with the aid of Article 36 of the EEC Treaty to which the other questions submitted by the Verwaltungsgericht refer.

*2. The second question*

The emphasis in the second question is on whether phytosanitary examinations at the frontier in order to prevent the introduction of San José Scale are justified within the meaning of the first sentence of Article 36 of the EEC Treaty even after the issue of the Council Directive of 8 December 1969 on the control of San José Scale (OJ Special Edition (II) 1969, L 323, p. 565). From what was said in the course of the proceedings it has become clear that the consideration of this point must be extended to cover other aspects, in particular — and the wording of Article 36 gives occcasion for this — the question whether this type of examination is justified in principle.

In order to consider this wider aspect of the problem the information concerning the parasite in question put before us in the course of the proceedings is clearly of great interest. It seems to be very dangerous; once it is established in a particular place it appears practically impossible to eradicate it completely. The climatic conditions for its propagation exist throughout the whole Community. It has already appeared — to different degrees — in Italy, France and a limited area of Southern Germany. The danger posed by this organism has also led the European and Mediterranean Plant Protection Organization, a regional organization established within the context of the FAO, to fix a zero tolerance level for it and explains the particular concern of the Federal Government, which fears for the security of the large North German nurseries with their considerable economic importance.

However, the Commission has rightly pointed out that the damage represented by this parasite generally or in the

abstract is not sufficient for the application of Article 36. As the Court of Justice has often stated (cf., for example, Cases 13/68, *Salgoil* v *Italian Ministry for Foreign Trade,* Judgment of 19 December 1968, ECR [1968] 453 and Case 29/72, *SpA Marimex* v *Italian Finance Authorities,* Judgment of 14 December 1972, Rec. 1972, p. 1318), the provision in question constitutes an exception and therefore calls for a narrow interpretation even as regards the concept of measures which are 'justified'.

Phytosanitary measures can therefore only be justified if, without them, the state of health in the Member State in question would be threatened. In other words, there must be a serious risk that the products subject to the inspection may be contaminated.

In the present plant protection situation in the Community this risk cannot be excluded *a priori* as regards the harmful organisms in question, once the legislation in the various Member States on the control and prevention of plant diseases and harmful organisms is still greatly varied. However, the justification of the measures in question calls in addition for the situation to be further defined and distinguished and in practice there is no decisive factor to prevent this. This means that a Member State which takes protective measures against the introduction of harmful organisms must justify the existence of the said measures by taking into account the area of origin, the measures of control adopted there, that is, of the existing rate of infection, as well, where applicable, of seasonal peculiarities which may have an influence on the seriousness of the threat. If such a consideration shows that importations from certain countries which are carried out at certain periods present almost no risk for home-grown plants, it will be difficult to justify on a general level the carrying out of phytosanitary inspections at the frontier on a regular and undiscriminating basis.

In this connexion it is also interesting to consider — as has been particularly emphasized by the plaintiff in the main action — whether, as is the case in the Federal Republic of Germany, the importation is subject to the production of an official certificate of accordance with the phytosanitary regulations, issued by the exporting country and certifying that the goods are not contaminated and that the regulations of the importing country have also been observed. This fact alone is evidence against the existence of a real danger. However, as the reciprocal recognition of this type of certificate is not yet obligatory within the Community, additional inspections at the frontier cannot be regarded as illegal where there is sufficient evidence for doubting whether such certificates are equally reliable, for example, where it is possible to observe that over a considerable period in a series of cases and in spite of the official certificate the goods imported have not been free of contamination by pathogenic organisms.

During the proceedings the question was also raised whether importance must be attached to the fact that under Regulation No 1035/72 on the common organization of the market in fruit and vegetables, the imported product is subject at the frontier to a check on its quality and its marketing class. This question is not simply to be dismissed out of hand as unjustified, as it is conceivable, since the fruit which carries pathogenic organisms is of lower quality, that such an inspection enables the risk of introducing harmful organisms to be met. In the final analysis I consider that it is difficult to maintain on the basis of this consideration that additional phytosanitary examinations are superfluous, as the types of inspection mentioned are in fact carried out by different departments and from different points of view, that is, the quality check does not offer the same guarantee of the absence of contamination as does a specialized and thorough phytosanitary examination.

Having said this, there finally remains to be examined — and here I come to the heart of the second question — whether, even after the adoption of the Council Directive on the control of San José Scale, phytosanitary inspections carried out at the frontier under national law may still be justified within the meaning of Article 36. As you are aware, the plaintiff in the main action contests this vigorously. It considers that the abovementioned Council Directive has settled this problem uniformly and exhaustively for the whole of the Community. It maintains that this Directive lays down the principle of the control of the parasite, without regard to national frontiers, and that an inspection of the trade in host plants and parts of plants may only be carried out at the border of the contaminated areas and the safety zones. Moreover, the structure of the Directive clearly shows that the danger created by plant fruits is considered to be smaller, as even the transfer of fruit originating in a contaminated area is not subject to any obligatory examination. It concludes from this that the additional inspections held at the national frontiers must be regarded as contrary to the aims of the Directive because they amount to establishing additional principles and that, according to the criteria laid down in this Directive they cannot be regarded as necessary.

Like the Federal Government and the Commission I consider this point of view to be incorrect.

As regards the argument that the Council Directive does not prevent national inspections being held at the frontier, it must be pointed out first of all that the Directive only lays down minimum measures to control San José Scale and prevent it from spreading. As is shown by Article 11, it expressly allows for the adoption of additional and stricter provisions, even to prevent the spread of the parasite if such provisions are considered to be necessary. The Directive thus lays down no uniform system of measures for the control of the organism; it allows different risks of contamination to exist and it is therefore impossible to maintain, for this reason alone, that inspections held at the frontier are in principle incompatible with it. Another important factor is that the Directive is clearly confined to internal measures. It does not deal with the question of inspections at the frontier, as is shown by its fourth recital alone, which reads as follows:

'Whereas protective measures to prevent the introduction of harmful organisms into individual Member States would only have a limited effect if such organisms were not controlled simultaneously and methodically throughout the Community and were not prevented from spreading;'

That this point of view is correct is, moreover, borne out by the fact that as early as 1965 the Commission drew up a proposal for a Council Directive on protective measures against the introduction into the Member States of organisms harmful to plants. A document dated January 1973 shows that, at the present stage of the discussions on this test, the adoption of protective measures against the introduction of harmful organisms into the Member States is still regarded as necessary in principle. The abolition of inspections carried out at the frontier in the recipient State is only planned to take place gradually, when the supervision carried out in the despatching State inspires sufficient confidence, and even in the final version of the regulations it is intended that inspections may still be carried out at the frontier on certain grounds.

I can therefore say without hesitation — and with this I shall bring my consideration of the second question to an end — that the justification for the phytosanitary inspections at the frontier cannot be contested by reference to the

Council Directive of 8 December 1969 and the expiry of the period for its implementation provided for therein.

*3. The third question*

Finally, the third question concerns the reservation contained in Article 36 of the EEC Treaty by which the restrictions on imports referred to therein shall not constitute a means of arbitrary discrimination. It is therefore necessary to consider whether the phytosanitary inspection of foreign apples held without exception on importation constitutes arbitrary discrimination within the meaning of Article 36, where no similar examination requirement exists in relation to apples produced in the Federal Republic of Germany when they are despatched within that country.

In this connexion the Federal government argues first of all that, according to the German regulation on the control of San José Scale of 20 April 1972 which was adopted in implementation of the Council Directive of 8 December 1969, home-grown products are treated in a *comparable* manner as, taking everything into account, the marketing of the apples is subject to a similar requirement. It says that by virtue of the requirement of notification which is incumbent upon the owners of plants, the inspection carried out by the plant protection department concerns the source plants and that, where they are needed, the measures of control necessary are taken on the plant itself. On a reasonable view of the question as a whole it cannot be said that the imported products are treated differently nor, therefore, that there is any discrimination.

I consider that it has rightly been replied to this that in examining the existence of an alleged discriminatory situation it is not permissible to make such generalized comparison, which would make the inspection difficult and might give rise to infringements of the prohibition on discrimination. Reference must rather be made solely to the ultimate use proposed for the products in question in each case and whether, from this point of view, they bear an equivalent burden. This is clearly shown by the case-law developed in relation to Articles 12 and 95 (cf., especially Cases 2 and 3/62, Judgment of 14 December 1962, *Commission of the EEC* v *Grand Duchy of Luxembourg and Kingdom of Belgium* 1962 [ECR] 425) *SpA Marimex* v *Italian Finance Authorities,* Rec. 1972, p. 1309). It is difficult to put forward a different rule in relation to the application of Article 36.

The court making the order for reference was thus quite justified in pointing out that, when they are marketed, home-grown apples are not subject to any supervision corresponding to the inspections at the frontier. As the owners of home-grown *fruit* are also not subject to any requirement of notification and control, inequality of treatment clearly exists and the only question which may therefore arise is whether, in spite of that, it is not possible to speak of discrimination.

If the problem is considered from this point of view it immediately becomes clear that the question of discrimination cannot only be ruled out — as the plaintiff maintains — where the inspection held at the frontier forms part of a general system of national regulations governing plant protection which applies systematically, on the basis of the same criteria, to all products, that is, where the criteria applied are those developed within the context of the case-law on problems involving the law relating to fiscal charges (cf., for example, Case 29/72, Rec. 1972 p. 1309). That this point of view would be undoubtedly too narrow is shown, for example, by a case in which only imports, to the exclusion of the home-grown products, give rise to a risk of damage, because no contamination exists within the national territory. Thus, as the Commission

maintains on the basis of certain expressions used in Article 2 (r) of its Directive of 22 December 1969, the decisive factor can only be whether the different treatment is required by the factual situation.

On this point, the considerations put forward by the Federal Government also are certainly of importance. It maintains that within the country the parasite is controlled effectively on the plant itself within the small contaminated area. It considers that it is not necessary to provide for additional inspections when the products are marketed, although Article 19 of the German Law on Plant Protection ('Pflanzenschutzgesetz') in principle allows such examinations to be made where other measures prove insufficient. As, however, in the case of imported products it is impossible to take comparable measures to protect German plants, that is, measures directed to the plant itself, the only solution is to inspect the imported fruits. If the treatment of both imported and home-grown products were to be absolutely identical it would mean that within the country the effective measures of control directed to the plant itself would have to be replaced by less effective controls when the products are marketed, which no one could regard as sensible.

I consider that the justification of this argument cannot be doubted. However, like the Commission, I believe that it is not sufficient in itself. It must rather be explained in detail in the manner suggested by the Commission. The compulsory inspection on importation, which is not matched by any internal inspection when the goods are marketed, can in fact only be justified where there is an actual difference in the situation as regards the seriousness of the risk. The decisive factor is therefore how the risk of contamination and of introducing the parasite appears at the time of importation. If a reasonable assessment of this risk by the Member State in question, which clearly, since this is a difficult assessment to make, enjoys a considerable margin of discretion and which must take into account the frequency of the contamination and the effectiveness of the measures of control applied in the area of origin concerned, shows that the imported products give rise to a greater risk, a phytosanitary inspection at the frontier may be justified, but only in such a case.

In view of what has been submitted in the course of the proceedings one cannot escape the impression that at the time in question, as regards imports of apples from France, such justification existed. Ultimately, however, such a finding cannot be made within the context of the present proceedings, that is, in a request for a preliminary ruling under Article 177. It is a matter solely for the court dealing with the main action which will, if appropriate, have to carry out the necessary inquiries on this point.

4. In the light of the foregoing, I suggest that you should give the following answers to the questions referred by the Verwaltungsgericht Köln:

(a) The obligation to have plant products inspected on import from other Member States, in order to establish whether they are contaminated with certain harmful organisms, with the consequence that refusal to consent to the phytosanitary examination means that the import of the goods will be prohibited, is calculated, where no corresponding inspections are carried out when domestic products are marketed within the country, to make importation more difficult and costly and must therefore be

considered, apart from the exceptions laid down under Community law, as a measure having equivalent effect within the meaning of the EEC Treaty.

(b) Such examinations may be justified within the meaning of Article 36 of the EEC Treaty where a serious risk exists of introducing the parasite without such a protective measure, that is to say, where a danger to the state of health of the domestic plant is to be feared; in this connexion account must be taken of the area of origin of the goods, the efficiency of the measures of control which are applied there, the reliability of the certificates of conformity with the phytosanitary regulations issued by the country of origin and, where applicable, of the seasonal variations of the risk. They may be justified even after the date by which the Member States were obliged to observe the minimum provisions laid down in the Council Directive of 8 December 1969 on the control of San José Scale.

(c) The compulsory phytosanitary inspection of apples of foreign origin which takes place on the importation of this fruit from another Member State does not always constitute a means of arbitrary discrimination within the meaning of Article 36 because apples produced within the importing country are not subject, on despatch, to a similar compulsory inspection. The different treatment is permissible where the protection of the health of plants in a possible area of contamination within the national territory is ensured by adequate effective measures and where, on the basis of a reasonable assessment carried out in the light of the factors set out under (b), it may be assumed that the imported products present a greater risk of contamination and of introducing the parasite.