OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 12 June 1990

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My Lords,

1. In this case, the Commission seeks a declaration that Italy has failed to fulfil its obligations under Article 30 of the EEC Treaty and Directive 77/93/EEC (Official Journal 1977 L 26, p. 20) by prohibiting the importation of grapefruit from other Member States through inland border posts. Directive 77/93 is concerned, according to Article 1(1), with 'protective measures against the introduction into the Member States from other Member States or non-member countries of organisms which are harmful to plants or plant products'. Article 4(2) provides, as far as is relevant, that:

'Member States may:

(a) ban the introduction into their territory of the plants, plant products and other objects listed in Annex III, Part B, against their names . . . '

Against the name of Italy in Annex III. B of the directive appears the description 'Citrus fruit plants'. It is common ground that that expression covers grapefruit.

2. At the beginning of the 1980s, grapefruit could be imported into Italy via a number of road, rail, air and sea routes. The relevant Italian legislation was subsequently modified on a number of occasions and, on 18 January 1985, a ministerial decree was adopted (see GURI No 17, 21.1.1985, p. 425) requiring imports of grapefruit into Italy to be effected through five named coastal ports. All other points of entry, of which there had in 1980 been a considerable number, were henceforward closed to such imports. The number of coastal ports through which grapefruit could be imported into Italy was subsequently increased slightly but other points of entry remained closed to grapefruit.

3. This reduction in the number of points of entry through which grapefruit could be imported into Italy took place against the background of an exponential growth in the quantity of grapefruit imported into Italy from other Member States. Figures supplied by the Commission, in response to a question from the Court, show that, although the vast majority of the grapefruit imported into Italy between 1980 and 1989 was imported from outside the Community, the quantity imported from other Member States, including grapefruit produced in non-member countries, rose from 85 000 kg in 1980 to 6 184 000 kg in 1983. It should

* Original language: English.

be noted that, on 8 March 1984, a ministerial decree was adopted (see GURI No 83, 23.3.1984, p. 2505) which for the first time singled out grapefruit for special treatment and significantly reduced the number of points of entry through which they could lawfully be imported into Italy. By 1988, the quantity imported from other Member States had fallen to 167 000 kg. In the following year, no grapefruit at all were imported into Italy from other Member States.

4. The Commission has stated, without being contradicted by the Italian Government, that imports of grapefruit from other Member States used to take place principally by land, whereas imports from third countries have always arrived mainly by sea. The Italian Government acknowledges that its national production of grapefruit is limited and insufficient to satisfy demand.

5. At the hearing, counsel for the Italian Government pointed out that, according to the figures produced by the Commission, imports of grapefruit into Italy from other Member States were greater in 1986 than in 1985. He also claimed that the absence of imports from other Member States in 1989 was due to the adoption on 30 March 1988 of a ministerial decree (see GURI No 107, 9.5.1988, p. 11) which, while increasing the number of coastal ports through which grapefruit could be imported into Italy to seven, introduced a further requirement that imports of grapefruit be transported directly to Italy without passing through third countries.

6. This ban on indirect imports is not challenged by the Commission in these proceedings, but its existence appears to deprive the Commission's application of much of its purpose. If the measure which is challenged in these proceedings, namely the ban on importation of grapefruit from other Member States through inland border posts, is held unlawful, the removal of that ban might have little effect if the ban on indirect imports were to remain in place. Since the only Member State which has a land frontier with Italy is France, the result might be only to open the frontier to imports of grapefruit produced in France; but, although France is apparently a producer of citrus fruit, it is not clear from the information before the Court whether France produces grapefruit. There may therefore be some doubt about the practical effect of these proceedings.

7. None the less, the Court should in my view proceed to give a ruling on the breach of Community law alleged by the Commission, and the Italian Government has not suggested the contrary. The precise scope and the effects of the ban on indirect imports are not clear from the information before the Court. The possibility cannot be excluded that imports of grapefruit may be affected by the ban on imports by land independently of the ban on indirect imports. Moreover, the Court's ruling in this case may offer guidance on the legality of the ban on indirect imports and thereby avoid the need for that ban to be the subject of separate proceedings. I therefore return to the question whether the Italian Republic acted lawfully in requiring imports of grapefruit to be effected by sea.

8. The restrictions which are the subject of these proceedings were imposed ostensibly to prevent the introduction into Italy of harmful organisms, Italian citrus fruit, it is said, currently being among the healthiest in the world. The Italian Government maintains that the imposition of such restrictions is authorized by Article 4(2)(a) and Annex III. B.1 of Directive 77/93. Requiring imports of grapefruit to pass through coastal ports is said to be the only way of enabling proper phytosanitary inspections to be carried out. Such inspections have to be effected, so it is claimed, when a cargo arrives in port and is unloaded. It would be impracticable for them to be carried out at inland frontier crossings because of the shortage of qualified staff and because cargoes cannot conveniently be unloaded and examined in physical isolation, which is necessary if harmful organisms are to be detected. Moreover, according to the Italian Government, unloading cargoes at coastal ports facilitates the detection of citrus fruit hidden among other types of fruit. The risk of infection from smuggled fruit is considered by the Italian Government to be particularly high.

9. The Council acknowledged the particular risks to plant health created by imports of citrus fruit when it adopted Article 4(2)(a) of Directive 77/93. The Commission does not deny that special care needs to be taken to ensure that imported grapefruit is not harbouring harmful organisms, but argues that the steps taken by the Italian Government to achieve this end are disproportionate and discriminatory: disproportionate because the health of the Italian citrus fruit industry could be protected by other means which would be less detrimental to intra-Community trade; discriminatory because they bear more heavily on imports from other Member States than on imports from third countries. The Commission concludes that the closure of all inland frontier posts to imports of grapefruit into Italy is contrary both to Directive 77/93 and to Article 30 of the Treaty.

10. The Commission deals with a number of apparent obstacles to that conclusion in its letter of formal notice and reasoned opinion. First, although most grapefruit comes originally from outside the Community, the Commission points out that Article 30 applies to it as soon as it enters into free circulation in the Member States: see Article 9(2) of the Treaty; Case 41/76 *Donckerwolcke* [1976] ECR 1921, paragraphs 17 and 18. The Court held in Case 8/74 *Dassonville* [1974] ECR 837 that Member States were not entitled to create unjustified distinctions between products in free circulation within the Community and products imported directly from third countries. It is true that grapefruit are subject to the common organization of the market in fruit and vegetables established by Regulation (EEC) No 1035/72 (Official Journal, English Special Edition 1972 (II), p. 437), as amended, but Article 30 forms an integral part of that organization. Those points are not challenged by the Italian Government.

11. It follows that, since the contested Italian legislation has the effect of making imports of grapefruit into Italy from at least some of the other Member States more difficult, that legislation will be caught by Article 30 of the Treaty unless it can be justified under Article 36. The Italian

Government argues that, apart from Article 36, Article 4(2)(a) of Directive 77/93 confers a general and unlimited power on the Member States concerned to prohibit imports of grapefruit. I would reject that argument. The powers conferred on the Member States by the directive must be exercised in accordance with the Treaty. This means in the present case that restrictions on imports from other Member States must be justified under Article 36 of the Treaty as being necessary for the protection of the health and life of plants. If that were not so and if Article 4(2)(a) of Directive 77/93 purported to derogate from Article 30 of the Treaty in circumstances falling outside the scope of Article 36, then the validity of Article 4(2)(a) would have to be reviewed in the light of the duty of the Community institutions to 'have due regard to freedom of trade within the Community, which is a fundamental principle of the common market' (see Case 37/83 *Rewe-Zentrale* v *Landwirtschaftskammer Rheinland* [1984] ECR 1229, paragraph 18).

12. I do not consider it necessary to examine the validity of Article 4(2)(a) of Directive 77/93 here, because, properly construed, it is not in any event inconsistent with the Treaty. In conferring on certain Member States the power to derogate from the fundamental principle of the free movement of goods, Article 4(2)(a) of Directive 77/93 must be interpreted strictly. This means in particular that it should be understood as authorizing restrictions on imports from other Member States only where the general principles of law, notably proportionality and non-discrimination, have been respected. It cannot therefore be read as permitting the imposition of restrictions on imports which are stricter than is necessary to prevent the introduction of harmful organisms or which discriminate arbitrarily between imports from other Member States and imports from third countries. It follows, however, that in authorizing, subject to these conditions, a complete ban on imports of citrus fruit, Article 4(2)(a) of Directive 77/93 must be interpreted as permitting lesser restrictions where these are adequate to prevent the introduction of harmful organisms into the Member State in question.

13. Article 4(2)(a) simply embodies a recognition by the Community legislature that citrus fruit are prone to diseases against which special protection may be required. It thereby contributes to the comprehensiveness of that directive as a code on protective measures against the introduction of harmful plant organisms. It does not in my view purport to create derogations from the Treaty rules on the free movement of goods where none previously existed.

14. The case consequently turns on whether Italy could have protected its citrus fruit industry against the introduction of harmful organisms from abroad by measures having a less deleterious effect on intra-Community trade. The answer to that question depends on whether it is feasible for imported grapefruit to be subjected to the necessary

examinations at points of entry other than coastal ports. The Italian Government bears the burden of establishing that those questions fall to be answered in the negative: see Case 251/78 *Denkavit Futtermittel* [1979] ECR 3369, paragraph 24.

15. I therefore turn to the issue whether the Italian Government has discharged the burden of showing that it is not practicable for grapefruit entering Italy by land to be checked to ensure that they are not harbouring diseases. In its letter of formal notice and reasoned opinion, the Commission suggests a number of ways in which this might be done. Those suggestions are not repeated in the application or reply, but it is relevant to examine them in considering whether the Italian Government has established that the contested Italian legislation complies with the principle of proportionality.

16. The Commission accepts that it is necessary to unload cargoes in order to carry out the necessary inspections properly and even concedes that this may be more difficult at inland border posts than at coastal ports. It suggests, however, that cargoes could be sealed when they cross the frontier and inspected within the territory of the Italian Republic at a more appropriate place, perhaps even at a coastal port where there is one in the vicinity.

17. In that respect, the Commission refers in its reply to Article 11(3) of Directive 77/93, as amended by Article 1(7) of Directive 88/572/EEC (Official Journal 1988 L 313, p. 39), which Member States were required to implement by 1 January 1989. This requires Member States to ensure that the carrying out of inspections at the border to ensure compliance with Article 4 of the directive is progressively reduced. According to Article 11(3), such inspections should 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'. In any event, even if the Italian authorities were justified in insisting that cargoes imported by land be unloaded at the frontier, the Commission argues that the onus would be on haulage firms to transport loads in a way which took account of this possibility. The result would not necessarily be to cause undue delay.

18. The Commission is not convinced either that Italy has insufficient qualified staff to carry out inspections at inland border crossings. It takes the view that Italy could, at reasonable cost, ensure that inspectors are present at particular times, perhaps having been notified in advance by haulage companies that their services would be needed, in the same way as the arrival of ships is apparently notified in advance. The Commission points out that phytosanitary experts are already required by Italian law to be present at a number of inland frontier posts and claims that it would not be difficult to train those experts to examine grapefruit.

19. The Italian Government has not in my view succeeded in showing that those proposals are unreasonable. It simply asserts that they would entail excessive complexity, organizational difficulties and expense, both for importers and for the authorities responsible for carrying out the requisite inspections. It adds that the Commission is exceeding its jurisdiction in seeking to interfere with the manner in which Italy organizes its internal administration.

20. I do not find those objections convincing. The Commission is not seeking to interfere with the way Italy organizes its internal administration, but merely to show that the restrictions imposed by the Italian authorities on the importation of grapefruit are disproportionate because their ostensible objective could be attained by other measures which would be less detrimental to intra-Community trade.

21. As far as expense and administrative difficulty are concerned, the Court made it clear in Case 104/75 *de Peijper* [1976] ECR 613, paragraph 18, that Article 36 of the Treaty could not be used to justify rules or practices containing restrictions on the free movement of goods:

'which are explained primarily by a concern to lighten the administration's burden or reduce public expenditure, unless, in the absence of the said rules or practices, this burden or expenditure clearly would exceed the limits of what can reasonably be required'.

22. I do not consider that the Italian Government has succeeded in establishing that to allow grapefruit to be imported into Italy by land would entail an unreasonable administrative burden or excessive public expenditure. It will be observed that, until the beginning of 1985, a number of inland frontier posts remained open to such imports. Despite having been asked to do so by the Court, the Italian Government has been unable to identify any specific factor, such as a sharp increase in the quantity of diseased or smuggled fruit entering Italy from abroad, which might explain the decision taken in 1985 to restrict imports of grapefruit to a number of specified coastal ports.

23. With regard to the cost to importers of bringing grapefruit into Italy by land rather than by sea, this is clearly a matter for the importers concerned. The Commission does not suggest that imports of grapefruit from other Member States by sea should be prohibited.

24. I conclude that the Italian Government has failed to show that the closure of its inland border crossings to imports of grapefruit from other Member States was necessary to prevent the introduction into Italy of harmful plant organisms. I therefore propose that the Court:

(1) declare that, by prohibiting the importation of grapefruit from other Member States through inland border posts, the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty;

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