of trade within the Community, which is a fundamental principle of the common market.

3. It must be recognized that in the exercise of the powers conferred on them by Articles 43 and 100 of the Treaty, the Community institutions have a discretion in particular with regard to the possibility of proceeding towards harmonization only in stages and of requiring only the gradual abolition of unilateral measures adopted by the Member States. In view of the particular nature of the control of harmful organisms of plants and in view of the very incomplete nature of the harmonization effected thereby, the Council, by permitting inspection by sampling of up to one-third of consignments, has not exceeded the limits of its discretionary power.

In Case 37/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht Köln [Administrative Court, Cologne], for a preliminary ruling in the action pending before that court between

REWE-ZENTRALE AG, Cologne

and

DIRECTOR OF THE LANDWIRTSCHAFTSKAMMER [Chamber of Agriculture] RHEINLAND, acting as agent of the regional authorities, Bonn,

Intervener: Public prosecutor at the Verwaltungsgericht, Cologne,

on the compatibility with Articles 190 and 30 of the EEC Treaty of the penultimate and final sentences of Article 11 (3) of Council Directive No 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products (Official Journal 1977, L 26, p. 20),

THE COURT (Fifth Chamber)

composed of: Y. Galmot, President of Chamber, Lord Mackenzie Stuart, O. Due, U. Everling and C. Kakouris, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and national procedure

Rewe-Zentrale AG, Cologne, the plaintiff in the main proceedings (hereinafter referred to as "the plaintiff"), imports vegetables and potatoes from other Member States of the European Communities into the Federal Republic of Germany. When those products cross the frontier they are subject to phytosanitary inspections which are carried out under the control of the Director of the Landwirtschaftskammer for the Rhineland. The legal basis for those inspections is the Pflanzenbeschauverordnung [Order on the inspection of plants] of 15 March 1982 (Bundesgesetzblatt I, p. 329), which implemented in German law the provisions of Council Directive No 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products (Official Journal 1977, L 26, p. 20, as most recently amended by Council Directive No 81/7/EEC of 1 January 1981, Official Journal 1981, L 14, p. 23).

According to Article 8 (2) of the Pflanzenbeschauverordnung, which is intended to give effect to Article 11 (3) of Directive No 77/83/EEC, the obligation to inspect imports of fruit, vegetables or potatoes, with the exception of seed potatoes, from another Member State generally applies only to "no more than one-third of the consignments imported from a given Member State, as evenly spread as possible over time and over all the products."

By letter of 29 March 1982 to the defendant in the main proceedings (hereinafter referred to as "the defendant") the plaintiff contested that "one-third rule" and asked the defendant to give an undertaking that from 1 April 1982 phytosanitary inspections would be carried out in the area for which he was responsible on no more than three-twentieths of consignments imported from another Member State. The defendant replied by letter of 6 April 1982 that he would continue to deal with all imports which were subject to phytosanitary inspection in accordance with the relevant legal provisions.

By an application dated 16 April 1982 the plaintiff sought a declaration from the Verwaltungsgericht of Cologne that the defendant did not have the right to carry out the phytosanitary inspections on imports of fruit and potatoes for which he was responsible on more than three-twentieths of consignments imported from other Member States. In support of its request it contended that Article 8 (2) of the Pflanzenbeschauverordnung was inapplicable since it was contrary to Community law, which takes precedence. That provision is in conformity with the final subparagraph of Article 11 (3) of Directive No 77/93/EEC but the latter provision is itself contrary to Articles 30 and 36 of the EEC Treaty because such inspections constitute measures having an equivalent

effect within the meaning of Article 30 of the Treaty and because the national rules concerning phytosanitary inspections could only be harmonized in such a way that such inspections, as second inspections of imports, were permitted in respect of no more than 15 % of consignments imported from another Member State. Furthermore, the final subparagraph of Article 11 (3) of Directive No 77/93/EEC is invalid by virtue of Article 190 of the Treaty because the statement of the reasons on which it is based is insufficient. Inspection of one-third of all imports is not "occasional" inspection or "sampling", and the provision thus contains an inconsistency in that respect which is not resolved in the preamble to the directive.

The defendant considers the action to be unfounded. The frequency of inspection by sampling is fixed, within the limits of the "one-third rule", taking proper account of all the specific circumstances, according to the nature, quantity and origin of the imported products and the geographical areas of contamination by quarantine diseases and harmful organisms in the country of origin.

By order of 18 January 1983 the Verwaltungsgericht of Cologne referred the following questions to the Court of Justice for a preliminary ruling:

"(a) (Submitted pursuant to subparagraph (b) of the first paragraph of Article 177 of the EEC Treaty) Are the penultimate and final sentences of Article 11 (3) of Council Directive No 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products (Official Journal 1977, L 26, p. 20) compatible with:

(i) Article 190 of the EEC Treaty,

(ii) Article 30 of the EEC Treaty?

(b) (Submitted pursuant to paragraph (a) of the first paragraph of Article 177 of the EEC Treaty) If the provision referred to above is invalid:

To what extent, at the present stage of the development of Community law in the sphere of plant protection, is the carrying out of phytosanitary inspections by the importing State on imports of fruit and potatoes (other than seed potatoes) from a Member State (other than in exceptional cases where, for example, there is reason to suspect that the product is contaminated) justified within the meaning of the first sentence of Article 36 of the EEC Treaty when the consignment is accompanied by a phytosanitary certificate issued by a Member State?"

The Verwaltungsgericht considers that a ruling by the Court on those questions is necessary to enable it to give judgment in the dispute and, after considering in detail the Court's case-law, expresses doubt as to the legality of "the contested double phytosanitary inspections of fruit and potatoes without particular reason."

The order making the reference was received at the Court Registry on 10 March 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Rewe-Zentrale AG, represented by Mr G. Meier, by the Director of the Landwirtschaftkammer for the Rhineland, represented by Mr Mobis, by the Irish Government, represented by Mr L. J. Dockery, Chief State Solicitor, by the Council, represented by its Legal Adviser, Mr B. Schloh, acting as Agent, assisted by Mrs M. Sims, a member of its Legal

Department, and by the Commission, represented by Mr J. Grünwald, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By order of 5 October 1983 the Court decided to assign the case to the Fifth Chamber.

II — Relevant provisions

The purpose of Directive No 77/93/EEC, which is based in particular on Articles 43 and 100 of the Treaty, is to abolish within the Community systematic checking of plants and plant products for harmful organisms when they are imported from another Member State. In order to dispense with systematic inspections by the importing Member States, the directive provides for compulsory inspection in the consignor Member State and the issue of a certificate which must accompany plants exported to another Member State. The importing Member State must base its controls on an examination of the documents required, namely the certificates accompanying consignments of goods. It may therefore check the identity of the goods and check whether the nature and quantity of the consignment conform with the description contained in the relevant documents. Finally, in addition to that inspection, the Member State may carry out a supplementary health check on the imported plants or plant products.

However after the expiry of a transitional period of four years such inspections may not be carried out systematically except where there is strong evidence that the provisions have not been observed, for example where contamination is clear on visual inspection. In addition a more detailed inspection may be carried out if the goods originate in a non-member country and have not been the subject of previous examination in the Community. Apart from those two cases, inspection must no longer be systematic but only occasional. To be occasional, in the terms of the directive, the inspections may not be carried out in respect of more than one-third of the goods imported from a given Member State and must be as evenly spread as possible over time and over all the products. Moreover in order to be lawful the inspections must be carried out by sampling.

The contested provision is worded as follows:

Article 11 (3) (inspections by the importing Member State; systematic and occasional inspections by sampling)

"With regard to fruit and vegatables and potatoes other than seed potatoes, Member States may not supplement the official check on identity and the requirements permitted under paragraph 1 by systematic official checks on compliance with the provisions adopted pursuant to Articles 3 and 5, except where:

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

(b) the plants referred to above originate in a non-member country and the examination provided for in Article 12 (1) (a) has not already been carried out in another Member State.

In all other cases, only occasional official inspections of fruit and vegetables and potatoes other than seed potatoes shall be carried out, by sampling. They shall be deemed occasional if they are made on no more than one-third of the consignments introduced from a given Member State and are as evenly spread as possible over time and over all the products."

III — Written observations submitted to the Court

Admissibility

The *Commission* considers that the second question referred to the Court (question (b) of the Verwaltungsgericht) does not conform to Article 177 of the Treaty and is therefore inadmissible. The question relates neither to the interpretation of the Treaty (subparagraph (a) of the first paragraph of Article 177) nor to the validity and interpretation of acts of the institutions of the Community (subparagraph (b) of the first paragraph of Article 177). It is in fact asking the Court to act as an arbitrator and to deliver an opinion on a problem whose resolution is, within the framework of the Treaty and in particular having regard to Article 100 thereof, exclusively a matter for the Commission and the Council.

In the Commission's view, a national court may not require that the Court of Justice should, after it has declared a measure of Community law to be void or at the time of making such a declaration, lay down rules replacing an invalid measure. It is of the opinion that any attempt by a national court to extend the work of the Court beyond the jurisdiction provided for in Article 177 is incompatible with that provision and must therefore be rejected as inadmissible.

Substance of the case

Article 190 of the EEC Treaty

The *plaintiff* contends that the second sentence of the second subparagraph of Article 11 (3) of Directive No 77/93/EEC is contrary to Article 190 of the Treaty. It considers there to be an inconsistency between the first sentence of the second subparagraph of Article 11 (3), which refers to the possibility of carrying out inspections occasionally and by sampling, and the following sentence according to which inspections are deemed occasional if they are made on no more than one-third of consignments introduced from a given Member State and are as evenly spread as possible over time and over all the products. Consequently it considers that taking the literal meaning of the provision, inspections cannot be said to be carried out occasionally and by sampling when such inspections are regular and relate to as much as one-third of the products imported from other Member States.

As the purpose of the rules in question is to further one of the aims of the Treaty, namely the gradual removal of obstacles to and checks on intra-Community trade, as is stated in the eighth recital of the preamble to the directive, the plaintiff is of the opinion that laying down a legal definition in the second sentence of the second subparagraph of Article 11 (3) which radically alters the concept of inspections carried out occasionally and by sampling, nullifies the scheme for the gradual removal of phytosanitary checks at the frontier, without the directive in question containing any reason for such a rule.

In this connection the plaintiff refers to the judgment of the Court of 7 July 1981 in Case 158/80 *(Rewe,* "Butter-buying cruises", [1981] ECR 1805) and argues that the reasons given in Directive No 77/93/EEC do not fulfil the requirements laid down by the Court in its

case-law. The alleged inconsistency is all the more serious since it is a provision empowering the Member State to derogate from the principle that measures having an effect equivalent to quantitative restrictions are prohibited, which is one of the basic foundations of the common market.

The plaintiff submits that those considerations form a sufficient basis for the second sentence of the second subparagraph of Article 11 (3) of Directive No 77/93/EEC to be declared void.

The *Irish Government* submits that there are no valid grounds for regarding the contested provisions as contrary to Article 190 of the Treaty. In its opinion those provisions are consistent with the recitals in the preamble to Directive No 77/93/EEC and the recitals adequately refer to and explain them. In particular there is no conflict between the recitals in the preamble to the directive and the absence of a time-limit for the exercise by importing Member States of the right to carry out occasional inspections as defined by the directive.

The *Council,* for its part, refers to the Court's judgment in the *Rewe* Case, cited above, and to the judgments of 12 July 1979 in Case 166/78 *(Italy* v *Council* [1979] ECR 2575), 9 December 1982 in Case 309/81 *(Klughardt* [1982] ECR 4291) and 30 September 1982 in Case 110/81 Roquette [1982] ECR 3159). It follows from those cases, *inter alia,* that the reasons appended to legislative acts must be sufficient to enable the Court to exercise its supervisory powers and that the requirements of Article 190 are satisfied if the statement of reasons explains in essence the measures taken by the institutions. The Council considers that the concept used by it in the final sentence of Article 11 (3) is sufficiently described since the word "occasional" is clearly explained by "no more than one-third" and there is no need for further explanation in the recitals in the preamble to the directive. Moreover the Council emphasizes that the fundamental purpose of the directive is the gradual removal of double inspections carried out systematically by the exporting Member State and the importing Member State. There is therefore no need to give fuller reasons for the concept of occasional inspections which replaces the concept of systematic inspections in relation to fruit and vegetables originating in another Member State.

The Council concludes that the penultimate and final sentences of Article 11 (3) of the directive in question are not invalid since there is no failure to state the reasons on which it is based.

The *Commission* refers to the eighth recital in the preamble to the directive which, in its opinion, shows that the only aim of the directive is the gradual removal of obstacles to and checks on intra-Community trade and not the complete elimination of checks. With those words the Community legislature intended to give notice not of outright abolition but of a trend towards the abolition of checks beginning with the systematic inspections under the rules laid down by the International Plant Protection Convention.

In the Commission's view the starting point for harmonization is the legal position created by the International Plant Protection Convention as follows from the fifth, sixth and 13th recitals in the preamble to the directive. The purpose of the harmonization is set out in the fifth and sixth recitals as follows:

"Whereas the need for such measures has long been recognized; whereas they have formed the subject of many national regulations and international conventions, including the International Plant Protection Convention of 6 December 1951 concluded at the United Nations Food and Agricultural Organization, which is of world-wide interest;

Whereas the International Plant Protection Convention and the close cooperation of States in the European and Mediterranean Plant Protection Organization have, to a certain extent, already resulted in the harmonization of plant-health laws."

The legal position as it should be after the expiry of the four-year transitional period laid down by the directive is described in the 18th and 19th recitals in the preamble as follows:

"Whereas, on expiry of the four-year period, the plant-health checks carried out in the country of destination on fruit, vegetables and potatoes, apart from seed potatoes, will no longer be permitted, except for special reasons or, to a limited extent, apart from certain inspection formalities;

Whereas such plant-health checks must be limited to introductions of products originating in non-member countries and to cases where there is strong evidence that one of the plant-health provisions has not been observed; whereas, in all other cases, occasional checks only may be allowed."

The Commission considers that inasmuch as the 18th recital refers to "plant-health checks carried out . . . to a limited extent" and inasmuch as the 19th recital states that only "occasional" checks will be allowed, in contrast to the systematic checks carried out previously, those recitals determine precisely the system of checks as defined in the second subparagraph of Article 11 (3) of the directive; the checks may be carried out on no more than one-third of imported products and only by sampling; moreover they must be carried out occasionally and not systematically.

In the opinion of the Commission it follows from the preceding considerations that the complaint that the statement of reasons is insufficient is unfounded.

Article 30

The *plaintiff* claims that the provision in question also contravenes Article 30 of the Treaty and cannot be justified by reference to the first sentence of Article 36.

According to the plaintiff the present issue is to verify the legality of a provision, namely, in this case, to check the compatibility of Article 11 of the directive with the Treaty. According to the first paragraph of Article 173, subparagraph (b) of the first paragraph of Article 177 and Article 184 of the Treaty it is also possible, in the course of proceedings to examine the validity of a provision, to consider whether a directive, as an "act of the institutions of the Community" (third paragraph of Article 189 of the Treaty), is valid or invalid as an "infringement" of the Treaty.

Referring to the Court's judgment of 8 July 1975 in Case 5/75 *(Rewe* [1975] ECR 843) the plaintiff submits that phytosanitary inspections, to which plant products from another Member State are subject at the frontier, constitute measures having an effect equivalent to quantitative restrictions and are prohibited subject to the exceptions laid down in Article 36 of the Treaty. Since each consignment of fruit and potatoes imported from a Member State is accompanied by a phytosanitary certificate issued by the exporting State, the

inspections carried out by the importing State constitute a second check. According to the plaintiff the only additional checks which may be carried out lawfully in the importing Member State are those which are carried out occasionally and by sampling and which in fact relate to goods which may have been contaminated by harmful organisms during transportation, something that is moreover highly unlikely since the relevant authority's phytosanitary certificate must also relate to the packaging and means of transport of the goods by virtue of Article 6 (1) of the directive.

Inspection of up to one-third of imported consignments is not necessary within the meaning of the first sentence of Article 36. The plaintiff supports that contention by referring to the Court's order of 4 March 1982 in Case 42/82 R *(Commission* v *French Republic* [1982] ECR 841) in which the Court gave a ruling on the extent to which inspection by sampling is admissible and declared that prior to the consignments of the goods in question being put into free circulation such inspections must be restricted to a maximum of 15 % of the consignments presented at the frontier except in cases where there is specific evidence of a particular danger. In the present case, at most, inspection of a maximum of 15 % of imported consignments would be justified and they must be spread as evenly as possible over time and over all the products.

The *defendant* emphasizes in his submission that it has been observed in the field for which he is responsible that inspections by the exporting Member States have not always proved to be effective and that anomalies have been and still are found with regard to imports. He points out moreover that, as a general rule, the maximum limit for inspections is not reached. He annexes to his submissions a list of the objections of all the offices responsible for the inspection of plant products in the Federal Republic of Germany for the period from 1 January 1977 to the beginning of March 1983 with regard to consignments which had to be rejected.

The *Irish Government* states that what is at issue in this case is not a national measure adopted by a Member State but rather a provision contained in a directive adopted by the Council under Articles 43 and 100 of the Treaty. As the directive is based on Article 43 of the Treaty, Article 38 (2) has the effect of removing in the present case the need to examine the justification for the measures contained in the last two sentences of Article 11 (3) of the directive by reference to Article 36 of the Treaty. In those circumstances the Irish Government is of the opinion that the provisions in question may not be reviewed by the Court.

If the Court should, contrary to that opinion, rule on the validity of the relevant provisions with regard to Articles 30 and 36, there is a presumption in favour of the validity of those provisions which is in practice virtually conclusive. The Irish Government rejects the analogy made by the plaintiff by reference to the Court's order in Case 42/82 R. That order is not a rule of law but rather an interim measure in a particular case, the subject matter of which was completely different from that of a provision of Community law contained in a Council directive. Control measures on the importation of wine are primarily a matter of protecting

the consumer whereas phytosanitary inspection measures concern plants which may introduce a disease or a pest capable of infesting the ground and of affecting future crops. Despite the certificate issued by the exporting Member State, there is a risk that infection may be introduced in intra-Community trade so that it is not excessive to inspect up to one-third of imports. The absence of the necessary level of import monitoring might cause Member States to invoke the safeguard clause contained in Directive No 77/93/EEC.

The Irish Government concludes that on the basis of those arguments there is no reason to doubt the validity of the provisions in question.

The *Council* refers to the Court's judgments of 15 December 1976 in Case 35/76 (*Simmenthal* [1976] ECR 1871), 20 February 1979 in Case 120/78 (*Rewe* [1979] ECR 649), 8 November 1979 in Case 251/78 (*Denkavit* [1979] ECR 3369), 17 December 1981 in Case 272/80 (*Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277), 31 March 1982 in Case 75/81 (*Blesgen* [1982] ECR 1211) and 8 July 1975 in Case 4/75 (*Rewe* [1975] ECR 843).

It is of the opinion that while the phytosanitary checks carried out by the importing Member State in this case must be regarded as measures having an effect equivalent to quantitative restrictions, Community law provides for exceptions which apply in this case. In that respect it relies on the judgment in Case 4/75 *Rewe*, cited above. The exceptions are laid down in Article 36 of the Treaty and that article may be relied on directly because Directive No 77/93/EEC has not replaced it with a completely new scheme.

The Council emphasizes that this case concerns a legal act of the Community and that the argument may therefore concentrate on that act. Reference should therefore not be made to those cases which are concerned only with unilateral measures adopted by the Member States and in which their compatibility with Articles 30 and 36 was assessed. More relevant is the Court's judgment of 25 January 1977 in Case 46/76 (*Bauhuis* [1977] ECR 5) concerning Directive No 64/432/EEC whose object was to concentrate inspections of exports from one Member State to another in the exporting State "so that inspections at the frontier organized unilaterally by the importing Member State become unnecessary or are at least reduced to an occasional check that the veterinary and public health measures which are required to be taken in the exporting Member State have been complied with" (paragraph 27). It follows from that judgment that the measures are not adopted by each Member State in order to protect its own interests but by the Council in the general interests of the Community. That judgment therefore supports the view that such inspections are not to be regarded as unilateral measures which hinder trade but rather as operations intended to promote the free movement of goods in particular by rendering ineffective the obstacles to such free movement which might be created for health inspections adopted pursuant to Article 36 (paragraph 30).

The Council concedes that Directive No 77/93/EEC, unlike Directive No 64/432/EEC, cannot be regarded as a true harmonizing directive. Nevertheless even where harmonization already exists the Court has recognized the legality of inspections by sampling (see paragraph 20 of its judgment in the *Simmenthal* case, cited above). The same should apply *a fortiori* where the approximation is only partial as in this case. In support of this argument the Council once again refers to the judgments in Cases 251/78 and 272/80, cited above. The Council therefore takes the view that a second inspection carried out on up to one-third of consignments is indeed compatible with Article 36 of the Treaty.

The Council next considers what the position would be if the Court declared that the penultimate and final sentences of Article 11 (3) of Directive No 77/93/EEC do not fall within Article 36 of the Treaty. Matters would then revert to how they were previously, that is to say the situation would be governed by international law relating to plant protection as laid down by the international convention signed at Rome on 6 December 1951 (Food and Agricultural Organization) which came into force in all the Member States of the Community before the EEC Treaty came into effect. According to Articles VI (1) (a) and VI (2) (a) and (f), the contracting parties have full authority to introduce import restrictions, including the possibility of carrying out a second inspection of all consignments in a systematic and complete manner. The Council therefore states that, "far from being contrary to the Treaty and the Court's case-law", the one-third rule "has reduced the freedom of action of the Member States in that specific situation."

With regard to the plaintiff's reference to the Court's order in Case 42/82 R the Council notes that that order has lost its validity since final judgment was given on 22 March 1983 [1983] ECR 1013). The plaintiff, nevertheless interpreted that order as a decision of principle concerning the question of the extent of phytosanitary inspections. The Council submits several arguments opposing such an interpretation: To expect decisions of principle from orders given under Article 186 of the Treaty rests on a misconception of the nature of such orders. It would seem to be hazardous to draw a conclusion before knowing and examining the full text of the Court's judgment. Lastly it remains to be verified whether the same provisions are capable of applying to fruit on the one hand and to wine on the other since the inspections serve different purposes.

The Council argues finally that the complete text of the order confirms its view. Since the defendant State in Case 42/82 itself considered that inspection by sampling approximately one consignment in 10 was sufficient to guard against any risks, the Court, as a precaution, set the percentage of inspections at 15% in the provisional measures it ordered *ad interim*. In the final judgment, however, the Court did not give a ruling on the proportion of 15% but it did state that systematic analysis of all imports or of three consignments out of four was contrary to Articles 30 and 36 of the Treaty.

In conclusion on that point the Council considers that reducing the proportion inspected from 100% to no more than one-third amounts to substantial progress as referred to in the 12th and 16th

recitals of the preamble to the Directive No 77/93/EEC.

On the basis of the foregoing, the Council's investigation has not revealed the existence of any factors capable of affecting the validity of the contested provisions. The double inspections permitted by the directive are without doubt measures having an effect equivalent to quantitative restrictions, yet they are lawful because they fall within the exceptions provided for in Article 36 of the Treaty.

The *Commission* begins its submissions on the present point by recalling the problem as expressed by the Verwaltungsgericht in its request for a preliminary ruling where it was unsure to what extent, at the present stage of the development of Community law, taking into account the harmonization accomplished by Directive No 77/93/EEC, the carrying out of double phytosanitary inspections of one-third of consignments of fruit and potatoes from a Member State was justified, in the absence of any particular reason, for example, signs giving rise to a suspicion that the product was contaminated.

The question of the compatibility of the second subparagraph of Article 11 (3) of Directive No 77/93/EEC with Article 30 of the Treaty can, in the Commission's opinion, be divided into three parts:

(a) Does Article 30 of the Treaty apply to intra-Community trade in fruit and potatoes?

(b) According to which principles does Article 30 of the Treaty apply to legal acts of the Community, in particular to directives on harmonization?

(c) Is the second subparagraph of Article 11 (3) of Directive No 77/93/EEC compatible with those principles?

With regard to the applicability of Article 30 to fruit and potatoes, the Commission refers to Article 38 (1) of the Treaty, according to which the common market is to extend to agriculture and trade in agricultural products. Under Article 38 (2) the rules laid down for the establishment of the common market are to apply to agricultural products, save as otherwise provided in Articles 39 to 46. On that basis the Commission considers that intra-Community trade in fruit and potatoes is subject to the provisions of Article 30 of the Treaty.

Next the Commission considers whether the prohibitions in Articles 30 and 36 are addressed exclusively to the Member States. In its view there can be no doubt that the articles are addressed principally to the Member States because the aim was to abolish the quantitative restrictions applied by the Member States when the common market was established and to prevent their re-introduction. In those circumstances it would be absurd to prohibit the Council or Commission from maintaining or adopting quantitative restrictions or measures having an equivalent effect.

It does not necessarily follow that Article 3 (a) of the Treaty provides for "the limitation, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect" (only) as a duty imposed on the Member States, when the provision states that it is also the subject of "the activities of the Community" for the purposes set out in Article 2. The Council and the Commission interpret that as meaning not only that they must carry out the tasks expressly assigned to them in

Chapter 2 of Title 1 on "Free movement of goods" but also that in the exercise of all their other powers under the Treaties they must pursue the objective of eliminating obstacles to trade in the Community.

The Commission takes the view that in this case it is necessary to determine how important the objective of eliminating obstacles to trade is to the harmonization, under Article 100 of the Treaty, of provisions laid down by law and regulation, and to define the duties imposed on the Council and the Commission. In fact that is the sole purpose of the present litigation.

Where the purpose of the harmonization directive under Article 100 is, as in this case, to facilitate the functioning of the common market by approximating national supervisory measures, the initial presumption must be that the inspections to be harmonized are not prohibited as such by Article 30 but are, on the contrary, justified under Article 36. Otherwise the Commission could have commenced proceedings pursuant to Article 169 against the Member States for infringement of Article 30 to force them to withdraw the various supervisory measures.

It is therefore the responsibility of the Community legislature to attempt to approximate the various existing national inspection systems in such a way that the objectives set out in Article 3 (a), namely the elimination, as between Member States, of quantitative restrictions and all other measures having an equivalent effect, are taken into account as much as possible. The Commission points out that it is difficult to state in abstract terms, by means of legal rules, to what extent the purpose of the approximation of national supervisory provisions is to be effected by harmonization measures. The optimum solution would be the total elimination of all checks within the Community while the most narrow solution would be to harmonize the rules in such a way that the checks do not hinder intra-Community trade any more than they did before harmonization. Between those extremes lies an area within which the Community institutions must meet their goal of harmonization taking account of the principles of necessity, proportionality and non-discrimination.

It follows that the legality of Community measures to harmonize inspections in intra-Community trade must be assessed in accordance with specific criteria as defined above. That principle has been confirmed both in academic writings and in the Court's case-law (see its judgment of 24 October 1973 in Case 10/73 *Rewe* [1973] ECR 1175 and its judgment in the *Bauhuis* case, cited above), showing that the measures adopted under Community law may not be equated *a priori* with obstacles to trade adopted unilaterally by the Member States even if the Community measures involve some hindrance to such trade.

In addition the Commission attempts to show that the contested directive does not have any more detrimental effect on trade than the former national supervision and that the directive does not infringe the principles of proportionality, necessity and non-discrimination.

The Commission sets out the relevant provisions of the International Convention on Plant Protection and concludes that that convention in no way

restricts the supervisory powers of the importing States. In comparison with the previous legal position, Directive No 77/93/EEC does, however, considerably restrict the supervisory powers of the Member States thus clearly facilitating intra-Community trade both for the business circles concerned and for the supervisory authorities. First, in particular by giving a common definition of harmful organisms and of specific requirements on the importation of goods, it enables exporting Member States to apply their own phytosanitary legislation when inspecting plants instead of complying with foreign legal provisions as they had to before: supervision is thus simplified considerably and the procedure is therefore more transparent and less haphazard for the exporting Member State. Another major step forward is the fact that the inspection certificate is legally binding and that therefore the number of inspections is limited. The importing Member State's power to carry out inspections is therefore considerably reduced.

The principle of necessity, argues the Commission, means that the rules laid down to attain an objective recognized by the legal system must be effective, adequate and necessary: since plant protection is one of the objectives recognized by the legal system and phytosanitary inspections on exportation and importation are an effective and appropriate means of attaining that objective, the only question remaining is whether the contested system of inspection is also necessary to attain that objective.

The Commission explains that the "one-third rule" was not at first in its original proposal. After more than 10 years of discussions, resumed in 1973 after the accession of the United Kingdom, Ireland and Denmark, the Council adopted the definitive text of the directive in December 1976 including that rule. The inclusion of the "one-third rule" was the expression of the Council's desire to reconcile two conflicting but equally important objectives. The concept of occasional inspections reflects the intention to hinder trade in this respect as little as possible, while the "one-third rule" reflects the desire to minimize the risks attached to the new provisions adopted by the Community. Moreover, by general agreement a transitional period of four years was fixed for the implementation of the new rules on inspections.

The Commission examines at length the risks involved in trade in plants and emphasizes in particular that inspection by the importing Member State serves only to cross-check that the inspection carried out by the consignor State was effective. However the cross-check is accompanied by an additional inspection allowing the diagnosis of contamination that was neither present nor verifiable when the first inspection was carried out by the consignor State. It is therefore not simply a second, duplicated inspection and the system is justified by the fact that it relates to biological matter.

In addition the Commission emphasizes that unlike products such as wine which, if they are of low quality or contaminated, cause injury which is

limited to the products themselves or the consumers thereof, the consequences of plant diseases are never limited just to the specimens affected. Moreover, as the term "quarantine disease" clearly indicates, the diseases in question are epiphytic diseases which spread very rapidly and which cause immense damage.

With regard to the principle of proportionality the Commission submits that a distinction must be drawn between the problem of the proportionality of a rule of law and the problem of its implementation; no such distinction was made by the plaintiff or the Verwaltungsgericht when they attempted to apply an order of the Court concerning the unlawful implementation of Community supervisory measures to the adoption of Community supervisory rules.

The Commission maintains that if the plaintiff's reasoning based on the Court's order in Case 42/82 R were correct, it would also be necessary to hold that the provisions governing the wine sector which require the Member States to ensure compliance with Community law and which do not impose a 15% limit on inspections are unlawful.

Next the Commission refers to the judgment of 22 March 1983 in Case 42/82 (*Commission* v *French Republic* [1983] ECR 1013) according to which the measures of verification carried out must be necessary for attainment of the desired objective and must not create obstacles to trade which are disproportionate to that objective. In that respect it recalls its submissions concerning the necessity of the measure at issue and adds that it does not create disproportionate obstacles to the detriment of the business circles concerned but that Directive No 77/93/EEC is in fact the first step towards eliminating such obstacles. If the directive had not been adopted, the international convention would still be applicable with no restrictions as to the form of supervisory measures.

The Commission notes that neither the plaintiff nor the national court has attempted to put forward any argument to support the view that the "one-third rule" is disproportionate. Furthermore, with regard to the implementation of the directive, it points out that the provision in question should in fact rule out inspections being carried out unreasonably frequently. According to the Commission there is no other evidence to suggest that the inspections actually carried out are contrary to Article 30, as would be the case, for example, if the inspections were excessively long.

Finally the Commission states that the second subparagraph of Article 11 (3) of Directive No 77/93/EEC does not infringe the principle of non-discrimination either. The final sentence of Article 11 (3) expressly provides that products from different Member States must be treated equally.

IV — Oral procedure

At the sitting on 14 December 1983, oral argument was presented by the plaintiff in the main proceedings, represented by G. Meier, acting as Agent; by the defendant in the main proceedings, represented by W. Mobis, acting as Agent; by the Council, represented by B. Schloh, acting as Agent; and by the Commission, represented by J. Grünwald, acting as Agent,

At the sitting the plaintiff in the main proceedings emphasized that the aforementioned order of the Court in Case 42/82 R and the figure of 15% as an acceptable percentage of inspections were irrelevant in this case. On the contrary, what was important was that the rules in question providing for inspection of one-third of consignments were excessive and were not necessary within the meaning of Article 36. By laying down such rules the Council had exceeded its ordinary legislative power.

The Advocate General delivered his opinion at the sitting on 1 February 1984.

Decision

1 By order of 18 January 1983, which was received at the Court on 10 March 1983, the Verwaltungsgericht Köln [Administrative Court, Cologne] referred to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty a question on the validity of the penultimate and final sentences of Article 11 (3) of Council Directive No 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products (Official Journal 1977, L 26, p. 20), and a question on the interpretation of Article 36 of the EEC Treaty.

2 The questions arose in the course of an action brought by Rewe-Zentrale AG, Cologne, an importer of, *inter alia*, fruit and potatoes from other Member States, seeking a declaration that the Landwirtschaftskammer Rheinland [Chamber of Agriculture for the Rhineland] had no authority to carry out phytosanitary inspections on up to one-third of consignments of the said products on their importation, as provided for by the Pflanzenbeschauverordnung [Order on the inspection of plants] of 15 March 1982 (Bundesgesetzblatt I, p. 329).

3 The Verwaltungsgericht held that the German order merely gave effect in national law to Article 11 (3) of Directive No 77/93 and therefore expressed doubts as to the validity of the latter provision with regard to the statement of reasons on which it is based and with regard to its compatibility with the provisions of the Treaty relating to the free movement of goods.

4 The Verwaltungsgericht therefore stayed the proceedings and referred the following questions to the Court:

"(a) (Submitted pursuant to subparagraph (b) of the first paragraph of Article 177 of the EEC Treaty):

Are the penultimate and final sentences of Article 11 (3) of Council Directive No 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products (Official Journal 1977, L 26, p. 20) compatible with:

(i) Article 190 of the EEC Treaty,

(ii) Article 30 of the EEC Treaty?

(b) (Submitted pursuant to paragraph (a) of the first paragraph of Article 177 of the EEC Treaty) If the provision referred to above is invalid:

To what extent, at the present stage of the development of Community law in the sphere of plant protection, is the carrying out of phytosanitary inspections by the importing State on imports of fruit and potatoes (other than seed potatoes) from a Member State (other than in exceptional cases where, for example, there is reason to suspect that the product is contaminated) justified within the meaning of the first sentence of Article 36 of the EEC Treaty when the consignment is accompanied by a phytosanitary certificate issued by a Member State?"

5 Before replying to those questions the legislative context of the contested provisions must be examined.

6 It should be observed first that Directive No 77/93, which was adopted on the basis of Articles 43 and 100 of the Treaty, is not concerned with the organization of measures for eradicating harmful organisms of plants within each Member State, but is intended solely to lend support to such measures by means of coordinated protective measures against the introduction of such organisms into the Member States. It is a measure involving a degree of harmonization.

7 Articles 1 and 2 define the geographical scope of application of the directive and certain terms used therein and Article 3 and 5 either enjoin or authorize

the Member States to ban the introduction into their territory of the organisms, plants and plant products listed in Annexes I to IV to the directive.

8 According to Article 6 the Member States are to lay down, at least in respect of the introduction into another Member State of the plants, plant products and other objects listed in Annex V (including certain types of fresh fruit and potato tubers), that the latter and their packaging and, if necessary, the vehicles transporting them are to be examined on an official basis to make sure that they are not contaminated by the harmful organisms the introduction of which into its territory is banned by the Member State under Articles 3, 4 and 5. Where it is considered, on the basis of that examination, that those conditions are fulfilled, Article 7 provides that a phytosanitary certificate is to be issued.

9 As a counterpart to such examination carried out by the authorities of the exporting Member State, Article 11 of the directive lays down limits to the checks carried out by the authorities of the Member State of destination. With the exception of a check on the identity of the products and of certain precisely defined cases, the latter State may not provide, in respect of products from another Member State and certified by it, for systematic inspections to ascertain compliance with the provisions adopted pursuant to Articles 3 and 5 unless there is serious reason to believe that one of those provisions has not been complied with. In all other cases the penultimate sentence of Article 11 (3) provides that "only occasional official inspections . . . shall be carried out, by sampling". According to the final sentence: "They shall be deemed occasional if they are made on no more than one-third of the consignments introduced from a given Member State and are as evenly spread as possible over time and over all the products."

10 Finally, Article 20 of the directive provides that the restrictions laid down in Article 11 (3) are to be brought into force within four years and that national law is to be amended in accordance with the other provisions of the directive within two years.

The first question

11 It is clear from the order for reference that the doubts felt by the Verwaltungsgericht relate, on the one hand, to the possibility provided for in the final sentence of Article 11 (3) of carrying out inspections on up to one-third of the consignments and, on the other hand, to the fact that there might be a contradiction between that possibility and the use of the word "occasional" in the preceding sentence.

12 It must be emphasized that the final sentence is intended only to show the maximum number of inspections by sampling which the Council considered justified taking account of the particular nature of the problem and the stage of development of Community law on the subject. From that point of view the final sentence is not inconsistent with the concept of occasional inspections.

The statement of reasons for the contested provision

13 According to the Court's well-established case-law the extent of the duty to provide a statement of reasons prescribed in Article 190 of the Treaty depends on the nature of the measure in question. With regard to measures having general application the requirements of Article 190 are satisfied if the statement of reasons given explain in essence the measures laid down and a specific statement of reasons in support of all the details which might be contained in such a measure cannot be required, provided that such details fall within the general scheme of the measures as a whole. The statement of reasons for Directive No 77/93 must therefore be examined in the light of those criteria.

14 The first eight recitals in the preamble to Directive No 77/93 explain in some detail that the protection of plants against harmful organisms is absolutely necessary to avoid reduced yields and increase agricultural productivity and that it is necessary to re-organize plant-health inspection in the Community in conjunction with the gradual removal of obstacles to and checks on intra-Community trade. With regard to the latter the 12th recital states that plant-health inspection is carried out not only in the consignor country but also in the country of destination and that it is desirable to

abolish the latter checks gradually at the same time as rendering those of the consignor country more stringent.

15 The 15th and 16th recitals note that if a plant-health check carried out in the consignor Member State constitutes a guarantee that the products are free from harmful organisms, it is possible to dispense with systematic inspections carried out in the Member State of destination, but that they can only be dispensed with gradually since confidence between the Member States regarding the correct operation of the new inspection system must first be established. According to the 17th, 18th and 19th recitals, it appears justified for systematic checks to continue for a period of four years but after that period plant-health checks carried out in the Member State of destination will no longer be permitted except for special reasons or in the form of occasional checks.

16 From the foregoing examination of the recitals in the preamble to the directive it may be concluded that there is a full statement of reasons not only for the temporary continuation of systematic inspections but also for their replacement by occasional inspections. Even if those recitals do not give any specific reason for the level of occasional checks provided for by the final sentence of Article 11 (3), that provision falls within the general scheme of the measures as a whole and is not in any way inconsistent with the statement of reasons for those provisions. It must therefore be held that the statement of reasons is also sufficient with regard to that point.

Compliance with Article 30 of the Treaty

17 The plaintiff in the main proceedings contends in its observations submitted to the Court on this point that the inspections carried out in the Member State of destination constitute measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the EEC Treaty and that inspection of up to one-third of consignments cannot be justified under Article 36 in view of the examination carried out by the authorities of the consignor Member State.

18 Although it is true, as the Commission emphasized in its observations, that Articles 30 to 36 of the Treaty apply primarily to unilateral measures adopted by the Member States, the Community institutions themselves must

also have due regard to freedom of trade within the Community, which is a fundamental principle of the common market.

19 Nevertheless is must be stated that Directive No 77/93 is not intended to hinder intra-Community trade. On the contrary it seeks to achieve the gradual abolition of measures which were adopted unilaterally by the Member States and were, at the time, justified in principle by Article 36 of the Treaty, as the Court recognized in its preliminary ruling of 8 July 1975 on questions referred to it in an earlier dispute between the parties to the main proceedings in this case (Case 4/75 [1975] ECR 843). At the same time, the directive seeks to strengthen, in the general interest of the Community, the protection of agricultural products against the substantial damage which may be caused by harmful organisms.

20 It must be recognized that in the exercise of the powers conferred on them in this respect by Articles 43 and 100 of the Treaty, the Community institutions have a discretion in particular with regard to the possibility of proceeding towards harmonization only in stages and of requiring only the gradual abolition of unilateral measures adopted by the Member States. In view of the particular nature of the problem as described in the aforementioned recitals in the preamble to the directive and in view of the very incomplete nature of the harmonization effected thereby, it has by no means been shown that the Council, by permitting in the contested provision inspection by sampling of up to one-third of consignments, has exceeded the limits of its discretionary power.

21 The reply to the first question should therefore be that consideration of the contested provisions has disclosed no factor of such a kind as to affect their validity.

The second question

22 In view of the reply given to the first question, the second question has become devoid of any purpose.

Costs

23 The costs incurred by the Government of Ireland and by the Council and Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Verwaltungsgericht Köln by order of 18 January 1983, hereby rules:

Consideration of the penultimate and final sentences of Article 11 (3) of Council Directive No 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products has disclosed no factor of such a kind as to affect the validity of those provisions.

Galmot Mackenzie Stuart

Due Everling Kakouris

Delivered in open court in Luxembourg on 29 February 1984.

For the Registrar

H. A. Rühl

Principal Administrator

Y. Galmot

President of the Fifth Chamber