4. The additional or stricter provisions which may be required under Article 11 of Council Directive No 69/466/EEC of 8 December 1969 in order to control San José Scale and prevent it from spreading entitle the Member States to make phytosanitary inspections of imported products if effective measures are taken in order to prevent the distribution of contaminated domestic products and if there exists a risk of the harmful organism's spreading if no inspection is held on importation.

In Case 4/75

Reference to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht Köln (Cologne Administrative Court) for a preliminary ruling in the action pending before that court between.

FIRMA REWE ZENTRALFINANZ EGMBH, Cologne,

and

DIRECTOR OF THE LANDWIRTSCHAFTSKAMMER (Agricultural Chamber) acting as official representative of the Land, Bonn,

on the interpretation of the provisions of the Treaty concerning the prohibition on quantitative restrictions on imports and measures having equivalent effect, in relation to phytosanitary examinations on the importation of agricultural products,

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and A. J. Mackenzie Stuart, Presidents of Chambers, A. M. Donner, R. Monaco (Rapporteur), P. Pescatore, H. Kutscher, M. Sørensen and A. O'Keeffe, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order of reference and the written observations submitted under Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. This case, which was brought under Article 177 of the EEC Treaty, concerns the concept of 'measures having equivalent effect to quantitative restrictions on imports'. The questions posed by the court making the order for reference — the Verwaltungsgericht Köln — concern Articles 30 and 36 of the Treaty in relation to the phytosanitary examination provided for by German legislation on the import of certain agricultural products, such as apples.

The facts and the procedure may be summarized as follows:

Under the 'Pflanzenbeschauverordnung' (Regulations for plant inspection) certain fruits and vegetables imported into Germany are subject to an official phytosanitary examination when they cross the frontier. By a judgment of 11 October 1973 in Case 39/73 [1973] ECR 1039 et seq., the Court of Justice of the European Communities held that the pecuniary charge imposed on such an examination was a 'charge having an effect equivalent to customs duties' within the meaning of the EEC Treaty and prohibited by Articles 9 and 12 thereof. The Bundesverwaltungsgericht followed this decision in a judgment of 8 March 1974.

The main action concerns the legality of this examination, considered from the point of view of 'quantitative restrictions on imports' and 'measures having equivalent effect', within the meaning of Articles 30 et seq. of the Treaty.

On 29 October 1973 Rewe-Zentralfinanz refused to submit a batch of apples from France to the phytosanitary examination, on the grounds that such examination was prohibited by Article 30 of the Treaty as a measure having equivalent effect to a quantitative restriction on imports.

As, in these circumstances, the German customs authorities refused to authorize the importation of the products in dispute and required the carrier to leave the country, Rewe-Zentralfinanz submitted the consignment to the examination in question but, at the same time, lodged an administrative appeal against this refusal on the grounds set out above.

The Verwaltungsgericht Köln which dealt with the case accepted a suggestion put forward by the plaintiff and, by order of 24 October 1974, decided to stay the proceedings and to refer to the Court of Justice under Article 177 of the EEC Treaty the following 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, for contamination with 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 control of San José Scale (69/466/EEC, OJ L 323 of 24. 12. 1969, 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 36 of the EEC Treaty if apples produced in the Federal Republic of Germany are not subject to a similar requirement of inspection when dispatched within the country?'

2. Rewe-Zentralfinanz, represented by its Legal Adviser, Gert Meyer, the Federal Republic of Germany, represented by Martin Seidel, and the Commission of the European Communities, represented by its Legal Advisers, Sven Ziegler and Dieter Oldekop, submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice.

On hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without holding any preliminary inquiry.

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

A — Observations submitted by Rewe-Zentralfinanz

Rewe-Zentralfinanz first considers the provisions of German law on which the phytosanitary examinations are based and compares the system applying to imported products with that applying to domestic products. As regards the *import* or the *transit* of plants, vegetable products or other goods which are or may be contaminated, these provisions oblige the importer to submit such products to a phytosanitary examination at the frontier, before complying with the customs formalities, and to submit an official certificate issued by the authorities of the country of origin to show that the goods in question conform to the phytosanitary regulations. Under the terms of the law in question, 'fresh fruits' such as those forming the subject of the main action are among the products coming from Member States which must always be subject to an examination on their import into the Federal Republic.

On the other hand, the legislation concerning the protection of domestic products established a system which does not provide for a thorough phytosanitary examination by the competend plant protection authorities. The German legislative provisions relevant to the present action are in particular those contained in the regulation of 20 April 1972 (BFDl. I, p. 629) on the control of San José Scale ('Verordnung zur Bekämpfung der San José Laus').

Under the first subparagraph of the first paragraph of this regulation, any persons who possess or who are entitled to dispose of the host plants referred to by the regulation, with the exception of fruits and seeds, are obliged to inform the competent authorities immediately of the occurrence or the threatened occurrence of San José Scale, indicating the place where these plants are to be found. Once the appearance of the parasite has been noted, the authorities in question would demarcate the contaminated area and, as far as is necessary, set up a safety zone around it. Several provisions regulate in detail the obligations on those who possess and are entitled to dispose of the host plants, as regards the measures to be taken in order to eradicate this harmful organism. The demarcation of the contaminated area and of the safety zone is revoked by the authority when a fresh examination shows it to be free of contamination.

Having set out these preliminary considerations, Rewe-Zentralfinanz puts forward the following principal observations on the questions referred:

(a) The first question

It follows from the case-law of the Court on Article 30 of the Treaty that a phytosanitary examination at the frontier as such, that is, which does not lead to a batch being turned back, already constitutes a measure having equivalent effect to a quantitative restriction. Such examination creates an obstacle which renders importation more difficult and involves the importer in additional expense.

(b) The second question

In accordance with the principles laid down by the Court of Justice, the exceptions made by Article 36 of the Treaty to the free movement of goods are to be strictly and not widely interpreted.

Since neither Articles 39 to 46 of the Treaty nor the provisions of the common organization of the agricultural markets in fruits and vegetables hamper the application in this instance of Article 36 of the Treaty, the question raised by the court making the order for reference is whether the phytosanitary examination, held under internal law, is still 'justified' within the meaning of the first sentence of Article 36. This question calls for a negative reply. As regards the phytosanitary examinations intended to avoid the spread of the San José Scale, Community rules exist — Council Directive No 69/466/EEC of 8. 12. 1969 (OJ L 323, 1969) — whose purpose is to take uniform steps to combat this harmful organism throughout the whole of the Community. These rules are based essentially on the idea that measures must be taken against San José Scale without taking account of the frontiers existing between the Member States.

The decisive criterion is rather that of the demarcation of 'safety zones'. Where an occurrence of San José Scale is recorded, the Member States are bound to demarcate the contaminated area and a safety zone large enough to ensure the protection of the surrounding areas. Within these areas each Member States is bound to apply a series of specific measures and to submit the contaminated plants to a phytosanitary examination at least once a year. This examination takes place within the contaminated area and the safety zone and concerns exclusively the movement of the host plants, or parts of the host plants, between these zones and the other regions. It is true that, according to Article 11 of the Directive, the Member States may adopt additional or stricter provisions in this matter, but a reservation is impliedly attached to this power granted to the Member States that such measures be not contrary to the purpose of the Directive. Moreover, it is subject to the condition that it be necessary to adopt such measures.

Neither this Directive nor Article 36 of the Treaty requires all the plants and plant fruits imported from another Member State to be inspected, even in order to control San José Scale or to prevent its occurrence. This applies in particular to the trade in fruit. According to the Directive, plant products which are contaminated or suspected of being contaminated and which are growing in a contaminated area must be treated in such a way that the fruit of those plants is no longer contaminated when moved. In any batch of fresh fruit within which contamination has been found, the fruit must be destroyed and the other fruit in the batch treated in such a way that any San José Scale insects which might still be present are destroyed. By way of derogation from these provisions the movement of contaminated fresh fruit within the contaminated area may be authorized.

The German legislature only imposes an obligation to inform on persons who possess and are entitled to dispose of the host plants and not the plant fruits. The marketing of fresh fruit which is still contaminated is alone prohibited: such fruit is to be destroyed.

It follows from these regulations that both the Community legislature and the German legislature consider that the danger which San José Scale represents for fresh fruit from plants is much smaller than that which it represents for the host plants. Even on the transfer of fresh fruit from a contaminated area to an uncontaminated area, no inspection is necessary providing seeds are not involved. *A fortiori*, inspection is not necessary on transporting just any batch of fruit. The only obligation laid down is

that the plants suspected of being contaminated must be treated in such a way that the fresh fruits therefrom are no longer contaminated when moved.

Thus, to the extent that, in order to control San José Scale, German legislation prescribes or authorizes a phytosanitary inspection at the frontier for fruit imported from other Member States — whether or not such fruit originated in contaminated areas — it infringes the Directive in question and, thus, the predominant provisions of Community law. To this extent the German legal provisions had become inapplicable on 9 December 1971, the date on which the time-limit for the implementation of the Directive came to an end.

Moreover, the inspection in question is no longer necessary, either within the meaning of Article 11 of the Directive, nor within the meaning of Article 36 of the Treaty, on the ground that under paragraph 7 of the 'Pflanzenbeschauverordnung', plant importation is subject to the presentation of an official certificate of conformity with the phytosanitary regulations, issued by the country of origin. Where a Member State has issued such a certificate and the importing State subjects the importation to the production of such certificate, a further obligatory phytosanitary inspection at the frontier by the importing State is quite simply unacceptable and constitutes an arbitrary act.

Similarly, a phytosanitary inspection is unnecessary where the parasite in question is already to be found in the importing country or where this parasite cannot adversely affect domestic agricultural production. The former situation applies to San José Scale which has already spread in the south-west of the Federal Republic, where the Federal Republic has already set up safety zones. The latter applies to the fruit fly which originates in the United States and cannot live in the climatic conditions of the Community (except possibly in Italy or in the South of France).

Moreover, phytosanitary examinations at the frontier are never necessary where each batch is systematically subject — as is the case in the Federal Republic — to a marketing check, in order to determine the category of the product, in accordance with Article 8 of Regulation No 1035/72 of the Council of 18 May 1972 (OJ L 118, 1972). Contaminated products cannot satisfy the quality standards laid down.

(c) The third question

In order to answer this question, it is unnecessary to enquire whether it is logical or sufficient to subject foreign apples to a phytosanitary inspection at the frontier, while the plant protection measures applying to domestic products are limited to their production areas. The only conclusive factor in this case is whether, as regards the phytosanitary inspections in dispute, imported products are treated in the same way as domestic products and, to the extent that this is not the case, whether imported products are thereby adversely affected. It could only be maintained that the inspections in dispute were not discriminatory in nature if they formed part of a series of general national inspection regulations protecting plants which, on the basis of the same criteria, systematically affect all products both domestic and imported.

As regards the control of San José Scale on the national level, the decisive regulation in the Federal Republic, that is, the 'Verordnung zur Bekämpfung der San José Laus', referred to above, shows precisely that this is not the case. While the domestic law does not even provide for a phytosanitary examination of fruit coming from a contaminated area and, even where the fruit is contaminated, provides neither for an obligation to notify nor a general obligation to take measures of control, an obligation exists

to notify imported fruit and submit it for inspection, whatever its area of origin, whether or not contamination has been recorded and in spite of the obligatory production of a certificate of conformity with the phytosanitary regulations, issued ba the country of origin and certifying the lack of contamination.

Moreover, as regards the control of other organisms harmful to plants, the discrimination in relation to imported products is even more apparent since, apart from the case of seeds, the control of phytosanitary hazards is limited within the national territory — apart from the problem of San José Scale — to two types of plants, for which, however, no obligation of inspection exists. Moreover, the discrimination is not removed by the fact that the phytosanitary inspection at the frontier is intended to ensure protection against certain specific organisms which have not yet appeared in the Federal Republic. This argument might possibly be of importance as regards imports from third countries, but not as regards intra-Community trade, which is carried on within a relatively homogeneous climatic area.

On the basis of these observations, Rewe-Zentralfinanz proposes that the following answers should be given to the questions referred:

'1. The concept of "quantitative restrictions on imports and all measures having equivalent effect" referred to in Article 30 of the EEC Treaty also refers to the obligation to submit plant products, on their importation from other Member States, to an inspection which is intended to establish whether they are carriers of certain harmful organisms.
2. The Council Directive of 8 December 1969 on control of San José Scale (69/466/EEC) prohibits all national measures controlling San José Scale which take the form of inspections and which are based on any principle other than that of the demarcation of the contaminated areas and the fixing of safety zones.
3. The first sentence of Article 36 of the EEC Treaty and Article 11 of the Directive on control of San José Scale must be understood as meaning that general phytosanitary inspections carried out at the frontier pursuant to domestic law in order to avoid the introduction of San José Scale are neither "required" within the meaning of Article 11 of the Directive nor "justified" within the meaning of the first sentence of Article 36 of the EEC Treaty.
4. The first sentence of Article 36 of the EEC Treaty must be understood as meaning that the phytosanitary examinations carried out at the frontier pursuant to national law are not justified where the importing State subjects the importation of the plant products to the production of an official certificate, which is issued by the country of origin and submitted when the goods are imported, showing that the goods in question are in accordance with phytosanitary regulations.
5. A phytosanitary inspection carried out on the importation of products coming from other Member States constitutes "arbitrary discrimination" within the meaning of the second sentence of Article 36 of the EEC Treaty, where such products are not subject to the same inspection obligation within the importing country when despatched within that country.'

B — Observations submitted by the Federal Republic of Germany

(a) As regards the *first question,* the Federal Republic of Germany maintains on the basis of the case-law of the Court and Commission Directive No 70/50 of 22 December 1969 (OJ 1970 L 13, p. 29), that the phytosanitary examinations in dispute do not satisfy the conditions necessary in order to constitute measures having an effect equivalent to

quantitative restrictions. According to this Directive a measure having equivalent effect exists:

— when national regulations treat domestic products and imported products differently and thus hinder trade between Member States (by rendering importation more difficult or costly) (Article 2 of the Directive);

— where, although they are applied without distinction to both domestic and imported products, national regulations in fact hinder the free movement of goods because they are out of proportion to their purpose (Article 3 of the Directive).

Although it is correct that in order to establish the existence of a measure having equivalent effect it is not necessary for the marketing regulations actually to hinder the free movement of goods, but it is sufficient that they be likely to hinder them in this way, restrictions with only minor effects must be ignored, or else an enormous number of measures, whose compatibility with the provisions of Articles 30 et seq. of the Treaty is not in doubt, must be regarded as measures having equivalent effect. As a result, only those measures which appreciably hinder trade can be taken into account.

The phytosanitary inspections carried out at the frontiers of the Federal Republic do not satisfy such conditions. It is, of course, not impossible that the potential waste of time involved in the presentation of the products and the deflection of the trade therein results in certain financial losses for the importer and — at least in theory — in an increase in the cost of the importation.

However, in the light of the generally rapid performance of the inspections and the wide dispersal of the departments responsible therefor this disadvantage must be regarded as limited in effect. In particular, following the abolition by the Federal Republic, in accordance with the Court's judgment in Case 39/73, of the charge imposed for the phytosanitary examination, the remaining inspection measures have such a minimal effect on trade between States that they cannot be regarded as a hindrance.

Moreover, even if the phytosanitary inspections were regarded as an important an considerable burden on the movement of goods, it would still not constitute a measure having equivalent effect, as in this instance the imported goods are not treated in a discriminatory manner.

The German legislature sought to attain the objectives aimed at by the legislation of 10 May 1968 by a system of phytosanitary protection, in which the examinations at the frontier and the measures applicable within the national territory complement each other to such a degree that the abolition of some of these measures would jeopardize the control of organisms harmful to plants (including San José Scale). The rules which form part of this wide system of phytosanitary protection established in the Federal Republic show that the system of examinations which take place on importation and the measures of control over the domestic product differ in detail, and that the burden imposed on domestic goods is in no way lower than that imposed on imports. If different measures are sometimes applied to the two categories of products, this difference in system is solely the result of objective material constraints. The best method of phytosanitary inspection within the national territory lies in a system of surveillance carried out over a long period of time. On the other hand, as inspections of imported goods at the frontier are compressed into the shortest period of time, they have to be more intensive than the inspections of domestic products. Moreover, the monitoring carried out within the country enables the harmful organisms to be attacked in their natural habitat on the plants themselves, while examinations at the frontier only enable

the inspection to take place of plants and plant products intended for marketing. This explains the fact that apples, being fruits, are subject to an examination at the frontier, although they are not subject to any examination within the country. In this latter case, the plants from which these fruits come would already have been examined. Moreover, in addition to the absence of any disguised discrimination, the contested system of examinations at the frontier has no restrictive effects which are out of proportion to their purpose. As is shown by the example of the other Member States, there are no other means of attaining the objectives sought.

In the light of these observations, the following answer should be given to the first question:

'The obligation on importers to have plant products (here, apples) inspected for contamination with certain harmful organisms, does not constitute a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the EEC Treaty, where the resulting increased difficulties in importing remain relatively unimportant or where comparable obligations intended to control the occurrence of certain harmful organisms also render the movement of domestic plant products more difficult.'

(b) As regards the *second question*, which it considers as far as is necessary, the Federal Republic recalls, first, the nature and gravity of the danger represented by San José Scale. This harmful organism destroys the contaminated plants entirely or in part and once a whole region is contaminated it can only be combatted with difficulty. Experience has shown that it is very difficult, even with modern techniques and considerable expenditure, to eliminate a centre of infection caused by the introduction of contaminated products. This organism is very widespread in the Member States and only at great financial cost have the German health authorities succeeded in limiting its occurrence to a single, relatively small area. It is above all important to prevent the contamination of the nursery area of Northern Germany, the largest of its type in Europe. If it were contaminated by the parasite, its exports and thereby its essential activities would be doomed as a result of the strict protective measures applied by the other countries. The control of San José Scale has already been recognized by the Member States as absolutely necessary. In this connexion the Federal Republic refers to Council Directive No 69/466 of 8 December 1969 (OJ 1969, L 323, p. 5), and points out that the Community regulations adopted on that occasion only concerned the measures of control within the States but did not deal with the application of inspection measures at the frontier. In Article 11 of this Directive the Community legislature expressly accepted the possibility that the Member States might introduce additional or stricter provisions where they appear necessary. It thus envisaged the adoption of measures applying not only to the marketing of the products within the countries concerned, but also when they cross the frontier. This attitude is shown particularly by the fourth recital of the Directive. In addition, it is conformed by a draft Directive submitted to the Council by the Commission concerning 'protective measures to prevent the introduction into the Member States of organisms harmful to fruit and plants'. Moreover, the need to carry out a phytosanitary examination at the frontier has also been recognized on a wider scale than that of the Community. After referring to the 'International Plant Protection Convention' of 6 December 1951 and the 'Convention for the Establishment of the European and Mediterranean Plant Protection Organization' of 18 April 1951, of which the Member States of the Community are signatories, the Federal Republic notes that the measures adopted in Germany in

order to avoid the introduction of San José Scale and other harmful organisms corresponds to the effort made in this area on a world scale.

The Federal Republic concludes that these inspections are justified within the meaning of Article 36 of the Treaty and suggests that the following reply should be given to the second question:

'Article 36 of the EEC Treaty must be understood as meaning that phytosanitary examinations carried out at the frontier by a Member State in order to prevent the introduction of San José Scale into the national territory are justified within the meaning of this provision.'

(c) As regards the third *question,* the Federal Republic states first that the phytosanitary examinations to which imported apples are subject are only carried out by random checks on each consignment (railway truck, lorry): the fruit is never inspected in detail nor are samples taken from small quantities.

Having then recalled that the system of examinations in question is comparable to that applied to the domestic products and that its effects are no more restrictive than those inherent in the system applied to such products, the Federal Republic concludes that these examinations do not constitute 'a means of arbitrary discrimination or a disguised restriction on trade between Member States' under the terms of the second sentence of Article 36 of the Treaty.

It thus proposes that the following reply should be given to the third question:

'Phytosanitary examinations of imported apples which are carried out by means of random checks on each batch do not constitute "arbitrary discrimination" within the meaning of the second sentence of Article 36 of the EEC Treaty, if different provisions are implemented within the national territory in order to control the harmful organisms, even where the goods despatched within that territory are not subject to any check.'

C — Observations submitted by the Commission of the European Communities

After giving some details as to the origin, the area over which it is spread within the Community and the method by which San José Scale is propagated, the Commission points out that the control of this harmful organism forms the subject of international, national and Community provisions. It analyses *German* legislation and draws attention in particular:

— to the 'Pflanzenschutzgesetz' (Plant Protection Law) of 10 May 1968 and, as regards the control of San José Scale in particular, to the regulation of 20 April 1972;
— to the regulation of 23 August 1957 on the prevention of the introduction of bacteria and parasites dangerous to cultivated plants.

The Law of 10 May 1968 contains a vast catalogue of measures enabling the German government to intervene on a Federal level in the control of organisms harmful to plants. The 'Regulation on control of San José Scale' of 20 April 1972 falls concept this context. This regulation, which also implemented a Council Directive of 8 December 1969, laid down, in addition to the measures referred to by this Directive, an obligation on the owners and those in possession of host plants (except fruit) to give notice of the recorded or suspected occurrence of the parasite. However, it in no way derogated from the power of the 'Land' to adopt such additional or stricter measures in accordance with the Law of 10 May 1968 in order to eradicate San José Scale. Furthermore, on the basis of the information available a proper and complete hygiene inspection carried out by the competent authorities in the form of examinations and inspections does not appear to exist in the Federal Republic.

The obligation on the importer to present the imported products, before customs clearance, for a phytosanitary examination at the frontier arises from the abovementioned regulation of 23 August 1957. This regulation forbids the importation of contaminated apples, in particular those contaminated by San José Scale. If it is established that part of the batch is contaminated the remaining plants can only be imported to the extent that they are free from contamination and that there is no risk of the parasites spreading when the consignment is split up. However, from 1 December to 31 March the import of fruit which is slightly contaminated by San José Scale is permitted by the phytosanitary department, providing that the fruit in question is immediately sent for processing, under the control of this department. Moreover, for the import of fresh fruit, including apples from other Member States, the regulation requires the submission of a certificate of conformity with the phytosanitary regulations issued by the country of origin.

As the inspection of the products in question is obligatory, it follows, according to the available information, that the customs authorities only give customs clearance thereto if the competent health authorities have declared them to be in a fit state for importation. The materials available do not enable the severity of the inspections made by these departments to be checked; it does not appear possible for the phytosanitary departments to limit themselves to a mere inspection of the documents accompanying the goods.

The Commission then considers the *French* legislation, according to which, under Regulation No 45/26 27 of 2 November 1945, plant protection is ensured by 'preventive measures to fight plant pests and bacteria'. In setting out the principal features of this legislation, the Commission emphasizes *inter alia* that plants and parts of plants intended for export, for which a phytosanitary certificate is required by the importing country, must be accompanied by a 'certificate of soundness and origin' which is only issued in respect of products coming from areas of cultivation which are subject to proper phytosanitary examinations organized by the State.

In particular, as regards the control of San José Scale, a decree of the Minister for Agriculture of 29 May 1948 laid down the measures to be applied in this area. Once an occurrence of the parasite was recorded the Minister of Agriculture was to demarcate, for each case, the contaminated area and a safety zone. The decree also contains the measures to be adopted in order to eradicate the harmful organism and to prevent it from spreading. In particular, it prohibits the export of plants, parts of plants and fresh fruit originating in these areas. However, healthy products which have been disinfected in an official establishment might be exported under the conditions fixed by the plant protection departments, if the importing State allows their entry and if they are accompanied by a phytosanitary certificate.

As regards imports, a ministerial decree of 1 September 1964 lists the products whose importation is subject to a phytosanitary examination carried out by the competent departments of certain customs offices and which, in respect of certain products, requires the production of a certificate issued by the country of origin showing the goods in question to be in accordance with the phytosanitary regulations. Apples fall within these two categories of products.

After emphasizing that provisions broadly corresponding to those described above had been adopted for the control of San José Scale by the other Member States, the Commission sets out the main points of the Community regulations on this subject, in particular Directive No

69/466/EEC of the Council of 8 December 1969 (OJ 1969, L 323, p. 5).

This Directive merely lays down the minimum measures which the Member States are obliged to adopt in this field, but allows them wide discretionary power in the implementation of its provisions. Moreover, it expressly provides that the Member States may take such additional or stricter measures as may be required to control San José Scale or to prevent it from spreading (Article 11).

Having set out the essential features of this Directive, the Commission states that on 31 March 1965 it sent to the Council a draft Directive concerning the introduction into the Member States of organisms harmful to plants and providing, first, that the goods, their packing and the vehicles which transport them be examined by representatives of the plant protection authorities on importation into a Member State and, secondly, that this inspection may be carried out on an occasional basis or by means of random checks, where no evidence of contamination exists and providing the prescribed certificate has been produced.

Furthermore, it is not impossible for the presence of harmful organisms to be detected by the inspections relating to 'quality standards', which also apply to apples and are carried out within the framework of the common organization of the market in fruits and vegetables. Moreover, within the Member States quality inspections and phytosanitary examinations may be partially combined and there is nothing to prevent States joining the two examinations.

Finally, the Commission refers to certain international, bilateral and multilateral agreements in the abovementioned sector and then puts forward the following observations on each of the questions referred:

(a) The first question

The case-law of the Court confirms the opinion already expressed by the Commission that a measure having equivalent effect may be prohibited without any need to show that it actually has a restrictive effect on trade: in order to be prohibited it is sufficient for such measure to be 'capable' of rendering more difficult or costly imports or exports which could otherwise take place.

In this instance, it is clear that as a result of a series of factors to which the Verwaltungsgericht Köln has already referred, the obligation on the importer to submit the plant product to a phytosanitary inspection at the frontier involves restrictive effects.

However, this is still not sufficient to lead to the conclusion that the obligation to submit products to a phytosanitary inspection on importation constitutes a measure having equivalent effect within the meaning of Articles 30 et seq. of the Treaty. The Commission has always maintained that internal measures which are applied without distinction to both imported and domestic products are not prohibited under the abovementioned Article 30, unless the restrictive effects thereof exceed the consequences intrinsic to such regulations, particularly where they are out of proportion to their purpose. This concept was set out again in Directive No 70/50/EEC of the Commission of 22 December 1969 (OJ 1970, L 13, p. 29).

With the exception of this interpretation, it cannot be disputed that the Member States appear in principle to be entitled under Article 36 of the Treaty to adopt measures which hinder imports, to the extent that such measures are 'justified' on the grounds set out in this Article.

However, there is a limit to the power of the Member States to adopt such

measures, which must be necessary and appropriate in relation to the aim to be achieved.

Furthermore, it should not be forgotten that as regards the control and prevention of diseases and organisms harmful to plants, no uniform development has taken place in the various national systems of legislation. This factor, as well as the differences in climate and other natural conditions existing in the various Member States and over the various territories of a single State, explains the fact that different standards have been able to develop in relation to the quality and strength of the controlling and protective measures. These are the principal reasons for the introduction by the Member States of phytosanitary examinations at the frontier.

On the legal level, such inspections are necessary and appropriate if — but only if — their absence threatens the phytosanitary conditions prevalent in the importing country. A considered assessment of their justification is, however, necessary as, although it is undeniable that San José Scale represents a serious potential danger, the mere theoretical danger represented by a parasite does not, alone and *a priori*, justify the phytosanitary inspection of all those products which are the usual carriers of this parasite. A general and sufficiently serious possibility must also exist that the imported products are contaminated and may thus introduce the parasite. Because of the importance of the existing dangers and the difficulties inherent in detecting them, the Member States must have a discretionary power to adopt regulations concerning the necessary examination. On the other hand, although the reciprocal recognition of certificates of conformity with phytosanitary regulations is so far not laid down by any rule of Community law, and although the importing country must hold a discretionary power on this matter also, the question might seriously be asked whether the need to hold, without exception, phytosanitary examinations on importation has been assessed on the basis of a correct use of this power, where no valid reason exists for believing that the certificate of phytosanitary health issued by the exporting country is not sufficiently reliable.

The Commission emphasizes, particularly in relation to the phytosanitary examinations intended to avoid the introduction of San José Scale, that this parasite may spread throughout the whole of North-West Europe, and concludes that in principle phytosanitary examinations which are carried out at the frontier in order to detect it are necessary, within the abovementioned limits.

(b) The second question

The above conclusion cannot be modified on the basis of Directive No 69/466 of 8 December 1969. This Directive obliges the Member States to apply certain minimum measures in the control of San José Scale, but in no way deprives them of the power to adopt such additional or stricter measures as may be required. From the same point of view, this Directive has not yet removed the possibility that in the various Member States different standards may continue to apply to the control of the risk of contamination of host plants and fruit. As long as protective and control measures taken by the Member States have not been completely harmonized on a Community level, phytosanitary inspections carried out at the frontier in order to prevent the introduction of San José Scale might be necessary under national law.

(c) The third question

The fact, first, that the gravity of the risk of contamination, in particular by San José Scale, may be assessed differently by the authorities of the various Member

States and, secondly, that the national provisions adopted in this connexion are not *a priori* absolutely identical, might result in the imported product being treated in a different way from the national product. Thus, for example, the fact that a Member State generally tries to detect the presence of a specific parasite only in imported products and not in domestic products is not necessarily discriminatory, to the extent that this parasite is controlled effectively in the same State. On the other hand, if a Member State subjected imported products to more rigorous measures of control than are applied to the national products, although the latter were exposed to a comparable or greater risk of contamination by the same parasite, such action would constitute 'arbitrary discrimination'. Similarly, where the application of a measure of control to only some of the products threatened by a parasite could diminish the overall risk of infection in the importing countries, it would clearly be arbitrary to base this system on a distinction between imported products and national products.

Of course, as it is bound up with numerous and varying factors it is extremely difficult to assess the justification for the measures taken in this connexion on a national basis. The Commission emphasizes that under Article 177 of the Treaty such an assessment falls within the powers of the national court and, while stating that in this instance it is not in a position to make a final assessment of the gravity of the risk of contamination existing in the Member States in question, the Commission calls attention to the following factors in particular:

— it is at the least questionable to claim that French apples are generally more exposed to the risk of contamination by San José Scale than are German apples. Apart from France, the area over which this parasite is spread includes the Federal Republic of Germany, with the result that there is no appreciable difference between these two countries on this point;
— France also applies an efficient system of plant protection which provides, *inter alia*, for a strict prohibition of the marketing of products from contaminated areas and safety zones which are intended for export to the other Member States;
— The French certificate covering soundness and origin is only issued if the products in question originate in areas of cultivation which are regularly subject to official inspections by the phytosanitary authorities.

In the light of these observations the Commission suggests that the following replies should be given to the questions referred:

'1. The obligation to have plant products inspected on importation from other Member States for contamination with certain harmful organisms, where a refusal to allow the phytosanitary examination means that the import of the goods will be prohibited, is likely to make importation more difficult or costly and, apart from the exceptions laid down by Community law itself, must therefore be regarded as a measure having an effect equivalent to a quantitative restriction.
2. 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 (69/466/EEC, OJ L 323 of 24. 12. 1969, p.5), phytosanitary examinations imposed at the frontier under domestic law to prevent the introduction of San José Scale may be justified as necessary to protect the health and life of plants.
3. An obligatory phytosanitary inspection on the importation of foreign apples does not constitute "arbitrary discrimination" merely because apples produced in the

importing country are not subject to a similar requirement of inspection when despatched. On the other hand, such discrimination would exist if, on the adoption of provisions or directives in this connexion, an objective assessment of the general gravity of the risk of contagion based, *inter alia*, on the available information regarding the actual contamination, the season, the area of origin and all the measures of prevention and control actually applied, showed the risk of contamination from imported apples to be equal to or less than that arising from corresponding home-produced apples. The production of an official certificate of soundness from the country of origin is an essential factor in such assessment.'

III — Oral Procedure

The 'Rewe-Zentralfinanz' undertaking, the Federal Republic of Germany and the Commission of the European Communities submitted oral observations at the hearing on 6 May 1975.

On this occasion the Federal Republic of Germany gave details as to the number of cases which have occurred during the last five years in which apples originating in another Member State had been found to be contaminated by San José Scale, despite the fact that a certificate of conformity with the phytosanitary regulations issued by the cointry of origin attested that the products were not contaminated.

At the same time it indicated the number of cases occurring during the months of January and February 1974 in which the certificates of soundness and origin accompanying the goods were irregular, and in this connexion submitted a certain number of copies.

The Court raised several questions regarding this evidence.

The Advocate-General delivered his opinion on 27 May 1975.

Law

1 By an order of 24 October 1974 received at the Court Registry on 13 January 1975, the Verwaltungsgericht Köln raised under Article 177 of the EEC Treaty certain questions on the interpretation of Articles 30 and 36 of the Treaty establishing the European Economic Community and concerning the free movement of goods.

These questions were raised in the course of an action before that court concerning the permissibility under the EEC Treaty of phytosanitary inspections carried out at the frontier by a Member State on imports of apples from another Member State.

2 The first question enquires whether phytosanitary inspections at the frontier which imports of plant products, such as apples, coming from another

Member State are required to undergo must be regarded as measures having an effect equivalent to quantitative restrictions on imports, within the meaning of Article 30 of the EEC Treaty.

The second and third questions enquire principally whether such inspections may be justified unter article 36 of the EEC Treaty after the implementation of Council Directive No 69/466 of 8 December 1969 on the control of San José Scale and whether, particularly as regards the importation of apples, they constitute 'a means of arbitrary discrimination' within the meaning of the said Article 36, on the ground that similar domestic products are not subject to compulsory inspections for the purpose of distribution within the country.

As these questions are connected they must be examined together.

3 Article 30 of the Treaty prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States.

For the purposes of this prohibition it is enough for the measures in question to be capable of acting as a direct or indirect, real or potential hindrance to imports between Member States.

In accordance with Article 2 (2) of Commission Directive No 70/50/EEC of 22 December 1969 (OJ 1970, No L 13, p. 29) measures having equivalent effect are those which make imports subject to a condition which is required in respect of imported products only or a condition differing from that required for domestic products and more difficult to satisfy.

4 It is clear from the questions put that the phytosanitary inspections in question only concern importations of plant products and that similar domestic products, such as apples, are not subject to comparable compulsory examinations for the purpose of distribution.

These inspections thus amount to a condition which is required in respect of imported products only, within the meaning of Article 2 (2) of the abovementioned directive.

Moreover, as a result, in particular, of the delays inherent in the inspections and the additional transport costs which the importer may incur thereby, the

inspections in question are likely to make importation more difficult or more costly.

5 It follows that phytosanitary inspections at the frontier which plant products, such as apples, coming from another Member State are required to undergo, constitute measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the Treaty, and are prohibited under that provision subject to the exceptions laid down by Community law.

6 Under the first sentence of Article 36 of the Treaty, the provisions of Articles 30 to 34 are not to preclude restrictions on imports and, therefore, measures having equivalent effect, which are justified for reasons of protection of the health of plants.

Council Directive No 69/466/EEC of 8 December 1969 (OJ 1969, L 323, p. 5) on the control of San José Scale, lays down a series of provisions which are common to all the Member States of the Community.

The purpose of this Directive is to introduce certain minimum measures common to all the Member States by which certain harmful organisms may be controlled 'simultaneously and methodically' throughout the Community and prevented from spreading.

At the same time the Directive, which was adopted unter Articles 43 and 100 of the Treaty, forms part of the measures intended to remove obstacles to the free movement of agricultural products within the Common Market.

7 Its fourth recital shows, however, that the measures laid down are intended to supplement and not to replace the protective measures taken against the introduction of harmful organisms into each Member State.

By authorizing those States to adopt such additional or stricter provisions as may be required to control San José Scale or to prevent it from spreading, Article 11 reserves to them the power to maintain such measures in force to the extent necessary.

In the light of the current Community rules in this matter, a phytosanitary inspection carried out by a Member State on the importation of plant

products constitutes, in principle, one of the restrictions on imports which are justified under the first sentence of Article 36 of the Treaty.

8 However, the restrictions on imports referred to in the first sentence of Article 36 cannot be accepted under the second sentence of that article if they constitute a means of arbitrary discrimination.

The fact that plant products imported from another Member State are subject to a phytosanitary inspection although domestic products are not subject to an equivalent examination when they are despatched within the Member State might constitute arbitrary discrimination within the meaning of the abovementioned provision.

Therefore, the phytosanitary inspection of imported products which are shown to originate in areas other than those referred to in Article 3 of Council Directive No 69/466/EEC may constitute an additional or stricter measure which is not justified by Article 11 of that directive and should be regarded as a means of arbitrary discrimination within the meaning of the second sentence of Article 36 of the Treaty.

The different treatment of imported and domestic products, based on the need to prevent the spread of the harmful organism could not, however, be regarded as arbitrary discrimination 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.

9 The reply to the questions put must therefore be that a requirement to submit imports of plant products, such as apples, from another Member State to a phytosanitary inspection at the frontier in order to establish whether such products are carriers of certain organisms harmful to plants constitutes a measure having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the Treaty and is prohibited under that provision, subject to the exceptions laid down in Article 36 of the Treaty.

The additional or stricter provisions which may be required under Article 11 of Council Directive No 69/466/EEC of 8 December 1969 in order to control San José Scale and prevent it from spreading entitle the Member States to make 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.

Costs

10 The costs incurred by the Federal Republic of Germany and the Commission of the EEC, which both submitted observations to the Court, are not recoverable.

11 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 as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Verwaltungsgericht Köln, by order of that court dated 24 October 1974, hereby rules:

1. **A requirement to submit imports of plant products, such as apples, from another Member State to a phytosanitary inspection at the frontier in order to establish whether such products are carriers of certain organisms harmful to plants constitutes a measure having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the Treaty and is prohibited under that provision, subject to the exceptions laid down in Article 36 of the Treaty;**

2. **The additional or stricter provisions which may be required under Article 11 of Council Directive No 69/466/EEC of 8 December 1969 in order to control San José Scale and prevent it from spreading entitle the Member States to make**

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.