technical or chemical analyses or laboratory tests when the same analyses or tests have already been carried out in another Member State and their results are available to those authorities or may at their request be placed at their disposal.

	Mertens de Wilmars	Bosco	Due
Touffait	Pescatore	Mackenzie Stuart	O'Keeffe
Koopmans	Everling	Chloros	Grévisse

Delivered in open court in Luxembourg on 17 December 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 14 OCTOBER 1981 [1]

Mr President,
Members of the Court,

This reference for a preliminary ruling which concerns once again the interpretation of Articles 30 and 36 of the Treaty arises out of criminal proceedings brought in the Netherlands against Frans-Nederlandse Maatschappij voor Biologische Producten BV, an importer of French plant protection products.

I — (a) That company is being prosecuted for having sold in February 1978 a fungicide called "Fumicot Fumispore" to a company in Groningen which used it to disinfect its sugar silo. This product is intended to eliminate any trace of mouldiness remaining in the air in premises used for the production and storage of foodstuffs and is used mainly in dairies, in premises used for making cheese and in bakeries.

The disinfectant has been approved in France, where it is manufactured, in accordance with the rules in force (Law No 525 of 2 November 1943, as amended, relating to the organization

1 — Translated from the French.

and control of anti-parasitic products for agricultural use and the provisions implementing that Law). According to the statements made by the counsel for the defendant company in the proceedings before the Netherlands court, the product has also been approved in Italy, Switzerland, in the Federal Republic of Germany and in Belgium.

In the Netherlands, on the other hand, a prosecution was brought against the importing company alleging an offence under the first paragraph of Article 2 of the Netherlands Law of 12 July 1962 relating to plant protection products, in that the packaging of the disinfectant did not indicate the number of the approval for use prescribed by that provision. Under the terms of that provision it is an offence to sell, to store or use a plant protection product where it is not shown that the said product has been approved pursuant to that Law. The second paragraph of Article 2 of that Law provides that a plant protection product is to be deemed to be approved when the name of the product and the approval number appear on the packaging. Offences against that provision are punishable by financial sanctions pursuant to the "Wet op de Economische Delicten" [Law relating to economic offences] of 22 June 1950.

As the Netherlands Government has pointed out the Law of 1962 was passed in order to protect public health which is likely to be threatened directly or indirectly by the use of such products. There is a direct threat as the result *inter alia* of storage deficiencies or negligent handling. The threat is indirect, and arises in the case of products which have a slow rate of decomposition, when, as a result of widespread use on plants directly consumed by human beings or ingested by edible animals, the concentration of those products at the end of the nutritive cycle reaches such a level as to constitute a serious hazard for humans. It is because of the dimensions of those dangers that the Netherlands authorities decided to introduce a strict system prohibiting the use of those products, save where they are the subject of prior approval for use.

The decision to grant approval is taken by the Minister for Agriculture and Fisheries or by the Minister for Public Health and Environmental Hygiene provided that the pesticide complies with the requirements laid down by Article 3 of the Law and specified in more detail in the implementing decree of 4 August 1964. Article 3 (1) of the Law provides that a plant protection product may only be approved if:

(a) its content of active substance or substances, its other constituents, colour, shape and finishing, and its packaging and the data appearing thereon satisfy the requirements laid down by ministerial decree;

(b) the analyses carried out enable the conclusion reasonably to be drawn that the product is fit for the use for which it is intended and that its application, in conformity with its purpose and with the instructions for its use, will not give rise to any secondary harmful effects;

(c) its content of active substance or substances does not exceed that necessary for achieving the purpose for which it is intended.

This approval is by no means unqualified, as is apparent from Article 5 of the Law. On the one hand, paragraph 1 of that article fixes the maximum period of validity of the approval at 10 years. On the other, under paragraph 2

the Minister may attach various conditions relating to the purposes for which the product may or may not be used, to circumstances of time and place, to climatic conditions, to the quantities to be used, to the manner in which and the technical methods by which the product may or may not be used as well as to safety precautions to be observed during use. Moreover, the Minister may also impose additional conditions regarding the composition, colour, shape, finishing and packaging of the product and the data appearing on the packaging (paragraph 3). Finally, a condition may be imposed limiting to a predetermined class of natural or legal persons those who may supply or utilize the product (paragraph 4).

Pursuant to Article 14 of the decree of 4 August 1964 implementing the law ("Bestrijdingsmiddelenbeschikking") which was still in force at the time when the alleged offences took place, the Minister's decision is proposed by a committee, known as the "Commissie voor Fytofarmacie" [Plant Protection Committee]. The procedure to be followed to obtain approval for a product was also laid down by the same decree, which today is superseded in this respect by the "Beschikking toelating bestrijdingsmiddelen" [Decree relating to the approval of plant protection products] of 28 November 1980 which, according to the main proceedings, has not fundamentally altered the pre-existing system. I should, however, point out one difference relating to the costs stipulated in connection with examining applications for approval for use. Under the present system, as under the former, an application is only dealt with on payment of a one-time charge of HFL 250. On the other hand, Article 15 (2) (b) of the Decree of 1964 provided expressly that the costs of any laboratory examinations deemed necessary by the committee to enable it to give its opinion, are to be borne by the applicant. The 1980 Decree is silent on this point.

(b) In the present case, it is apparent from the file that the appellant in the main proceedings submitted its application for approval of "Fumicot Fumispore" to the Plant Protection Committee on 3 May 1967. In the opinion of the committee the data submitted by the applicant were quite inadequate for the purposes of judging whether the product complied with the requirements of the Law. As a result the committee put the applicant company in touch with the "Centraal Institut voor Voedingsonderzoek" [Central Institute for the Inspection of Foodstuffs] in order to enable the analyses which were considered necessary, to be carried out. There then began, according to the information contained in the documents on the case, a long period during which, if I may be allowed to use a colourful expression, the committee and the company appear to have engaged in a game of cat and mouse, with the committee requesting the company to let it have information which, when received, did not appear to it to be the information which it had requested. According to the statements of the Secretary of the Plant Protection Committee referred to by the Netherlands Government in its written observations, the information given was generally out of date and, what is more, mainly concerned the use of the active substance of the product as a medicinal preparation and not as a disinfectant.

Under those circumstances, the committee applied paragraph 1 of Article 16 of the Decree of 4 August 1964 and finally informed the company by letter of 6 September 1964 that its request for approval had been put in abeyance.

Apparently, however, that did not put an end to the company's attempts to obtain approval to market its product. The file contains a letter from the Central Institute for the Inspection of Foodstuffs of 11 April 1975 which the company uses to draw attention to the cost, which it considers exorbitant, and the duration, which it considers excessive, of the necessary analyses. According to the company the cost of that research in regard to "Fumicot Fumispore" was in the order of HFL 150 000 to 200 000, whereas the turnover anticipated from the sale of the product was approximately HFL 10 000 per year. The company derives the figure for the research costs from the even higher figure stated in the letter but applicable to two of its products. The same letter goes on to state that the analysis of the active substance of "Fumicot Fumispore" would take at least six months and the research into toxicity to be carried out on rats, doubtless also necessary, would take more than two years.

Those facts may explain why the appellant in the main proceedings did not press further in its relations with the authorities responsible for dealing with its application for the approval of "Fumicot Fumispore". But that did not apparently deter the company from selling that product, as the facts of the case show.

(c) The prosecution launched on the basis of those facts resulted in a judgment of 4 December 1979 of the Economische Politierechter [Judge dealing with economic offences] at the Arrondissementsrechtbank [District Court], Rotterdam, by which the company was fined HFL 1 000. The District Court was therefore not persuaded by the argument of counsel for the defendant company to the effect that the facts forming the subject-matter of the charge could not be considered as criminal in nature since they were contrary to a law which was itself incompatible with Article 30 of the Treaty.

In support of its decision the District Court relied upon Article 36 of the Treaty by virtue of which Article 30 does not preclude prohibitions of restrictions on imports where, as in the present case, such restrictions are justified on the grounds of the protection of the health and life of humans, animals or plants. The court added that "the differences existing between Member States relating to ... such restrictions should be removed by an approximation of legislative provisions under Article 100 of the EEC Treaty".

The defendant company lodged an appeal against that decision, as did the Public Prosecutor's Department, with the Gerechtshof [Court of Appeal], The Hague. Its appeal to that court was also based on Community law. It did not dispute the truth of the matters alleged against it but repeated the argument which it had already put forward at first instance, namely that Article 2 of the Law of 1962 constituted a measure having equivalent effect prohibited by Article 30 of the Treaty and did not satisfy the necessary preconditions to bring it within the exemption from that prohibition. On the latter point, the appellant in the main proceedings, who relies expressly on the judgment of this Court in the so-called *Cassis de Dijon* case of 20 February 1979 (Case 120/78 *Rewe-Zentral AG* [1979] ECR 649). First, it insisted on the fact that the product in question is not merely

marketed lawfully in France but that its marketing there was authorized after an examination which demonstrated that it complied with the French Law which, like the Netherlands Law, and with equal rigour, is designed to protect public health. Furthermore, according to the company, the Netherlands provisions go beyond what is necessary in order to satisfy an overriding requirement and they do not constitute the most suitable method, and the one which least restricts trade. In that respect it stresses in particular the disproportion between the turnover which may be achieved with the product in the Netherlands and the costs of the examinations necessary to enable it to be used in that country, which are six to eight times greater. This is also the point of view which it has put forward in its observations submitted to this Court.

The Gerechtshof, however, considered that those arguments raised a question of interpretation of Community law. It has, therefore asked this Court to give a preliminary ruling on the following question:

"Is the scheme of the Netherlands Law of 1962 relating to plant protection products compatible with Article 30 of the EEC Treaty in so far as that Law prohibits the marketing in the Netherlands of a product originating in another Member State in which that product has been lawfully marketed and in which it meets the legislative requirements which protect the same overriding requirements of public health as the Netherlands Law?"

II — This Court does not have jurisdiction to rule on that question in its existing formulation. "In the context of requests for preliminary rulings, the Court has no jurisdiction either to apply the Treaty to a specific case or to decide upon the validity of a provision of domestic law in relation to the Treaty, as it would be possible for it to do under Article 169" (judgment of the Court of 15 July 1964 in Case 6/64 *Flaminio Costa* v *ENEL* [1964] ECR 585). Nevertheless, in such a case "the Court has power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty" (ibid.). The question referred to the Court by the Gerechtshof must, I think, be understood as a request to be given an interpretation of those points of Community law will enable it to decide whether a national law such as the Netherlands legislation constitutes a quantitative restriction on imports or a measure having equivalent effect prohibited in principle by Article 30 of the Treaty and, if so, whether that legislation may be exempted from such prohibition by virtue of Article 36 of the Treaty.

Before suggesting a reply to the two questions I should point out that there are not yet any common rules regulating the production and marketing of plant protection products. At the time of the alleged offences there was not even in force any provision specifically relating to those products. However, since 1 January 1981 Council Directive 79/117 of 21 December 1978 has been in force, prohibiting the placing on the market and use of plant protection products containing certain active substances, but the active substance of the product in

question is not listed amongst them. There is also a proposal for a directive concerning the placing of EEC-accepted plant protection products on the market which was submitted by the Commission to the Council in 1976. That proposal provides, in respect of plant protection products, for an "EEC acceptance" which would enable the product to be placed on the market in the Community once it had obtained such acceptance. However from what has been said the study of that proposal by the Council is proving to be slow and difficult.

Furthermore, as part of the work of the Council of Europe there has been published a document entitled "Guidance and Recommendations for the use of national authorities and others as well as manufacturers involved in the approval and registration of pesticides for use in agricultural and non-agricultural fields" dealing in detail with the preconditions for approval of pesticides. Those recommendations are the result of the "Partial Agreement in the Social and Public Health Field" of 1959 to which all Member States were parties with the exception of Greece. The representative of the Netherlands Government stated at the hearing that, as a result of the work of the Council of Europe, the requirements of the various Member States on the approval of insecticides had become comparable, which facilitated the approval in one State of a pesticide manufactured in another.

III — (a) The case-law of the Court clearly demonstrates that in the absence of common rules it is for the Member States to "regulate all matters relating to [the] production, distribution and consumption on their own territory" of pesticides, "subject however to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade" (judgment of 20 February 1979, *Rewe*, mentioned above, at p. 662, paragraph 8 of the decision; judgment of 26 June 1980, Case 788/79 *Herbert Gilli and Paul Andres* [1980] ECR 2071 at p. 2078, paragraph 5 of the decision; judgment of 19 February 1981 in Case 130/80 *Kelderman* [1981] ECR 527, paragraph 5 of the decision; judgment of 17 June 1981 in Case 113/80, *Commission* v *Ireland* [1981] ECR 1625, paragraph 10 of the decision).

In that last phrase the Court made clear that, at least to the extent to which intra-Community trade is affected, the power of Member States to retain their national legislation unaltered, to amend it or to introduce legislation where there was none before, is curtailed, even in the absence of secondary rules of Community law, by rules of primary Community law. It was that principle which Mr Advocate General Capotorti enunciated in his Opinion delivered on 25 February 1981 in Case 132/80 *United Foods* [1981] ECR 995: "... it is necessary to dismiss the idea that Member States are free to continue to apply their own legislation relating to the conditions for the marketing of products lawfully sold in other Member States

until the Community harmonizes the legislation of the various Member States in each sector". The judgment of this Court of 5 April 1979 in Case 148/78 *Pubblico Ministero* v *Tullio Ratti* [1979] ECR 1629 affirmed that, when there exist Community directives providing for the harmonization of measures necessary to ensure the protection of health and establishing Community procedures to supervise compliance therewith, "recourse to Article 36 ceases to be justified and the appropriate controls must henceforth be carried out and the protective measures taken in accordance with the scheme laid down by the harmonizing directive" (paragraph 36 of the decision at p. 1644). However, it is no less true that, where, as in the present case, there is no directive harmonizing the various national laws, the latter must be compatible with the relevant provisions of the Treaties themselves.

It is therefore not correct to say, as the Arrondissementsrechtbank, Rotterdam, has done, that only an approximation of legislative provisions within the meaning of Article 100 of the Treaty can eliminate the differences existing between the laws of the Member States including those which govern the conditions under which a product coming from another Member State may be imported. As has been seen, national laws do conflict with Community law if they constitute measures having an effect equivalent to quantitative restrictions on imports, and thus prohibited by Article 30, and are not exempted from such prohibition by virtue of Article 36. Therefore, since by virtue of Article 5 of the Treaty Member States must take "all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty", it may properly be considered that only those laws should remain in force, at least for the time being, which do not infringe Articles 30 and 36, which in itself is already a considerable first step towards harmonization.

(b) Article 30 of the Treaty prohibits *inter alia* measures having an effect equivalent to quantitative restrictions on imports between Member States, measures defined according to the now firmly established case-law of the Court as "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" (judgment of the Court of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 852; judgment of 13 March 1979 in Case 119/78 *Peureux* v *Services Fiscaux de la Haute-Saone et du Territoire de Belfort* [1979] ECR 975 at p. 985, paragraph 22 of the decision; judgment of 17 June 1981 in Case 113/80 *Commission* v *Ireland* [1981] ECR 1625, paragraph 9 of the decision; it is to be noted that paragraph 8 of the decision in the judgment of 26 February 1980 in Case 94/79 *Vriend* [1980] ECR 339 substitutes for the term "any trading rules" the wider term "any national provisions").

The very wide terms of that definition are justified by the importance of the free movement of goods, "which constitutes one of the fundamental rules of the Community" (see, *inter alia*, paragraph 14 of the decision in the judgment of 20 February 1979 in the *Rewe* case, ibid. at p. 664) and perhaps its most fundamental principle, as evidenced by its place in the Treaty (Title I of Part Two, entitled "Foundations of the Community").

None of the parties intervening in these proceedings take issue with that definition. None of them disputes the prime importance of the free movement of goods within the scheme of the EEC Treaty. All acknowledge that in the determination of a dispute such as the present one, care must be taken to guarantee as far as is at all possible the application of this principle.

In this case, if the definition given by the Court to measures having equivalent effect is applied to the Netherlands system, there is no escaping the conclusion that "a national system of approval of national and imported plant protection products as a precondition for placing them on the market and for their use in a Member State, whether they have been approved or not in other Member States, indirectly presents an obstacle to the importation of those products", as the Netherlands Government itself has acknowledged.

(c) However, the various intervening parties have all laid stress, albeit that the Commission has done so to a lesser degree, on Article 36 of the Treaty, which derogates from Article 30 and have taken the view that the conditions laid down by Article 36 for its application were, in the opinion of the Member States, or, in the Commission's opinion, might be, satisfied.

All agree that of the factors listed in Article 36 which may override the free movement of goods the protection of public health is the relevant factor in this case. As the Court made clear in its judgment of 20 May 1976 in Case 104/75 (*De Peijper* [1976] ECR 613 at p. 635, paragraph 15 of the decision), "health and the life of humans rank first among the property or interests protected by Article 36 and it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure and in particular how strict the checks to be carried out are to be". If we apply to this case the solution adopted, in regard to imports of fresh fish, by the Court in its judgment of 7 April 1981 (Case 132/80 *United Foods and Others* [1981] ECR 995, paragraph 25 of the decision), it follows that "since restrictions on trade justified on grounds of the protection of public health are expressly allowed under Article 36 of the Treaty and the Community has not yet adopted common or harmonized rules in this matter, the application to" plant protection products imported from other Member States, of a system of approval prior to their marketing "cannot be considered as constituting, as far as the principle on which it is based is concerned, a measure prohibited under the Treaty".

This is the view which was expressed by the various governments intervening in the proceedings when they stressed the responsibility which the Member States have in regard to the protection of public health on their territory, a responsibility which establishes their right, and even their duty, to adopt provisions dealing with all matters relating to the placing on the market and to the use of plant protection products, for so long as there are no Community rules in this field. The United Kingdom, and the Italian, Netherlands and Danish Governments also stated that the obstacles to intra-Community trade resulting from the disparities between the various national laws must be accepted provided that they are justified under the terms of Article 36

of the Treaty. The Netherlands Government summed up the scheme of Article 36 when it stated that that provision makes national measures permissible from the point of view of Community law, "provided, always, that such measures are justified and do not lead to unreasonable consequences".

(d) In fact, the limits to the application of Article 36 laid down in the provision itself are more strict than might be supposed from the proposition which I have just cited. Besides the requirement that the national measure must be "justified" on one of the grounds mentioned in the first sentence of Article 36, those limits are defined in the second sentence of the article which provides: "Such prohibitions or restrictions [on imports, exports or on goods in transit, resulting from national rules] shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States". Therefore the finding that the rules at issue fall, in principle, within the exception provided for by Article 36 leaves open the question whether the detailed procedures for the implementation of those rules may constitute a disguised restriction on trade between Member States so as to deprive such rules of their justification within the meaning of the article (cf. paragraph 26 of the decision in the judgment in the *United Foods* case mentioned above).

Control of those detailed procedures must be all the more rigorous since, according to a consistent line of decisions of this Court, Article 36 "constitutes a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly" (judgment of 25 January 1977 in Case 46/76 *Bauhuis* [1977] ECR 1, at p. 15, paragraph 12 of the decision; cf. also the Opinion of Mr Advocate General Warner in Case 34/79 *Henn and Darby* [1979] ECR 3795 at p. 3825.

It is therefore the appraisal of the detailed procedures for implementing the Netherlands rules relating to plant protection products which will determine the reply to be given to the court making the reference and, ultimately, the outcome of the main proceedings.

(e) It is here that the division of functions between this Court and the national court assumes importance.

On the basis of the information contained in the file, the task of the Court is to determine which control procedures appear to it to be open to criticism from the point of view of Community law. It must do this in such a way as to give an answer to the precise question of the court making the reference, which has regard merely to its own national legislation, but it must also be mindful of the scope of its answer which, owing to its abstract nature, will apply to the legislation of all the Member States.

On the other hand it is for the national court to apply these criteria in the light of all the circumstances of the case "taking into account the fact that it must always be the duty of a national authority relying on Article 36 to prove that the measures which it enforces satisfy these criteria", as the Court stated in its judgment of 8 November 1979 in Case 251/78 *Denkavit* [1979] ECR 3369, paragraph 24 of the decision, p. 3392.

IV — (a) Before considering these procedures I think it is right to keep very firmly in mind that pesticides are products which may be harmful to public health.

Moreover, their dangerous nature does not merely stem from their intrinsic properties. It must also be considered in relation to their use. The conditions in which a product is used, and thus the risks involved in such use, are necessarily different from one Member State to another. Thus, the Danish Government has pointed out that the minimum period of time to be observed between the last treatment with pesticide and the harvest varies according to the rate of growth of the plant varieties so treated as well as according to the rate of decomposition of the pesticide used which, in its turn, is affected, amongst other things, by the ambient temperature. According to the Netherlands Government differences in the use of the same product from one Member State to another are, moreover, one of the reasons for the slow progress of negotiations leading to the adoption of the proposal for a Council directive concerning EEC acceptance of plant protection products which I mentioned at the beginning of this opinion.

For that reason the various intervening parties, including the Commission, are of the opinion that legislation, in the form of Council directives, is alone able to bring about truly complete harmonization.

Does that mean to say that the Court is, in the absence of a specific provision of Community law, wholly powerless to judge whether national rules or practices constitute an unlawful obstacle to trade? I do not think so. In my view the Court has, on the contrary, not only the power but also the duty, without undertaking anything beyond the powers of jurists and without assuming functions not normally attributed to a court, to condemn the most obvious restrictions which the disparity between national laws entails for the free movement of goods.

(b) It is conceivable that certain control procedures are imposed with the aim of discouraging or hindering imports and not because they are necessary on objective grounds. In the fact of controls which he considers unnecessary and which involve excessive expenditure or take too long to be carried out, an importer must be able to go before a court and submit that such controls constitute an arbitrary discrimination or a disguised restriction on trade even if they are ostensibly intended to protect the health and life of humans, animals or plants, to cite the grounds which are the most apposite to the present case and which are mentioned in Article 36.

In particular the Member State of importation may not insist on new controls which are identical to those carried out in the exporting Member State. Such a requirement cannot be considered to be justified, that is to say necessary (cf. judgment in *Denkavit*, cited above, [1979] ECR at p. 3391, paragraph 21 of

the decision), to protect public health. From another point of view, it might also be said that such a requirement would conflict with the principle of proportionality which, as the United Kingdom has pointed out, would prevent the unreasonable exercise of the rights derived from Article 36.

Notwithstanding the differences in certain respects between the cases which I have mentioned and the present case, I think that this conclusion is also the only one which is compatible with the principles which emerge from the case-law of the Court. In essence, it is clear that a duplication of controls finds no justification in Article 36 if the protection of public health may be ensured by other means which constitute less of an obstacle to the free movement of goods within the Community. This emerges from the judgment of this Court of 20 May 1976 in the *De Peijper* case (ibid. at p. 636, paragraph 18 of the decision) and above all from the judgments of 8 November 1979 in the *Denkavit* case (ibid. at pp. 3391-3392, paragraphs 22 and 23 of the decision) and of 7 April 1981 in the *United Foods* case (ibid. at p. 1025, paragraph 29 of the decision).

(c) The controls carried out in the Member State of origin may, however, in my view only be recognized as being of general validity if certain strict conditions are satisfied. First and most obvious, the authorities of the importing State must retain the right to require new controls if they suspect the least fraud on the part of the importer, for example, if they have reason to believe that the documents submitted to them have been falsified. There are, however, ways in which the risks of fraud may be eliminated. One such method is prescribed by Italian law. Article 32 of the Decreto del Presidente della Repubblica [Decree of the President of the Republic] No 1255 of 3 August 1968 requires in effect that all documents submitted by an importer with a view to obtaining approval to market his products on Italian territory must bear the stamp of the consular authority of the place of production.

Secondly, for a duplication of controls to conflict with Community law, it is also necessary, in my opinion, that the authorities of the importing State should be certain that the imported product corresponds in all respects with the product which has undergone the controls required in the exporting State. That requirement is necessary since the laws of all the Member States merely cover products intended for their own market and do not therefore necessarily apply to exported products, no distinction being made between exports to other Member States and those to non-member countries.

Finally, the importing Member State must be able to require the product to be subjected to further analyses in addition to those carried out in the exporting Member State under the laws of that State. Specific analysis of that kind would, to adopt the words of the Commission, be justified in order to take account of the conditions in which the product would be used in its territory.

Notwithstanding its limitation to the case of identical controls, the recognition of equivalence of the requirements imposed by the laws of the various Member States may still be considered in certain quarters, as the fears expressed by the representative of the Danish Government at the hearing have shown, as posing excessively difficult problems in the event of dispute. On that view of the matter, it

would be quite beyond the powers of a national court to determine whether the controls undergone by a product in the Member State where it is manufactured are identical with those required by the provisions of the importing State. Frankly, that objection seems to me to be unfounded. Inasmuch as, for the purpose of adjudicating in full knowledge of the facts, a national court might consider itself unable to assess whether the controls are discriminatory or not, it would need do no more than obtain elucidation from an expert opinion, which would not pose any insuperable problem since the commissioning of an expert is part of the most prevalent judicial practice, and this is also so when a foreign element is involved.

Finally, it is conceivable that the time required to carry out analyses and the costs of those analyses may also be aspects of a control procedure which constitute arbitrary discrimination or a disguised restriction on trade. Certainly, as they apply without distinction to national and foreign products, that should not normally be the case. However, whilst I do not wish rashly to cast the slightest suspicion upon the Netherlands authorities involved in the present case, it cannot be ruled out that, in fact, given cases of equal difficulty and involving the same costs of analysis, national products do receive privileged treatment. Such disparity of treatment does of course presuppose some degree of bad faith on the part of authorities responsible for carrying out the control but experience of international relations in the economic sphere, even within the Community, teaches us that such practices may exist. I would add that it is obviously for the national court to decide whether, and if so, to what extent, the control procedures applied to plant protection products in the Netherlands fall within any of the cases which I have just indicated.

For those reasons it seems to me that, in the final analysis, in reply to the question submitted to it by the Gerechtshof, The Hague, the Court should rule that:

"In the absence of common or harmonized rules as regards the marketing of plant protection products, national provisions which make the marketing of such products subject to prior approval for use cannot be considered, in principle, as a restriction prohibited by the EEC Treaty. However all procedures for implementing such decisions which go beyond the requirements of the protection of public health and are thus capable of impeding or restricting intra-Community trade must, by virtue of Articles 30 and 36 of the Treaty, be considered as measures having an effect equivalent to quantitative restrictions."