OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 20 March 1990 *

Mr President,
Members of the Court,

Facts and relevant provisions

1. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has referred to the Court the following question for a preliminary ruling:

'May the prohibition applicable in the Netherlands by virtue of Article 7 of the Vogelwet (Law on Birds) 1936 on the importation and keeping of red grouse, shot and killed in the United Kingdom without any breach of the law applicable in that country, be regarded as a prohibition which is justified under Article 36 of the EEC Treaty on grounds of the protection of health and life of animals, regard being had to the fact that:

in the first place, the exception referred to in Article 6(2) of the Directive of the Council of the European Communities of 2 April 1979 (79/409/EEC) applies to red grouse, which are referred to in Annex III/1 to the directive as the *Lagopus lagopus scoticus*;

secondly, the purpose of the prohibition laid down in Article 7 of the Vogelwet is the preservation of wild birds and in particular the protection of all species of birds occurring in the wild state in Europe, subject to certain exceptions which do not, however, include the red grouse?' [1]

2. The Hoge Raad der Nederlanden has submitted that question concerning the interpretation of Article 36 of the EEC Treaty in connection with the criminal proceedings instituted against Gourmetterie Van den Burg BV (hereinafter referred to as 'Van den Burg') whose registered office is in The Hague.

Van den Burg is a trader in poultry and game. In December 1984 it was reported to the authorities for offering for sale dead red grouse originating in the United Kingdom. It was prosecuted on the ground that red grouse are protected under the Vogelwet (Law on Birds), which has been in force in the Netherlands since 1936 and therefore greatly predates the entry into force of the EEC Treaty. Article 1(2) of the Vogelwet 1936 defines 'protected birds' as meaning 'all birds which belong to one of the species of birds occurring in the wild state in Europe, except for tame pigeons, tame mute swans and the birds referred to in Article 2 of the Jachtwet (Law on Hunting)'. Article 5 of the Vogelwet 1936 imposes a prohibition on 'killing, attempting to kill, capturing or attempting to capture protected birds'. Article 7 prohibits the 'keeping, offering to purchase, purchase, offering for sale, sale, delivery, transport, offering to transport, import, transit or export' of such birds. Article 28 makes infringements of those prohibitions punishable offences.

* Original language: Dutch.

1 — *Lagopus lagopus scoticus*. Apart from this quotation, the term 'red grouse' will henceforth be used in accordance with the terminology employed in the relevant provisions of Community law.

Neither the parties to the main proceedings nor the Commission, which has submitted observations to the Court, dispute the fact that this bird species does not occur in the Netherlands. Nor is it referred to in Article 2 of the Jachtwet, with the result that the Vogelwet applies to it. That situation is anomalous: *every* species occurring in the wild state in Europe (whether or not it is an endangered or migratory species) is protected by the Vogelwet, whereas the Jachtwet provides in certain circumstances for the possibility of hunting *only* species found in the Netherlands.

3. It should be possible to find a relevant rule of Community law in Council Directive 79/409 of 2 April 1979 on the conservation of wild birds;[2] in the third recital to the preamble thereto, it is stated, with regard to migratory birds occurring in the wild state, that they constitute a common heritage of the Member States.

That directive on wild birds imposes on the Member States a number of obligations with regard to different bird species. The red grouse is referred to in Annexes II/1 and III/1. This means that a number of articles in the directive apply to it. According to Article 6(2) 'the sale, transport for sale, keeping for sale on the offering for sale of live or dead birds and of any readily recognizable parts or derivatives of such birds' are not prohibited if the birds referred to in Annex III/1 have been legally killed or captured or otherwise legally acquired. On the other hand, the sale of birds referred to in Annex III/2 is prohibited by Article 6(1).

2 — OJ 1979, L 103, p. 1.

In order to ascertain whether a red grouse has been legally killed or captured or otherwise legally acquired, reference must be made to Article 7(1) and (2) which reads as follows:

'1. Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation. Member States shall ensure that the hunting of these species does not jeopardize conservation efforts in their distribution area.

2. The species referred to in Annex II/1 may be hunted in the geographical sea and land area where this directive applies.'

As has been stated in the written observations, it cannot be inferred from the provisions of the directive that it is forbidden to kill and/or trade in red grouse. Article 14 of the directive in fact provides that:

'Member States may introduce stricter protective measures than those provided for under this directive.'

Essentially, the national court proceeds on the assumption that the measures in force in the United Kingdom are no stricter than those prescribed by the directive. The prohibition under Netherlands law on sale

and importation is treated by the Commission as 'a stricter protective measure' within the meaning of Article 14. That assessment starts from the premiss that the system established by the directive authorizes protective measures predating its adoption to remain in force, in addition to measures taken by a Member State for the protection of birds neither occurring on its own territory nor of a migratory species.[3] Even if that were the case,[4] such measures (which have not been harmonized) must satisfy Articles 30 and 36 of the Treaty, as the national court correctly presupposes in its question.[5]

4. Council Regulation (EEC) No 3626/82 of 3 December 1982[6] laid down rules for the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora, the Washington Convention of 3 March 1973, which is set out in Annex A to the regulation.[7]

It is quite clear that the red grouse does not fall within either the aforesaid regulation or the Treaty since that bird is not referred to in any of the different annexes to the Convention. Moreover, it is not disputed that the species in question is not 'endangered'. In other words, the exhaustive nature of the annexes is not contested, at least so far as the (absence of) the species in question is concerned.

Nevertheless, Regulation No 3626/82 may be applicable inasmuch as Article 15(3) thereof provides that:

'For the purpose of protecting the health and life of animals or plants, Member States may take measures similar to those provided for in the regulation in respect of species not covered by the regulation.'

Article 15(1) provides as follows:

'In respect of the species to which this regulation applies, Member States may maintain or take stricter measures, providing that they comply with the Treaty, and in particular Article 36 thereof, for one or more of the following purposes:

(a) improvement of conditions of survival of living specimens in recipient countries;

(b) the conservation of native species;

(c) the conservation of a species or a population of a species in the country of origin.'

It is thus possible to argue, as the Commission does in its observations and the Advocate General of the Hoge Raad in his Opinion delivered in connection with the order of reference, that the Netherlands may adopt 'measures similar' to those referred to in Article 15 of Regulation No

3 — It has not been disputed, either in the written observations or at the hearing, that the bird in question is not a migratory bird within the territory of the Community: see Cramp and Simmons, *Handbook of the Birds of Europe, the Middle East and North Africa*, Part II, 1980, p 391, at p 394

4 — The text of Article 14 of the directive contains the verb 'introduce', from which it could be inferred that only newly introduced measures or newly adopted rules, and not old rules or measures which have been retained, are meant

5 — See the case-law cited in footnote 12.

6 — OJ 1982, L 384, p. 1.

7 — Ibid., p. 7.

3626/82 in respect of a species which is not endangered such as the population of red grouse in the United Kingdom. The compatibility of such measures with the Treaty, in particular Article 36 thereof, from which a regulation may evidently not derogate and to which Article 15 expressly refers, thus forms the subject-matter of the question submitted for a preliminary ruling, as stated earlier.

Assessment in the light of Article 36

5. The fact that the contested provision of the Vogelwet 1936, laying down an absolute prohibition on imports, constitutes a measure having an effect equivalent to a quantitative restriction on imports is for the national court a point of departure which, moreover, has not been contested in the observations submitted to the Court either.[8] Furthermore, since the provision relates specifically to imported products, it cannot be justified on the basis of any 'rule of reason' contained in Article 30 of the EEC Treaty.[9]

6. Consequently, the assessment will focus exclusively on the applicability of the derogation in Article 36 from the point of view of the 'health and life of humans, animals or plants'. It seems apparent from the preamble to the Vogelwet 1936 and from Article 2 thereof ('interests of the bird population') that the law not only has its purpose to protect bird species which are rare or endangered, as Van den Burg submits in its observations, but also pursues the wider aim of improving bird stocks. According to the Commission, that aim may be regarded as falling within the legal interests referred to in Article 36, namely the protection of health and life of animals. That is right in my view: Article 36 does not draw any distinction according to species. The fact that the red grouse is not an endangered species is therefore immaterial from that point of view.[10]

7. An important question is whether Article 36 can also apply in a case such as this, involving the adoption by a Member State of a measure for protecting against hunting animals found *not* within its territory but in another Member State. In the circumstances it is not disputed that the red grouse does not occur in the Netherlands.

8 — For the classification of an absolute prohibition on the marketing and importation of a product as a measure having an effect equivalent to a quantitative restriction, see the Court's judgment of 23 February 1988 in Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 7.

9 — It follows that the case-law of the Court according to which 'environmental protection' — a different, somewhat broader concept than the 'protection of health and life of humans, animals or plants'referred to in Article 36 — constitutes an interest worthy of protection in accordance with the 'rule of reason' (see the Court's judgment of 20 September 1988 in Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, in which reference is made to the judgment of 7 February 1985 in Case 240/88 *Procureur de la République* v *ABDHU* [1985] ECR 531) is inapplicable here. See also footnotes 10 and 11 below.

10 — The question submitted for a preliminary ruling concerns exclusively Article 36 of the EEC Treaty in so far as it is aimed at the protection of the health and life of animals and, *indirectly* therefore, at the protection of the environment. When questioned at the hearing about the relationship between those two interests worthy of protection (protection of health and life and environmental protection, now referred to as an objective in Article 100a(3) of the EEC Treaty) none of the parties present argued in favour of a separate assessment of the Netherlands measure in question from the point of view of environmental protection. Such an assessment would be based on the premiss that environmental protection either already falls within the scope of 'the protection of health and life' in Article 36, or needs to be added pursuant to Article 100a(4) to the list of justifying grounds set out therein. Even so, however, it is of course necessary to satisfy the criteria laid down by Article 36, which would not seem to be the case here, as is made clear below (in paragraph 10). Consideration of the scope of Article 36 in conjunction with Article 100a(4), from the point of view of environmental protection, can therefore be left aside. See also footnote 11.

In the Commission's view, it is immediately apparent from Article 36 that the aim of protecting animal life can apply equally well to animals which do not occur in the country adopting the protective measures as to animal species actually found there. Personally I fail to see how the wording can support an inference in favour of either view. It is true that Article 36 does not expressly state that the interests which it protects must be located in the legislating Member State. Nevertheless, it would seem still less appropriate to regard that article as an encouragement to adopt legislation for the protection of interests located in other Member States. Moreover, a measure unilaterally adopted by one Member State in connection with the hunting of animals in another Member State would seem at first sight to be difficult to reconcile with the principle of mutual confidence between Member States when they give effect to a Community directive in their legislation (see paragraph 10, below).

Neither do I understand the Commission's reference to paragraph 45 of the judgment of 25 January 1977 in Case 46/76 *Bauhuis* v *Netherlands* [1977] ECR 5, in which the Court purportedly stated that the interests referred to in Article 36 may also be situated in a Member State other than that which adopts the measure in question. In my view, the judgment in *Bauhuis* does not state anything of the kind. Quite the contrary, for it is expressly stated in several grounds of the judgment (paragraphs 27 to 30) that a veterinary inspection which is *imposed by a directive* on the exporting Member State (paragraph 27) is not a measure unilaterally laid down by each Member State but a measure made obligatory and uniform in the case of all the products in question, whichever the exporting Member State or the Member State of destination may be (paragraph 28); for that reason it cannot be regarded as a rule prescribed by each Member State in order to protect some interest of its own, but by the Council in the general interest of the Community (paragraph 29), with the result that such inspections should be regarded as operations intended to promote the free movement of goods rather than as charges having equivalent effect (paragraphs 30 and 31). From all the emphasis laid by the Court on the Community-wide character of the measure, as regards its nature as a source of law (a directive) and its effects (uniformity) and purpose (promotion of the free movement of goods), I draw the opposite conclusion to that advanced by the Commission in its observations.

The Commission's final argument in support of the view that Article 36 is applicable in connection with the protection of interests wholly situated in another Member State is derived from the 'transfrontier nature of the protection of birds', which is expressly recognized both by Directive 79/409 and by the Washington Convention annexed to Regulation No 3626/82. Although the Commission's argument cannot strictly speaking be based on those two measures for the purposes of the assessment of this case — since neither of them is directly applicable but only on the basis of an extension of its scope determined by a Member State — nevertheless I consider it sufficient to assume that a Member State can rely on the concern for animal life in another Member State to justify a restriction on the free movement of goods. It is quite clear, however, in my view, that the requirements of necessity and proportionality, which I shall discuss in due course,

must in such a case be assessed with the customary rigour. The fact that this case is concerned with a non-migratory bird is relevant in connection with that assessment.

8. Hence it is now necessary to ascertain whether the measure provided for by the Vogelwet 1936 is justified within the meaning of Article 36 of the EEC Treaty, that is to say whether, in the case of the Netherlands, it constitutes a measure which is proportionate to the aim of protecting the life of the red grouse, which occurs in the United Kingdom (and is exported to the Netherlands only once shot and killed). [11]

In the light of Article 14 of the directive on the conservation of wild birds (referred to in paragraph 3), which leaves to the Member States the possibility of adopting stricter protective measures, the most relevant judgments are those to the effect that the existence of harmonizing directives cannot extend the remaining powers left to the Member States by Article 36, [12] but can in fact restrict them, to the extent that harmonization has been completed. [13]

In the Court's case-law, the requirements of necessity and proportionality are frequently considered at the same time, [14] in an analysis which closely revolves around the facts relied upon in support and the legal circumstances themselves. The assessment of the first requirement involves ascertaining whether there is a relationship of necessity between the measure adopted and the attainment of the objective pursued. This has two implications: in the first place, the existence of a causal connection between the measure adopted and the aim pursued, that is to say the measure is relevant or pertinent, and secondly there is no alternative to it which is less restrictive of the free movement of goods. [15] The second requirement is concerned with the existence of a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective pursued thereby and its actual attainment.

9. As regards the relevance or pertinence of the measure, it cannot be ruled out, as stated earlier (in paragraph 7), that in the case pending before the national court that requirement is satisfied. There is a possibility that the prohibition of imports into the Netherlands may reduce demand for dead birds of the species in question from the United Kingdom and thereby exert a positive influence on the population of that species in the Member State in which it occurs; in other words, there may to some extent be a causal connection between the measure in question and the objective pursued.

That leaves the second aspect of the requirement of necessity, namely the criterion of the least restrictive alternative. It is discussed by the Commission in its observations; in its view, the fact that the red

11 — It is clear from that wording that in this specific case the question would not differ substantially if the interest worthy of protection under Article 36 were environmental protection and not the protection of bird life (see the previous footnote): in the case of a bird species which is not endangered and does not migrate across national frontiers, 'the protection of ... life of ... animals', a justifying ground which draws no distinction between the greater or lesser environmental value of the species concerned, strikes me as leaving just as much scope for ecological considerations as a justifying ground aimed specifically at environmental protection.

12 — Judgment of 20 May 1976 in Case 104/75 *De Peijper* [1976] ECR 613, paragraph 32.

13 — Judgment of 30 November 1983 in Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 35.

14 — See, for example, Case 104/75, cited above in footnote 12, paragraphs 21 and 22, and the judgment of 8 February 1983 in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraph 16.

15 — See, for instance, the judgment of 22 March 1983 in Case 42/82 *Commission* v *France* [1983] ECR 1013, paragraphs 55 to 57.

grouse does not occur in the Netherlands means that the requirement of proportionality (requirement of necessity strikes me as more correct) is automatically fulfilled — the only conceivable measure which the Netherlands can adopt with regard to a bird which is not found there is a prohibition on importation and sale.

I have some doubts with regard to the Commission's reasoning which was endorsed by the Netherlands Government at the hearing. The fact that the red grouse does not occur in the Netherlands cannot empty the requirement of necessity of its substance. That follows from the judgments concerning the criterion of necessity, in which the Court decided that the need to adopt protective measures ceases to exist where the exporting country has a statutory system which affords protection equivalent to that available in the importing country. Those judgments were concerned not only with measures for the protection of interests situated entirely within a Member State's national territory, [16] but also with a case in which a national (environmental) protection measure was directed at transfrontier interests. [17] [18]

However, the point of departure for the assessment of necessity in this case lies, in my view, primarily in the system established by the directive on the conservation of wild birds. In connection with that directive, the Council, in which all the Member States are represented, considered that the bird in question occurs in such large numbers in the areas in which it is found that it is not endangered by hunting as regulated by the Member State of origin. In the context of harmonization, another Member State must be able to adduce powerful reasons before it can be assumed that a prohibition on imports, that is to say a breach of the fundamental principle of the free movement of goods, constitutes the only, or at any rate the least restrictive measure for the conservation of a bird species occurring in the first Member State. Admittedly, the directive allows Member States to adopt more far-reaching measures but even measures of that kind must be adopted by a Member State having regard to the requirement of mutual confidence under the legislation of other Member States, where the measure adopted relates primarily to an interest located in those States.

In a situation such as this, which involves not an endangered bird species but one which does not occur in the legislating Member State, it seems to me that the Kingdom of the Netherlands, in the present context of Community cooperation, has at its disposal a less far-reaching measure. This consists in gathering regular information on the red grouse population by means of the reports referred to in Article 12 of Directive 79/409 and then submitting proposals, as far as is necessary, to the Committee set up under Article 16 for the insertion of that bird species, in accordance with Article 15 (that is to say by a qualified majority), in Annex I to the directive as an endangered species. That strikes me as being more consistent with the principle of mutual confidence now applied between Member States than is the case where use is made of a provision in the Vogelwet 1936, which was adopted on the basis of an appraisal of

16 — Judgments of 16 December 1980 in Case 27/80 *Fietje* [1980] ECR 3839, paragraph 12, first sentence, and of 22 June 1982 in Case 220/81 *Robertson* [1982] ECR 2349, paragraph 12

17 — Judgment of 10 March 1983 in Case 172/82 *Fabricants raffineurs d'huile de graissage* v *Inter-Huiles* [1983] ECR 555, paragraph 14, final sentence.

18 — For the same view, see the commentary by J. H. Jans on the judgment of the Raad van State, Afdeling Rechtspraak (Netherlands Council of State, Administrative Appeal Section) of 20 March 1984, Milieu en Recht, 1985, p. 86, at p. 89.

interests in which it was as yet impossible to take into account the 'acquis communautaire', still less the views of the Member State in which the bird species in question actually occurs. That is all the more important since, in the appraisal of the interests in question carried out in the Netherlands with regard to the relevant bird species, certain interests cannot be taken into consideration (such as, for instance, the advisability of authorizing hunting so as to protect agricultural crops),[19] which, in the case of the Member State in which the bird in question occurs, may well have been relevant.

A Member State may consider the adoption of a more far-reaching measure only if such a less restrictive alternative should appear to offer no solution, but even in those circumstances it must be established that the measure adopted satisfies the requirement of proportionality, to which I now turn.

10. A measure which has a causal connection with the objective it pursues, and to which there is no less restrictive alternative, must subsequently be assessed in the light of the criterion of proportionality between the obstacle introduced and the objective pursued and/or the result actually achieved thereby. As a result of the application of that criterion, a Member State may be obliged to dispense with the measure in question or resign itself to a less effective one, where the restrictive effect of the first measure is disproportionate so far as the free movement of goods is concerned to the objective pursued by the measure or to the result actually achieved thereby.

That situation is illustrated by the Court's judgment of 20 September 1988 in Case 302/86 *Commission* v *Denmark*;[20] although it involved the assessment of a mandatory requirement in the light of Article 30 of the EEC Treaty, that judgment may nevertheless be relied upon here as a precedent in connection with the criterion of proportionality. In that case, the Court considered that a comprehensive system of approved reusable containers for beer and fresh drinks was justified in the interests of environmental protection. Another measure authorizing non-approved (non-metal) containers, provided an independent deposit-and-return system was established, but imposing a limit of 3 000 hectolitres a year per producer, was held by the Court to be unjustified and contrary to Article 30, inasmuch as the restrictive effect on intra-Community trade was disproportionate to the lesser guarantee which an independent system of returnable containers offers as against the comprehensive system (under which empty containers can be returned to any retailer).

Similarly, in the case of measures in relation to which the protection of animal health was relied upon, the Court considered that it was excessive to take steps against risks so

19 — As briefly indicated earlier, at the end of paragraph 2, no such appraisal of interests seems to have taken place since the question whether the bird may be hunted in the Netherlands does not arise there.

20 — [1988] ECR 4607.

remote or so slight as no longer to be capable of being considered real.[21]

In my view, the application of the Vogelwet 1936, which is at issue in the dispute in the main proceedings, founders in any event on the criterion of proportionality. The restriction of intra-Community trade resulting from an absolute prohibition of imports in the Netherlands is out of proportion, in my view, to the small contribution which such a prohibition is capable of making *in concreto* — by discouraging the killing of the bird species in question in the United Kingdom — to the achievement of the objective pursued, namely the improvement of stocks of bird species which is not endangered and whose protection is not a priority under Community law. That is so particularly since the measure under consideration and the obstacle to trade resulting therefrom are intended to protect a bird and thus, contrary to the principle of mutual confidence between States, to take effect on the territory of another Member State; moreover, the measure was adopted on the basis of a unilateral appraisal of the interests involved, that is to say without taking account of interests which may warrant or justify the hunting of that species.

11. In view of the foregoing considerations, I suggest that the Court should answer the question submitted to it for a preliminary ruling as follows:

'The provisions of the EEC Treaty on the free movement of goods must be interpreted as precluding the application of a prohibition on importation and marketing in respect of all birds, including dead specimens, of a species which does not occur in the territory of the legislating Member State but is found in large numbers in another Member State where, in accordance with the classification of the species concerned in Annexes II/1 and III/1 to Directive 79/409/EEC and in conformity with the national rules of that other State applicable on the basis of the directive, it may be shot and killed without infringing the law in force there.'

21 — See the judgment of 31 January 1984 in Case 40/82 *Commission* v *United Kingdom* [1984] ECR 283, paragraphs 14 to 21. The reasoning can be summarized as follows: since a given disease had occurred with decreasing frequency in the Community in the previous six years, and the vaccination used against it, which might have had adverse effects at home, was not normally practised on animals intended for slaughter, an absolute prohibition on the importation of meat from slaughtered animals from Member States which practised vaccination was not justified. See, in particular, the end of paragraph 18, in which the Court stated that its assessment was 'based on *the absence* in certain categories *of any risk of infection*' (emphasis added).