territory, with health provisions governing the collection and transportation of products regarded as harmful to health. A prohibition of exports of offal does not appear to be necessary for that purpose provided that the requirements laid down by those provisions are observed.

REPORT FOR THE HEARING
delivered in Case 118/86 *

I — Facts and procedure

1. The Netherlands Destructiewet (Law on the destruction of cattle carcasses and animal offal) of 21 February 1957 (*Staatsblad*, 1957/84, p. 155) regulates the operations intended to render animal offal innocuous by converting it into useful products, with the object, according to its preamble, of preventing any risk or damage to or impairment of public health.

According to Article 2 (1) (f), the Destructiewet applies to poultry offal which is manifestly unfit for human consumption and which comes from premises where poultry is slaughtered by way of trade, with the exception of products put to another useful purpose.

Article 4 provides that it is prohibited to withhold animal offal from destruction.

Article 5 (1) provides that it is prohibited to set up, bring into operation, keep in operation, extend or alter a rendering plant without a licence.

According to Article 12, any owner or holder of offal which is to be processed must make a declaration to that effect and hand it over to the local authority. The local authority is obliged to pass the offal on to a licensed rendering-plant operator; the latter is obliged to collect, transport and process the offal in accordance with the Destructiewet.

2. At present there are four rendering plants in the Netherlands, each operating within the area assigned to it.

3. Poultry offal which is unfit for human consumption is covered by Regulation No 827/68 of the Council of 28 June 1968 on the common organization of the market in certain products listed in Annex II to the Treaty (Official Journal, English Special Edition 1968 (I), p. 209).

Poultry declared unfit for human consumption is not in principle covered by the common organization provided for by Council Regulation No 2777/75 of 29 October 1975 on the common organization of the market in the poultry-meat sector (Official Journal 1975, L 282, p. 77), but

* Language of the Case: Dutch.

any poultry offal which is edible is covered by that common organization pursuant to Council Directive 71/118/EEC of 15 February 1971 on health problems affecting trade in fresh poultrymeat (Official Journal, English Special Edition 1971 (I), p. 106) as amended by Directive 75/431 of 10 July 1975 (Official Journal 1975, L 192, p. 6).

4. In November 1984, the Public Prosecutor's Office attached to the Arrondissementsrechtbank (District Court), Arnhem, brought charges against Nertsvoederfabriek Nederland BV for having, between January and October 1984, in breach of Article 5 of the Destructiewet, set up, brought into operation or maintained in operation without a licence, an installation intended exclusively or mainly for rendering animal offal innocuous by converting it into useful products and for having used that installation to process poultry offal into an end product (a brownish powder) suitable for incorporation in animal feedingstuffs by means of heating in a drying installation. The magistrate found the defendant guilty by judgment of 10 December 1984.

5. Nertsvoederfabriek Nederland BV, the defendant in the proceedings at first instance (hereinafter referred to as 'the defendant') and the Public Prosecutor's Office both appealed to the Gerechtshof, (Regional Court of Appeal), Arnhem. Before that court, the defendant maintained that the Destructiewet infringed Regulations Nos 827/68 and 2777/75 and Articles 34 and 37 (2) of the EEC Treaty, and referred to a letter from the Commission expressing the view that the Destructiewet was also indirectly in breach of Article 30 of the Treaty. The Public Prosecutor, on the other hand, contended that the Destructiewet was justified on grounds of the protection of the health of humans and animals within the meaning of Article 36 of the Treaty.

The Gerechtshof considered that it had been established that at some time during the period from January 1984 to 23 October 1984 in the municipality of Veenendaal the defendant had, on his industrial premises at Middelbuurtseweg, operated, without authorization and in breach of Article 5 of the Destructiewet, a plant intended mainly for rendering innocuous waste products of animal origin by converting them into useful products and that, in the aforementioned installation (rendering plant) poultry offal had been converted into an end product (a brownish powder) suitable for incorporation in animal feedingstuffs by heating in a drying installation.

The Gerechtshof nevertheless took the view that the question might arise whether the licensing system for rendering plants provided for in the Destructiewet was, with respect to poultry offal, compatible with various provisions of Community law and that it was necessary to interpret those provisions in order to give a decision on the case before it, since the question might be important in determining whether or not an infringement had occurred.

6. Consequently, the Gerechtshof, Arnhem, by order of 27 March 1986, stayed the proceedings and submitted the following question for a preliminary ruling under Article 177 of the EEC Treaty:

'Assuming that

the legislation of a Member State construes: "destruction" as meaning rendering waste material innocuous by processing it into useful products in a rendering plant; "rendering plant" as meaning an installation exclusively or mainly intended to render waste material of animal origin innocuous

by processing it into useful products; "waste material" as meaning *inter alia* game and poultry offal manifestly unfit for human consumption which arises in establishments where game and poultry are slaughtered by way of trade, with the exception of offal having another useful purpose;

where poultry is slaughtered, approximately 18% of the poultry consists of slaughter offal, of which about a quarter can be put to another useful purpose;

under the legislation it is prohibited to withhold animal waste from destruction;

under the legislation it is prohibited to set up, to bring into operation, to keep in operation, to extend or to alter a rendering plant without a licence and such a licence may be granted in order to ensure that there are adequate facilities for destruction;

in the Member State concerned four licences have been issued;

the holder of a licence is obliged to collect and destroy (or have destroyed) free of charge all waste material in the territory assigned to him;

the destruction of poultry offal — which is a remunerative activity — is therefore restricted to licence-holders;

according to the government concerned the legislation entails a prohibition on the exportation of waste material;

how should the following be interpreted: Article 30, Article 34, Article 36 and Article 37 of the EEC Treaty, singly or in combination, Regulation (EEC) No 827/68 of the Council of 28 June 1968 on the common organization of the market in certain products listed in Annex II to the Treaty and Regulation (EEC) No 2777/75 of the Council of 29 October 1975 on the common organization of the market in poultry-meat, singly or in combination, in view of the fact that the destruction of poultry offal is restricted solely to a few licence-holders?'

7. The order of the Gerechtshof, Arnhem, was received at the Court Registry on 21 May 1986.

8. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 18 August 1986 by the Commission of the European Communities, represented by its Legal Adviser, Robert Caspar Fischer, on 20 August 1986 by Nertsvoerderfabriek Nederland BV, the defendant in the main proceedings, represented by H. J. Bronkhorst, of the Hague Bar, and by the Government of the Kingdom of the Netherlands, represented by E. F. Jacobs, acting Secretary-General, Ministry of Foreign Affairs.

9. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure wihout any preparatory inquiry. It nevertheless invited the defendant in the main proceedings and the Commission to

reply in writing to a number of questions; the replies were given within the period prescribed.

II — Written observations submitted to the Court

1. According to *Nertsvoederfabriek Nederland BV,* the defendant in the main proceedings, the system created by the Destructiewet is incompatible with Regulations Nos 2777/75 and 827/68 and Articles 30, 34, 36 and 37 (2) of the EEC Treaty.

(a) It states that Regulation No 2777/75 applies to the parts of slaughtered animals which are not necessarily unfit for human consumption, but which are declared unfit. This must be taken to mean carcasses and parts of carcasses. The system established by the Destructiewet grants to three or four monopsonies the power of determining prices or influencing price formation in respect of the products covered by the common organization provided for by Regulation No 2777/75 and therefore infringes the freedom of trade guaranteed by the common organization of the markets, since the owners of the offal in question are compelled to sell it to the three licence-holders. Since slaughtered poultry comprises about 18% offal, this means that the three licence-holders are in a position to control prices for a large percentage of the offal produced.

The defendant in the main proceedings also contends that the Destructiewet, and in particular Article 5 thereof, establishes a system which involves intervention by the authorities throughout the price-formation process. With respect more particularly to poultry, the Court recognized, in its judgment of 18 May 1977 in Case 111/76 *Van den Hazel* [1977] ECR 901, that the common organization of the market in that sector is based on a deliberate choice of economic policy, relying essentially upon market forces to achieve the desired balance.

Moreover, it is incompatible with the obligations of the Member States under any common organization of a market to place restrictions on the objectives and principles underlying that organization, in this case unhindered price formation, even if that effect is achieved by measures which do not directly affect the products covered by the particular market organization in question. The Court held, in its judgment of 26 October 1983 in Case 297/82 *De Samvirkende Danske Landboforeninger* [1983] ECR 3299, that a tax on agricultural land may be incompatible with the provisions of the EEC Treaty on the common agricultural policy, to the extent to which, by virtue of its impact on price formation, it hinders the functioning of the machinery established within the framework of the common market organizations.

The defendant in the main proceedings states that the common organization of markets limits the freedom of manoeuvre of national authorities to a greater extent than the general provisions of the Treaty concerning the free movement of goods, as the Court stated in its judgment of 26 February 1980 in Case 94/79 *Pieter Vriend* [1980] ECR 327, in which it referred to the freedom of commercial transactions guaranteed by the common market organizations and the principle of the open market. The creation of a production monopoly is contrary to the principle of the open market, which underlies the common organization of the markets.

(b) The defendant in the main proceedings maintains that the system established by the Destructiewet, and in particular by Article 5 thereof, also encroaches upon the freedom of commercial transactions as guaranteed by Regulation No 827/68 and is incompatible with the obligation which that market organization imposes upon the Member States to refrain from influencing price mechanisms. What applies in the case of Regulation No 2777/75 applies, *mutatis mutandis*, to the common organization established by Regulation No 827/68 and the maintenance of a national monopoly in the production of animal meal, a product which is directly covered by Regulation No 827/68, is incompatible with the fundamental principles of that common organization.

(c) The defendant in the main proceedings states that the prohibition of exports, contained by implication in Article 4 of the Destructiewet, has in practice ceased to have the effect of an obstacle to trade since, by its judgment of 13 November 1985, the Raad van State held that the authorities must provide assistance for the exportation of offal; the fact nevertheless remains that Article 34 of the EEC Treaty is referred to in the request for a preliminary ruling.

The Destructiewet prohibits the marketing of offal intended to be sent to other Member States, and foreign rendering plants cannot obtain offal on the same terms as their Netherlands counterparts. That situation infringes the essential principles of the common market as laid down in Articles 30 to 34 of the EEC Treaty, which prohibit such partitioning.

(d) The facts of the present case cannot justify the fragmentation of the Community market on the basis of Article 36 of the Treaty. No risk to humans or animals would result from other undertakings being authorized to process offal if the necessary precautions were taken. The authorities could draft adequate regulations governing transport, processing and storage and supervisory measures concerning marketing and processing both in the Netherlands and abroad.

(e) Finally, the Destructiewet infringes Article 37 (2) of the EEC Treaty because it establishes a monopoly of a commercial character in so far as it obliges the owners of offal to sell it to certain specified rendering plants.

In conclusion, Nertsvoederfabriek Nederland BV considers that the following answer should be given to the question submitted:

'(1) The Community provisions on the free movement of goods and monopolies of a commercial character, and also Regulations Nos 827/68 and 2777/75, do not authorize a Member State to regulate, within its territory, the removal and processing of offal, in particular the offal referred to in the above regulations, in such a manner that the processing can be carried out only by rendering plants to which the Member State has granted licences which, at the same time, it refuses to grant to other undertakings even though they have or plan to establish processing plants which, in every respect, satisfy the same requirements as those for which a licence was granted.

(2) The provisions of Community law and the regulations cited in paragraph 1 above likewise do not authorize a Member State to regulate, within its territory, the removal and processing of offal, in particular the offal referred to

in the said regulations, in such a manner as to prohibit the exportation of such offal to an approved rendering plant in another Member State.'

2. The Government of the Kingdom of the Netherlands points out, in general terms, referring to the judgment of 1 April 1982 in Joined Cases 141 to 143/81 *Holdijk* [1982] ECR 1299, that rules which do not have as their purpose or effect a specific restriction on exports, as in the case of the Destructiewet which requires that all offal is to be handed over to the local authorities in every case, cannot constitute an infringement of Articles 34 and 37 of the EEC Treaty.

It then observes that the destruction of offal which is contaminated or may be dangerous is an essential part of a responsible health and environmental policy. The grant of exclusive rights to certain undertakings under the Destructiewet is dictated by objective considerations affecting the public interest: on the one hand, the need to ensure a consistent and easily monitored standard of hygiene and, on the other, the need to ensure a minimum level of viability and continuity for the undertakings concerned. It is not possible simply to waive the legal obligation of destruction in respect of that part of the offal which is financially profitable.

The approved rendering plants are required by law not only to remove large quantities of profitable offal from large slaughterhouses; they are also required to deal with the removal of animals which have died or have been slaughtered on the premises of individual stock farmers. The latter task is certainly not an economically profitable operation. If the authorities were to require a payment to be made for this service, farmers would endeavour to dispose of carcasses by other means and without supervision, with all the risk of epizootic disease that that would entail, and if undertakings producing offal were entirely free to withhold offal from the destruction process, the income of the rendering plants would be directly jeoparized.

The Kingdom of the Netherlands refers to paragraph 36 of the judgment of the Court of 10 July 1984 in Case 72/83 *Campus Oil Limited* [1984] ECR 2727 in which it is stated that to come within the ambit of Article 36 of the EEC Treaty, the national rules must be justified by objective circumstances corresponding to the requirements laid down in that article. Once that justification has been established, the fact that the rules are of such a nature as to make it possible to achieve other objectives of an economic nature which the Member State may also seek to achieve does not exclude the application of Article 36.

For the same reasons, there can be no question of incompatibility with Article 37 of the Treaty.

The Kingdom of the Netherlands considers that the Destructiewet is based on grounds comparable to those of Council Directive 75/439 of 16 June 1975 on the disposal of waste oils (Official Journal 1975, L 194, p. 23), which also provides for the possibility of appointing only one processing undertaking for each zone and which was upheld by the Court as being in conformity with the Treaty in its judgment of 7 February 1985 in Case 240/83 *Association de défense des brûleurs d'huiles usagées*, [1985] ECR 531.

The Kingdom of the Netherlands declares that there is no intrinsic objection to the

setting up of new rendering plants, provided that they are compatible with the Netherlands policy on the destruction of such waste products. Producers of poultry offal can, moreover, put such offal to 'another useful purpose' if they comply with certain requirements concerning the operations involved in rendering the offal innocuous, consisting essentially of keeping the waste in sealed drums until the heating operation. The 'other useful purpose' to which such poultry waste is put is usually the manufacture of feedingstuffs for mink and dog and cat food.

The Kingdom of the Netherlands makes a number of observations concerning the assumptions made by the Gerechtshof in its order.

With respect to point 1, it states that Nertsvoederfabriek Nederland BV used the poultry offal processed by it for the same purpose as the licensed rendering plants, producing animal meal and grease for industrial purposes, and did not put it to 'another useful purpose'.

As regards point 2, the Kingdom of the Netherlands considers that the slaughter of poultry gives rise to offal representing 20% of the birds, or even 25% if the feathers are taken into account; for the country as a whole, poultry offal represents 13.6% by weight of the total supplies made over to rendering plants.

As regards points 4 and 5, the Kingdom of the Netherlands states that 19 years ago there were 12 licence holders, and eight of them withdrew from the system because they could no longer make a profit. Moreover, if there were an excessive number of licence holders it would be difficult to ensure the observance of standards of hygiene when the offal was delivered, transported and processed.

As regards point 6, the Kingdom of the Netherlands emphasizes that a licence holder is obliged to collect and process free of charge all animal waste in the area assigned to him. In certain cases, a payment is made to the producer of the offal, in particular for poultry offal. This is done because of the emergence of competition since some offal is now processed in order to be put to 'other useful purposes'. The rendering plants could obtain more income by selling the products derived from the processing of the waste materials, and poultry offal is important because of its quality.

As regards point 8, the Kingdom of the Netherlands repeats that the system established by the Destructiewet requires animal offal to be handed over to the local authority and therefore by implication prohibits the transport of such products beyond the municipal boundary. This constitutes, therefore, a total prohibition of marketing whether the products are intended for the internal market or for other Member States, and it is therefore not a specific restriction on exports.

In conclusion, the Kingdom of the Netherlands considers that Articles 30 to 37 of the EEC Treaty must be interpreted as not precluding legal rules which restrict the processing of offal to a number of licence-holders. The Netherlands rules, as laid down in the Destructiewet, could be based on Article 36 of the EEC Treaty.

Regulation No 2777/75 is wholly irrelevant to the question submitted since it applies exclusively to edible offal.

Regulation No 827/68 applies to offal which is manifestly unfit for human consumption, if reference is made to the description for tariff heading 05.15 contained in the annex. Article 4 of that regulation adopts with respect to such products the general rule contained in Articles 30 to 34 of the EEC Treaty; those provisions do not preclude rules on the destruction of waste products of the kind at present in force in the Netherlands.

3. The *Commission* states, with respect to the facts of the case, that the Destructiewet places Netherlands undertakings at a financial disadvantage by comparision with their competitors in other Member States. According to the Commission, the Destructiewet prohibits poultry slaughterers from building installations for the processing of offal into high-protein animal meal, in so far as that manufacturing process falls within the definition of destruction of offal contained in the Destructiewet; under that Law, there is no opportunity for poultry slaughterers wishing to do so to be licensed to carry out that process, even if only to process offal produced on their own premises, and a consequence of the Destructiewet is to deprive poultry slaughterers of the offal which they themselves wish to process into animal meal or to export.

(a) The Commission maintains that Articles 30 and 34 of the EEC Treaty, concerning the elimination of quantitative restrictions on imports and exports and measures having an equivalent effect, form an integral part of the common organization of the agricultural markets, as the Court held in its judgment of 29 November 1978 in Case 83/78 *Pigs Marketing Board* [1978] ECR 2347; moreover, according to paragraphs 57 and 58 of that judgment, those common organizations are founded on the principle of an open market and therefore there is no doubt as to the incompatibility with the principles of the market organization of any national provisions or practices which are liable to change patterns of imports or exports or to influence market price formation by denying producers the right freely to purchase and sell products within the Member State in which they are established or in another Member State, under the conditions laid down by the Community legislation, and to benefit directly from intervention measures and any other regulatory measures provided for by the common organization.

(b) According to the Commission, which refers to paragraph 38 of the judgment of 29 November 1978 (*Pigs Marketing Board*, cited above), the obligations imposed upon Member States by Article 37 of the Treaty are themselves replaced by obligations of equally broad scope arising from the common organization of the markets.

The Commission states that the fact that both the rendering plants themselves and other owners and holders of poultry offal are prevented from exporting it to other Member States constitutes an explicit infringement of the prohibition of measures having an effect equivalent to quantitative restrictions on exports, as provided for in Article 34 of the EEC Treaty and supplemented by the two market organizations involved here.

The Commission also states that the prohibition of processing, purchasing or selling the poultry offal covered by the

Destructiewet, combined with the obligation imposed on owners and holders of such offal to transfer them free of charge or, at least, for a price lower than the market price, to the rendering plant licensed for the area in question, distorts the operation of the machinery created by the two market organizations for such products and thus deprives the producers of such offal, which retains an economic value, of the advantages conferred on them by virtue of the free-market principle. Furthermore, the lack of a market and of a market price in the Netherlands for such poultry offal also makes it impossible to import such products from other Member States.

(c) As regards Article 36 of the EEC Treaty, the Commission does not agree that considerations of health policy can justify the prohibition of slaughterhouses from building plants for processing their offal into animal meal or exporting offal for the purpose of processing in another Member State. Adequate precautionary measures and strict supervision could meet the requirements of human and animal health protection and it is unnecessary to restrict the operation of the free-market principle and the free movement of goods for that purpose.

Nor can Article 36 of the Treaty by invoked in connection with the need for licensed rendering plants to be profitable. Such economic considerations have been rejected by the Court, in particular in paragraph 13 of its judgment of 10 March 1983 in Case 172/82 *Syndicat national des fabricants-raffineurs d'huiles de graissage* [1983] ECR 555.

In conclusion, the Commission considers that the provisions of the Destructiewet concerning the processing of poultry offal are incompatible with the provisions on the common organization of the markets established by Regulations Nos 827/68 and 2777/75, in so far as they restrict the collection and processing of such offal to a limited number of rendering plants enjoying exclusive rights in the area attributed to them and do not enable other undertakings to process, market and export such waste on condition that proper measures are taken to protect health and ensure adequate supervision.

The Commission therefore suggests that the Court should answer the question submitted by the Gerechtshof, Arnhem, in the manner set out above, in general terms and without referring to the Destructiewet.

III — Answers to the questions put by the Court

1. In reply to the question whether, in its opinion, Regulation No 2777/75 applies to poultry offal, *Nertsvoederfabriek Nederland BV* replied that, as a result of different consumer preferences and customs, in the Netherlands certain offal is regarded as unfit for human consumption, whereas it is not so regarded under Community law. Referring to the Explanatory Notes to the Common Customs Tariff, with respect to heading 02.02: 'Edible offals' of poultry, the defendant in the main proceedings considers that the offal referred to therein falls within the ambit of Regulation No 2777/75; such

offal is not, however, regarded by the Netherlands authorities as fit for human consumption and has to be made over to rendering plants.

2. In reply to a similar question, the *Commission* stated that, whilst poultry offal which is unfit for human consumption is in general covered by Regulation No 827/68, it may also in certain cases be covered by Regulation No 2777/75, since the downgrading of a slaughtered bird does not necessarily apply to all the offal. The Commission considers, however, that the difference is of no practical relevance, since the answer proposed by the Commission applies regardless of the market organization concerned.

With respect to the stage reached in the procedure concerning the Destructiewet mentioned in the Commission's observations, in which the Netherlands is accused of failing to fulfil its obligations, the Commission stated that it has not yet issued a reasoned opinion.

F. Schockweiler
Judge-Rapporteur