OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 22 FEBRUARY 1983 [1]

Mr President,
Members of the Court,

The main action giving rise to the reference to the Court for a preliminary ruling which we are to consider today is concerned with the lawfulness of charges for health inspection which became due under Article 32 of the Testo Unico No 1265 of 27 July 1934 (Gazzetta Ufficiale della Repubblica Italiana) on the import of poultry into Italy.

Armando and Ottavio Leonelli who had had to pay such charges between 1968 and 1975 on the import of poultry and fresh poultrymeat from Hungary brought an action for a refund in 1976 before the Tribunale [District Court], Trieste, against the Amministrazione delle Finanze dello Stato [State Finance Administration] on the grounds that the charges had an effect equivalent to customs duties, the levying of which was incompatible with Article 11 (2) of Regulation No 123/67/EEC of the Council of 13 June 1967 on the common organization of the market in poultrymeat (Official Journal, English Special Edition 1967, p. 63).

That provision, which substantially agrees with Article 11 (2) of the present regulation laying down the organization of the market in poultrymeat (Regulation No 2777/75 of the Council of 29 October 1975 (Official Journal, L 282, 1. 11. 1975, p. 77)), reads:

"Save as otherwise provided in this regulation or where derogation therefrom is decided by the Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission, the following shall be prohibited:

The levying of any customs duty or charge having equivalent effect;

The application of any quantitative restriction or measure having equivalent effect . . ."

The Tribunale, Trieste, allowed the claim and ordered the Amministrazione to refund LIT 23 938 555. The court of appeal also confirmed the judgment of the court of first instance and the Amministrazione then brought an appeal in cassation before the Corte Suprema di Cassazione which led to the present reference to the Court for a preliminary ruling.

In the order making the reference of 15 May 1981 the First Civil Division states that regard being had to the judgment of the Court in the *Wigei* case [2] the action should be dismissed as unfounded in so far as it concerned charges levied after the entry into force of 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). In that judgment the Court decided that Article 15 of the said directive introduced a legitimate derogation from the prohibition in Article 11 (2) of Regulation No 123/67 with the result that it may no longer be relied upon in order to challenge the Member States' right to levy charges at the external frontiers of the Community in respect of health inspections carried out by them on fresh poultrymeat imported from non-member countries unless such inspections are manifestly out of all proportion to the

1 — Translated from the German.

2 — Judgment of 22 January 1980 in Case 30/79 *Land of Berlin* v *Wigei* [1980] ECR 151.

objectives pursued or the charges levied clearly exceed the cost of the inspections.

By reason of the context of Article 15 of the latter directive according to which:

"Until the entry into force of Community provisions concerning imports of fresh poultrymeat from third countries, Member States shall apply to such imports provisions which are at least equivalent to those of this directive",

and of Article 16 which lays down certain periods for the transposition of the directive into national law, the question arises whether the power to derogate from the prohibition of levying charges for health inspections depends not only on fulfilling the said conditions but further on a Member State's having implemented the directive, which was not the case in Italy at the relevant time.

In the view of the national court that question is all the more justified inasmuch as the Court of Justice in the case of *Simmenthal*[1] decided that the Council might authorize derogations from the prohibition of charges for health inspections in trade with non-member countries provided that the charges had a uniform effect in *all* Member States in trade with non-member countries, did not exceed the actual cost of the inspections and the derogations took effect *only after* the Member States had adopted the measures prescribed in the directives which had introduced those derogations.

On those grounds the First Civil Division of the Corte Suprema di Cassazione stayed the proceedings and referred the following question to the Court under Article 177 for a preliminary ruling:

"Is Article 15 of Council Directive 71/118/EEC on health problems affecting trade in fresh poultrymeat to be interpreted as meaning that the derogation provided for therein from the prohibition of the levying of customs duties, other than those specified in the Common Customs Tariff, and national charges having equivalent effect (a prohibition laid down by Regulation No 123/67/EEC of the Council of 13 June 1967 on the common organization of the market in poultrymeat) and, therefore, the right of each Member State to continue to levy such charges are subject to the additional condition that the Member State in question has already adopted the laws, regulations and administrative provisions needed to comply with the aforesaid directive?"

My opinion thereon is as follows:

1. The court making the reference has to decide the lawfulness of health inspection charges levied on the import of live poultry and, as was made clear at the hearing, the import of fresh poultrymeat from a non-member country. As the lower courts rightly held, citing the established case-law of the Court in *Politik*[2], *Marimex I*[3], *Variola*[4], *Schroeder*[5], *Bauhuis*[6], *Simmenthal*[1], and

1 — Judgment of 28 June 1978 in Case 70/77 *Simmenthal SpA* v *Amministrazione delle Finanze dello Stato* [1978] ECR 1453.

2 — Judgment of 14 December 1971 in Case 43/71 *Politi sas* v *Ministry for Finance of the Italian Republic* [1971] ECR 1039.

3 — Judgment of 7 March 1972 in Case 84/71 *SpA Marimex* v *Ministry for Finance of the Italian Republic* [1972] ECR 89.

4 — Judgment of 10 October 1973 in Case 34/73 *Fratelli Variola SpA* v *Amministrazione Italiana delle Finanze* [1973] ECR 981.

5 — Judgment of 9 July 1975 in Case 21/75 *Firma I. Schroeder KG* v *Oberstadtdirektor der Stadt Köln* [1975] ECR 905.

6 — Judgment of 25 January 1977 in Case 46/76 *W. J. G. Bauhuis* v *The Netherlands State* [1977] ECR 5.

Wigei[1], the health inspection charges *unilaterally* levied by member countries on the occasion of import from non-member countries, just like the corresponding charges levied in intra-Community trade, are basically to be regarded as *charges similar to customs duties.* In that respect the Court has repeatedly and expressly emphasized that the concept underlying the prohibitions contained in the organizations of the agricultural markets corresponding to Articles 11 (2) and 13 (1) of Regulation No 123/67 is the same as in Article 9 et seq. of the EEC Treaty and that in that respect there is no reason to differentiate between intra-Community trade and trade with non-member countries.

Apart from cases, such as charges which are part of a system of inland charges, which in any event do not come under the concept of charges having an effect equivalent to customs duties, health inspection charges in view of that case-law are therefore permissible in trade with non-member countries only if either the inspections are harmonized as a matter of Community law or the relevant organizations of the agricultural markets themselves, as is the case with the particular Article 11 (2) in relation to trade with non-member countries, provide for the possibility of a derogation from the prohibition. Since as far as concerns trade with non-member countries the abolition of charges having an effect equivalent to customs duties has other aims and other legal bases than those underlying the prohibition of charges in intra-Community trade, the Court has in the case of *Simmenthal* expressly treated one such possibility of derogation provided for in the organizations of the markets as permissible.

In the *Wigei* case it was consequently decided that Article 15 of Directive 71/118 which has to be interpreted in the present proceedings also was an exception to the prohibition on the Member States of levying charges having an effect equivalent to customs duties within the meaning of Article 11 (2) of Regulations Nos 123/67 and 2777/75.

On the basis of that case-law it therefore remains to be considered first whether with regard to the scope of Article 15 of the directive in question a Member State may rely on that derogation before the expiry of the periods laid down in the directive itself for its implementation and before the adoption of the relevant implementation measures. If that is answered in the affirmative then with regard to the substantive scope of Article 15 the question remains whether the provision extends not only, as its wording indicates, to the import of fresh poultrymeat but also to the import of live poultry from non-member countries.

2. As regards the question of the application of Article 15 of Directive 71/118, Armando Leonelli, who has made observations in the proceedings and cited the case-law of the Court on the question of the direct application of directives, takes the view that the derogation becomes effective only when the Member States have attained a uniform application of the provisions laid down in the directive. The harmonizing Directive 71/118 which was substantially amended by Council Directive 75/431/EEC of 10 July 1975 (Official

1 — Judgment of 22 January 1980 in Case 30/79 *Land of Berlin* v *Wigei* [1980] ECR 151.

Journal, L 192, 24. 7. 1975, p. 6) *inter alia* with regard to the periods for implementation, is neither clear nor unconditional but leaves the Member States a certain discretion. He states that the Council allowed the Member States the possibility of exceeding the time-limits laid down in order to be able to undertake the prescribed adjustments. In Italy the two directives accordingly became effective only on 1 January 1977 after the national legal system had been adapted to the provisions of the directives.

On the other hand the Italian Government and the Commission, having regard to the wording, meaning and aim of the provision in question and to the case-law of the Court on this problem, basically agree that the Member States have been empowered since the entry into force of the directive to levy charges for health inspections in trade with non-member countries.

(a) In my opinion too it is apparent already from the *wording* of Article 15 and its *place* in the context of Directive 71/118 that the validity of the provision, which is a derogation from the prohibition of the levying of charges having an effect equivalent to customs duties, does not depend on the Member States' having adopted the laws, regulations and administrative provisions needed to comply with the directive. In that respect it must first of all be pointed out that the relevant provision is part of a directive which clearly and unmistakably has the aim in the interests of *intra-Community trade* of harmonizing the various health provisions for poultrymeat existing in the individual Member States. Only in that respect does Article 16 allow the Member States transitional periods for implementing the directive, differing according to whether it is a matter of provisions for intra-Community trade or provisions for trade within the territory of a Member State. On the other hand Article 15, as its wording shows, takes account of the fact that at the time at which the directive was adopted there were no corresponding "Community provisions concerning imports of fresh poultrymeat *from third countries*". Since this sector was not yet harmonized it was provided that the Member States in order to harmonize the provisions on health inspections in trade with non-member countries should apply to imported goods only provisions "which are at least equivalent to those of this directive". That provision applies, as the Court has expressly made clear in the cases of *Simmenthal* and *Wigei* which have already been cited, not only as regards the health inspections themselves but also in respect of the charges imposed therefor.

Thus, as already the wording of that provision shows, the Community legislature basically assumes that the Member States, in derogation from the prohibition contained in Article 11 (2) of Regulation No 123/67, are empowered as previously to carry out health inspections *in respect of trade with non-member countries* and to impose charges

therefor. Accordingly the Court expressly held in the *Wigei* case that

"The prohibition of the levying of charges having an effect equivalent to customs duties laid down in Article 11 (2) of Regulations Nos 123/67 and 2777/75 cannot be relied on for the purpose of preventing Member States levying at the external frontiers of the Community charges for the health inspections which they carry out of imports of fresh poultrymeat from third countries" (paragraph 10).

As regards the amount of the charges the Court further decided that it follows from the wording of Article 15 that:

"This provision allows stricter inspections at the external frontiers than those provided for by the directive in the case of intra-Community trade" (paragraph 14).

In that respect it was expressly stressed that Community law does not require Member States to show the same degree of confidence towards non-member countries as that which, on the basis of the relevant directive, should characterize relations between Member States.

For the purposes of ensuring *as uniform protection as possible* vis-à-vis *the outside* the Court simply set the Member States an *upper limit* to their discretion when it held that:

"In the event of the public health inspections at the external frontiers of the Community being out of all proportion to the objectives sought to be attained or if the charges were clearly to exceed the cost of those inspections, they would be outside the field of application of the derogation allowed by Article 11 (2) of the above-mentioned Regulations Nos 123/67 and 2777/75" (paragraph 12).

A *lower limit* for the health inspections to be carried out by Member States in respect of imports from non-member countries and the resulting charges is finally established by Article 15. As the Court held in the *Wigei* case with regard to this article and in the *Simmenthal* case with regard to the corresponding article of Council Directive 64/433 of 26 June 1964 on health problems affecting intra-Community trade in fresh meat (Official Journal, English Special Edition, 1963-64, p. 185) the specific purpose of these provisions is:

"to lay down on a *provisional* basis pending the implementation of the Community system for imports of fresh meat from third countries, a rule applicable to the *national arrangements remaining in force* in order to prevent their being less strict or less onerous than the inspection arrangements laid down in the directive for intra-Community trade."

That rule is thus intended, as the Court made clear, to avoid distortions of competition by ensuring that traders who put on the market fresh meat originating within the Community should not be treated less favourably than their competitors who import meat from non-member countries.

The provision in question is thus intended to safeguard the *principle of Community preference* by preventing Member States from applying on the import of products from non-member countries in respect of which the health requirements for *intra-Community trade have been harmonized* provisions which are *lower* than the standard sought by the harmonizing directives, since, when such goods cross the internal frontiers of the Community, in principle no further inspections should be carried out. In contrast to intra-Community trade, where the concern is that goods from other Member States should not be at a disadvantage, this provision is intended to exclude *preference for goods from non-member countries.*

It is apparent however from that aim of Article 15 that only observance of the lower limit referred to in the provision but irrelevant to the main action is dependent on implementation of the directive by the Member States. The power of the Member States as such to levy charges for health inspections on imports of fresh poultrymeat from non-member countries does not on the other hand presuppose such implementation. Such a power has existed since the entry into force of the derogation in Article 15, that is since Directive 71/118 was notified to the Member State in question.

(b) Finally, contrary to the view of Mr Leonelli, no other conclusion is to be drawn from the *Simmenthal* judgment. The particular feature of that case, which was concerned with charges for health inspections on the import of beef and veal from Uruguay, was that apart from the prohibition in the organization of the market for beef and veal of levying charges having an effect equivalent to customs duties there were on the one hand two Council directives which provided for veterinary inspections for beef and veal in *intra-Community trade* and on the other hand a further Council directive which in contrast to the present case provided for veterinary inspection on the import of beef and veal from *non-member countries.* On the question from the court making the reference whether the provisions of the latter directive were to be interpreted as authorizing the Member States to introduce health inspection charges on goods imported from non-member countries and, if so, with effect from what date, the Court held that the *levying* of charges for veterinary or public health inspections *on the basis of Community rules* on imports from non-member countries was lawful provided that the effect thereof on the relevant trade with non-member countries was uniform in all the Member States. Since the directive in question provided for the establishment of uniform veterinary and public health inspections the particulars of which were to be determined according to the circumstances by the Council, the Commission or the Member States, the Court consequently held that the derogation was applicable only when the Member States were in a position to establish the inspections provided for in the directive in accordance with the provisions of the directive.

The present case however differs from that case by the very fact that the health inspections and the related charges have

not been harmonized in trade with non-member countries and Community rules exist only in respect of intra-Community trade. If the Member States' power conferred by Article 15 of Directive 71/118 to levy charges in trade with non-member countries were to depend on implementation of the directive which relates to intra-Community trade, it would mean, as the Italian Government and the Commission rightly point out, that ultimately in contrast to the principle of Community preference products from non-member countries which reach the common market via a Member State which has not yet implemented the directive would be more favourably treated than products coming from Member States where the directive has already been implemented.

3. It is thus clear that the Member States are empowered by Article 15 of Directive 71/118 to levy charges for health inspections on the *import of fresh poultrymeat* from non-member countries. It remains, in conclusion, to consider whether this derogation from the prohibition of levying charges having an effect equivalent to customs duties contained in Article 11 (2) of the regulation on the organization of the market in poultrymeat is applicable, as the Italian Government thinks, also to the *import of live poultry from non-member countries.* The Italian Government takes the view that if Article 15 is read in conjunction with the organization of the market in poultrymeat and Article 11 of Directive 71/118 and the last recital in the preamble thereto then contrary to its wording it must be given a wide interpretation. No distinction is made in those provisions between live poultry and fresh poultrymeat especially as regards veterinary and public health inspections.

To assess the merits of that claim it must first of all be pointed out that according to Article 1 of Regulation No 123/67 both live poultry and fresh poultrymeat are covered by the common organization of the market in poultrymeat established by that regulation. Thus the import of both products from non-member countries comes within the scope of Article 11 (2) of Regulation No 123/67 according to which the levying of charges having an effect equivalent to customs duties is prohibited save as otherwise provided in the regulation or where derogation therefrom is decided by the Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission. As I have shown, one such derogation is contained in Article 15 in respect of "imports of fresh poultrymeat from third countries". That provision is moreover part of a directive which has the express aim of abolishing differences between the health provisions of the Member States concerning *fresh poultrymeat.*

As Regulations Nos 123/67 and 2777/75 on the organization of the market in poultrymeat and the harmonizing Directives 71/118 and 75/431 show, however, the Council has always drawn a clear distinction between live poultry and poultrymeat. For that reason alone the fact that Article 15 does not mention live poultry can hardly be explained as an oversight of the Council.

Further the general rule reiterated by the Court in established case-law that exceptions to a general principle must be strictly interpreted militates against the view advocated by the Italian Government.

Not least of all, the meaning and purpose of Article 15, which, after the health provisions of the Member States have been harmonized in respect of *poultrymeat* in intra-Community trade, is intended to prevent preference being given to goods from non-member countries, are obstacles to a wide interpretation or even to the application of the provision by way of analogy to the import of live poultry from non-member countries. In that respect it must be borne in mind that inspections of live poultry have not been dealt with in any directive on harmonization either in intra-Community trade or in trade with non-member countries.

As *inter alia* the cases of *Neumann* [1] and *Ludwig* [2] show, for such products, in respect of which there has been no approximation either in intra-Community trade or in trade with non-member countries, the prohibition of levying charges having an effect equivalent to customs duties contained in the relevant organization of the market applies with the result that no health inspection charges may be levied on such goods unless, as the Court has shown in the *Schroeder* case (op. cit.), the levy is on the basis of national rules on charges which apply in a similar manner to domestic products as well.

4. In view of those considerations I therefore propose that the Court should answer the question put to it as follows:

(a) The derogation contained in Article 15 of Directive 71/118 of the Council of 15 February 1971 (Official Journal, English Special Edition 1971 (I), p. 106) from the prohibition of levying duties and charges having an equivalent effect other than such as are contained in the Common Customs Tariff applies to imports of fresh poultrymeat from non-member countries from the date of the notification of the directive to the individual Member States and does not depend on the further condition that the Member States have adopted the requisite laws, regulations and administrative provisions to implement the directive.

(b) The derogation does not correspondingly apply to imports of live poultry from non-member countries.

1 — Judgment of 5 July 1978 in Case 137/77 *Stadt Frankfurt am Main* v *Firma Max Neumann* [1978] ECR 1623.

2 — Judgment of 5 July 1978 in Case 138/77 *Firma Hermann Ludwig* v *Free and Hanseatic City of Hamburg* [1978] ECR 1645.