inspection referred to in Regulation No 2638/69 of the Commission of 24 December 1969 laying down additional provisions on quality control of fruit and vegetables marketed within the Community.

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 3 February 1983.

For the Registrar

H. A. Rühl

Principal Administrator

P. Pescatore

President of the Second Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 28 OCTOBER 1982 [1]

Mr President,
Members of the Court,

The College van Beroep voor het Bedrijfsleven [administrative court of last instance in matters of trade and industry], The Hague, has requested from the Court a preliminary ruling on the interpretation of Articles 30 to 34 of the EEC Treaty and the regulation of 18 May 1972 on the common organization of the market in fruit and vegetables.

The facts

The facts are as follows:

On 25 September 1980 the company F. van Luipen en Zn BV, which is established at The Hague, was fined HFL 4 000 by the Tuchtgerecht [Disciplinary Tribunal] of the Kwaliteitscontrolebureau voor Groenten en Fruit [Quality Control Bureau for Fruit and Vegetables, to which I shall refer as "the Bureau"] for packing and holding for sale a consignment of tomatoes labelled "Grade I" on the ground that the consignment, bound for the Federal Republic of Germany, did not meet the quality requirements for that grade of product.

Van Luipen duly appealed to the College van Beroep against that decision and whilst not contesting the facts or its membership of the Bureau, contended that the national rules, which it

1 — Translated from the French.

considered to be contrary to Community law, had no binding force.

The legislative background against which the case is set should thus be examined before the case itself is discussed.

The legislative background

1. Regulation No 23 of the Council of 4 April 1962 concerns the *progressive establishment* of a common organization of the market in fruit and vegetables. It provides for the adoption of common quality standards for the purpose in particular of "keeping products of unsatisfactory quality off the market". To that end it provides for the quality of products intended for export to another Member State to be inspected before they cross the frontier of the territory of the exporting Member State.

The second subparagraph of Article 5 (1) provides that "the supervisory body ... shall issue for each lot a certificate stating the quality and certifying that the quality and classification of the products correspond at the time of inspection to the quality standards. The certificate shall accompany the goods to their destination".

Two subsequent regulations clarify those directions.

Regulation No 158/66 of the Council of 25 October 1966 laid down common quality standards for fruit and vegetables marketed within the Community and stipulated that the quality of products should preferably be checked prior to dispatch from the production areas when the goods are being packed or loaded. That provision was incorporated in Regulation No 1035/72 of the Council of 18 May 1972 on the *common organization* of the market in this sector.

Regulation No 2638/69 of the Commission of 24 December 1969 prescribes special measures permitting "priority" of inspection for products dispatched in complete loads from one area of the Community to another. It also provides for a certificate to be issued by the authority charged by each Member State with carrying out the inspections. The list of those authorities was published in Regulation No 2150/80 of 18 July 1980 which entered into force on 1 January 1981.

2. It is accepted that even before that date the task of carrying out inspections in the Netherlands had been assigned to the Bureau, which is an association incorporated under private law and was already responsible for inspecting products exported to *non-member countries.* Its rules provide that its task shall be to "assist in raising the standard of quality of fruit and vegetables produced in the Netherlands and in particular to help to improve the quality of those products by carrying out inspections and supervising compliance with the relevant provisions of law" (Article 3 (1)).

The Bureau makes inspections on behalf of members only. Marks, symbols and certificates necessary for exportation, which only the Bureau has the power to issue, may be issued only to its members (Article 4 (1) and (2)).

It is common ground that the association admits as a member any person who applies to it for that purpose and who is established in the Netherlands and registered in the Netherlands business register (Article 5). It is not therefore a

producers' organization within the meaning of Article 13 of Regulation No 1035/72, entailing the obligation on the associated producers in particular to "apply, with regard to production and marketing, rules which have been adopted by the produces' organization with a view to improving product quality and adapting the volume of supply to market requirements".

Each member undertakes, of course, to observe the quality standards and rules adopted by the association. He must also pay the subscriptions and other fees fixed each year in accordance with the rules.

Any infringement of those provisions is to be the subject of disciplinary proceedings which are governed by rules adopted pursuant to the Netherlands Law on the Quality of Agricultural Produce, 1971, which a disciplinary tribunal has the task of enforcing. A fine may be imposed for any such infringement.

To sum up, the effect, of those provisions is that, in order to be able to export to Member States, Netherlands wholesalers are *required* to become members of the association in order to have issued to them the (compulsory) quality certificates and (optional) inspection mark which the Community regulations prescribe for the movement of products to be authorized. It must in fact be said that those provisions amount to *a prohibition of the carrying on of trade by non-members.*

Discussion

The College van Beroep, to which van Luipen appealed against the decision of the Tuchtgerecht set up by the Tuchtgerechtbesluit Landbouwkwaliteitswet [Disciplinary Tribunal (Law on the Quality of Agricultural Produce) Order], asks the Court whether van Luipen's conviction for infringement of Articles 2 and 3 of the Landbouwkwaliteitsbesiuit Groenten en Fruit [Quality of Agricultural Produce (Fruit and Vegetables) Order] and of Article 2 of the Inspection Rules of the Bureau (national provisions) was, as van Luipen contends, based upon rules which have no binding force because they are contrary to Article 30 *et seq.* of the EEC Treaty.

In support of its application the company cites a passage from the decision of 26 February 1980 in the *Vriend* case [1] in which the Court held that national rules and regulations "which make the freedom of traders to market, re-sell, import and export or offer for export . . . conditional on their being affiliated to a public body or a body approved by an official authority . . ." are incompatible with Community law.

In fact in the *Vriend* case the Court has already had occasion to consider whether an obligation to affiliate to a legal person incorporated under private law charged with carrying out certain public duties is lawful. The Court held that the obligation "does not satisfy the requirement of genuine and effective competition, since, by reason of its general application to products offered for sale by persons who are not

1 — Case 94/79 [1980] ECR 327.

affiliated, it in fact even eliminates from the market those products which are of satisfactory quality".

In the present case the Netherlands Government does not directly contest that ground of that decision. Nevertheless it argues that a different approach to the concept of "freedom of commercial transactions" should be adopted because in this case the products in question, tomatoes, are governed by quality standards adopted at the Community level, which was not the case in *Vriend*. It adds that the Community system of quality control has been duly implemented by the national legislation, [1] the obligation to affiliate being nothing more than a mere formality as the necessary documents are issued automatically and it does not therefore affect the application of the Community rules; quite the reverse, it enables the aim of Regulation No 1305/72 — namely to ensure that quality standards are observed and applied uniformly — to be achieved; the restriction on the freedom of traders in fruit and vegetables to pursue their business does not therefore constitute a measure which is *excessive* or unjustified in relation to the public interest in view.

However, in the *Vriend* case the Court, with reference to Articles 30 and 34 of the Treaty, did not, when finding that the restriction on traders' freely marketing the products concerned might modify patterns of imports and exports and restrict freedom of commercial transactions, make that finding dependent on whether the obligation to affiliate, the breach of which was the ground for that prohibition, was *excessive* or not.

What is more, I should point out that the purpose of the compulsory affiliation is not just to enable observance of the Community standards to be checked. By and large the aim of the Netherlands rules is to ensure that national produce gains a reputation which may enable exports to be increased. It is a condition laid down by the Netherlands legislation to facilitate quality control and to enable the official inspection mark to be affixed, although the Community rules provide for the *optional* affixing only of such a mark.

In this respect the case bears some resemblance to the *Cadsky* case [2] in which the Netherlands Government submitted observations along the same lines as those of the Italian Government whose legislation was then in question. The two governments contended that the purpose of having rules on a compulsory national export mark in addition to the quality standards imposed by Community rules was to give the countries of destination some guarantee as to certain qualities of the product and that they were necessary to eliminate traders of dubious reputation who might give a bad name to traders who conduct their business properly.

However, the obligation to apply for such an official export inspection mark has no particular advantage for exporters because the standards of quality of market-garden produce are governed by an exhaustive set of common rules, in contrast to the *Vriend* case where such standards still did not exist in the sector in question.

The fourth recital in the preamble to Regulation No 1035/72 states in fact:

1 — Tuchtgerechtbesluit Landbouwkwaliteitswet and the Landbouwkwaliteitsbesluit Groenten en Fruit.

2 — Judgment of 26 February 1975 in Case 63/74 [1975] ECR 281.

"... application of these (common) standards should have the effect of keeping products of unsatisfactory quality off the market, guiding production to meet consumers' requirements and facilitating trade relations based on fair competition, thus helping to improve the profitability of production".

As it stands at present Community law does not give a Member State any authority at all to impose an obligation to affiliate on exporters by the indirect means of delegating authority to check compliance with Community law to an association incorporated under private law.

The fact that membership of the Bureau, which is the indispensable condition for obtaining a Community standards certificate and an official inspection stamp, is compulsory goes beyond what is specifically necessary for giving effect to the Community rules. It has an effect equivalent to quantitative restrictions prohibited by the Treaty.

In answer to the question submitted, the Court should in my opinion rule that:

National legislation whereby the acknowledgements of receipt and certificates required for controlling the quality of tomatoes marketed within the Community are issued only to the members of an association incorporated under private law is contrary to Regulation No 1035/72 of the Council, even if the association has been approved by the national authorities as the inspecting authority as provided for in that regulation.