complied with, constitute charges having an effect equivalent to customs duties.

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Delivered in open court in Luxembourg on 25 January 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 23 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

These proceedings are concerned with the interpretation of Article 16 of the EEC Treaty which provides that Member States shall abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage at the latest.

The plaintiff in the main action, a dealer residing in the Netherlands, imported into the Netherlands at the end of 1970 swine from other Member States. Between August 1966 and July 1971 he also exported swine, swine for breeding, bovine animals, bovine animals for breeding and horses from the Netherlands to other Member States. In accordance with the Netherlands' Law on livestock and the implementing rules adopted thereunder which provide that the import and export of particular bovine animals is subject to an inspection by the veterinary authority the goods in question were inspected. The plaintiff had to pay fees for these inspections, the particulars of which had been fixed by the Minister for Agriculture. Since he considered that this was unlawful he sued the Netherlands State for a refund.

As far as imports were concerned the plaintiff regards the fees as charges having equivalent effect and rests this view on the fact that a corresponding prohibition applying to intra-Community trade had direct effect in the Member States as from 1 January 1970. In so far as the fees were charged on his exports the plaintiff takes the view that they are charges having an effect equivalent to customs duties. In this connexion a corresponding prohibition relating to intra-Community trade had direct effect in its entirety as from 1 January 1962.

1 — Translated from the German.

The Netherlands Government has raised a number of objections to these views.

It submits that the inspection of imports is part of a general system of health inspection in the Netherlands and that the fees charged for it are also part of a general system, because they are levied on domestic livestock as well. In this connexion the court making the reference, with regard to the Netherlands Government's argument that the fees at issue could, not be compared with various domestic fees which sometimes vary considerably from place to place, came to the conclusion in a provisional consideration of the case, that they must in fact be charges having equivalent effect.

With reference to the inspection of livestock on the occasion of exportation the Netherlands Government also argues that the exporter derives a benefit from the services provided in this way because he is given a guarantee that he can import the inspected animals into other EEC countries. The fees charged for this, which only cover the costs, are to be regarded as consideration for a service provided by the administration. On this point the court making the reference found that in fact there is in this case no benefit within the meaning of the decision in Case 24/68 (Judgment of 1 July 1969, *Commission of the European Communities* v *Italian Republic* [1969] ECR 193), the Netherlands State having itself conceded that its appraisal lacks certainty and that it is consequently impossible to establish that there is a specific benefit.

The Netherlands State also went on to submit that the method which it adopts is in keeping with a principle of economic policy that the costs incurred in connexion with a product are to be borne by that product and in consequence by the consumer of it. However the court did not accept this for the reason that the costs of the veterinary inspection were incurred in the public interest, namely for the protection of health and life of humans and animals.

Finally the argument that if the costs for the veterinary inspection were met from general public funds they would have to be called concealed aids which are illegal under the Treaty was countered by the court with the view that charging fees to exporters may be discriminatory because as a result the goods are in a less favourable position on the market of the country of destination. Furthermore it has not been shown that exported bovine animals are in a more favourable position in the country of destination after the veterinary inspection.

Finally the court making the reference was faced with the problem that in the case of bovine animals and swine an inspection on exportation is provided for in Council Directive 64/432/EEC (OJ English Special Edition 1963-1964, p. 164) which has already been mentioned in the Simmenthal case. It is true that the court is inclined to regard this factor as irrelevant to its decision. On this point reference was made to the judgment in Case 29/72 *(S.p.A. Marimex* v *Italian Finance Administration,* [1972] ECR 1309) and it was said that the performance of the obligations laid down in the Directive does not necessarily mean that fees have also to be charged for this. The court also referred to the fact that the aim of the directive is the removal of obstacles to trade and that charging a fee, which has to be regarded as an indirect obstacle to trade, is scarcely compatible with this aim. However, since the Court of Justice has not so far expressly ruled on this particular problem, the court making the reference by an interlocutory judgment of 10 May 1976 stayed the proceedings and referred to the Court the following questions:

'Is the phrase "charges having an effect equivalent to customs duties on exports" to be interpreted as including pecuniary charges which are imposed by a Member

State in respect of the veterinary and public health inspection of livestock which is intended to be exported to another Member State in so far as such pecuniary charges suffice to cover, and do not exceed, the actual costs of a veterinary and public health inspection which is carried out by authority of the Government:

(a) (as regards bovine animals and swine): in compliance with obligations imposed on the exporting Member State by the Council of the European Economic Community in its Directive No 64/432/EEC of 26 June 1964; or

(b) (as regards bovine animals and swine:) in compliance with the obligations referred to at (a) above, and in addition to ensure that the bovine animals and swine concerned satisfy the particular conditions laid down for the importation thereof by the importing Member State; or

(c) (as regards animals other than bovine animals or swine:) in order to ensure that the animals concerned satisfy the conditions laid down for the importation thereof by the importing Member State?'

It is to be inferred from the statement of the court making the reference that the disputed fees are payable for a compulsory veterinary inspection carried out in the case of exports before the frontier is crossed. Such fees on the other hand do not apply to goods marketed on the home market. Therefore they are not to be regarded as part of a general system of fees under which products marketed on the home market and goods for export are charged in accordance with the same criteria. Further, the fees are not to be treated as consideration for a service provided by the administration.

If such reasoning is adopted there can be no doubt that according to the relevant case-law of the Court to date — in my opinion this does not require any further substantiation — the disputed fees as such are to be designated as charges having an effect equivalent to customs duties. There remains therefore only the question whether any justification for them can be found in the Treaty. In the view of the court making the reference this question must be answered with due regard to the considerations mentioned in the questions which have been quoted. However I consider, as the Commission does, that it is not right to limit the examination of this question in this way. Having regard to the fact that the court making the reference has only carried out a preliminary appraisal of the points which have just been mentioned and in view of the submissions of the Netherlands Government in the proceedings pending before this Court the examination should on the contrary be widened so as to include even those aspects which the court making the reference has already rejected as irrelevant in its judgment. We should therefore also go into the question whether the disputed fees cannot after all be regarded as consideration for services provided by the administration; furthermore we should consider whether charging such fees is in accordance with a general principle of economic policy and for that reason can be justified and finally we should also look into the question whether the objection can be raised that their elimination might infringe the provisions in the EEC Treaty relating to aid, because in that case the only possible method of financing the fees in from public funds.

1. Permit me to begin my examination of this case by considering the view that the fees in question only cover and do not exceed the actual cost of the inspection.

In this connexion it is sufficient to refer to the relevant judgments in Cases 39/73 *(Rewe Zentralfinanze eGmbH* v *Direktor der Landwirtschaftskammer Westfalen-Lippe,* [1973] ECR 1039) and 87/75 *(Conceria Daniele Bresciani* v *Administrazione Italiana della Finanze,* [1976] ECR 129). These

judgments show quite clearly that the factor just mentioned is completely irrelevant to the designation of the fees, provided all the other criteria for a charge having an effect equivalent to customs duty are present.

2. With reference to the fact that such inspections are provided for in the Council's directive I would like to state from the outset that no justification for charging fees can be found from this source.

It is in the first place interesting to note that Council Directive No 64/432 which applies in this case and which provides for the veterinary inspection in the exporting State of bovine animals and swine to be sent to other Member States, neither stipulates that appropriate fees be charged in intra-Community trade nor permits this. On the other hand this matter is dealt with quite differently by Council Directive No 72/462 (OJ English Special Edition 31. 12. 1972, p. 7) on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat from third countries. Article 12 (8) thereof expressly provides that the exporter, importer or their representative shall be liable for any expenditure incurred pursuant to this Article, including the slaughter or destruction of animals without compensation from the State. It is in fact possible to conclude from this that there was intended to be a difference between the payment of expenses as regards intra-Community trade on the one hand and imports from third countries on the other hand.

The Commission is right to point out in addition that an act of the Council cannot authorize such fees, which in intra-Community trade have an effect equivalent to customs duties, because the Community legislature, too, is bound by the principle of the free movement of goods. If departures from this principle were held to be admissible, then, — as in the case of monetary compensation which was one of the issues in Case 10/73 *(Rewe Zentral AG* v *Hauptzollamt Kehl,* [1973] ECR 1175) — they would only be permitted to the extent to which the situations in question were exceptional and it was necessary to ensure the proper functioning of the Common Market notwithstanding the difficulties which had arisen. However it is in my view quite clear that such an assessment is not appropriate for the purposes of the charging of fees for veterinary inspections before export.

Finally in this connexion the judgment in Case 63/74 *(W. Cadsky S.p.A.* v *Istituto nazionale per il Commercio Estero,* [1975] ECR 281), which was given on a related set of problems, is also of interest. This case was concerned with inspections of exports to secure the maintenance of particular standards of quality and also to ensure that the common rules for marketing are observed. However a fee charged for this was held to be an illegal charge having an effect equivalent to a customs duty. The Court of Justice ruled that it was irrelevant that the fee was payable in connexion with the implementation of measures provided for in Community regulations. This reasoning must also apply by analogy to this case.

3. There is a third aspect, which in the view of the court making the reference might be considered as justifying the charging of fees, namely that the inspections are also carried out with the object of ensuring that the exported goods comply with the conditions laid down by the importing country. In this connexion it is of course a question only of inspections which the importing State itself, notwithstanding the Community rules which were mentioned in the *Simmenthal* case, can still undertake. This applies to animals such as horses which have not so far been covered by the abovementioned Council directives. Furthermore, this is the case in so far as the Community rules expressly permit inspection of imports, and this was

extensively discussed in the *Simmenthal* case. Moreover Article 104 of the Act of Accession must be borne in mind with regard to exports to the nine Member States.

On this point the representative of the Netherlands Government was right to submit that it was obviously in the interest of the facilitation of trade and the avoidance of unreasonable measures, especially of unnecessary transport, to carry out such inspections when the goods are despatched. It would therefore not appear to be untoward not to regard such inspections as measures having an effect equivalent to quantiative restrictions within the meaning of Article 34 of the EEC Treaty or to consider them as being justified under Article 36. On the contrary a wide interpretation of Article 36 which is not merely limited to measures adopted for the protection of its own population by the Member State concerned, can be held to be justifiable, not at least because what we are in principle concerned with is nothing less than the shifting of lawful obstacles to trade from the importing to the exporting State. However in the final analysis the question of the legality of such inspections in the exporting State in the light of Articles 34 and 36 can remain open, because it must be acknowledged that the Commission's argument that no justification for the charging of *fees* is to be found in this way is in any case correct.

It can indeed be said that, if it is not permissible to charge fees for inspections which are undertaken in pursuance of Community law, then this must be all the more the case as regards inspections undertaken pursuant to purely national provision. Furthermore it is necessary to bear in mind the judgment in Case 29/72 – *Marimex* – which makes it clear that charging fees at the frontier is not lawful even if health inspections, the costs whereof are intended to be covered by the fees, are permitted under Article 36 of the Treaty. As in the case of imports this, however, would obviously also apply to exports and the inspections carried out in connexion therewith, because otherwise the effects of the *Marimex* judgment could simply be avoided by switching the inspections to the exporting State.

4. If it therefore appears that none of the circumstances mentioned in the judgment making the reference can justify the charging of fees, it is now necesarry, as I have stated, to consider the question whether the additional considerations discussed in the main action, to which the Netherlands Government reverted again in these proceedings, lead to another conclusion.

(a) In this connexion the notion that the fees are merely consideration for a service provided by the administration must in the first place be examined. The Netherlands Government submits on this point that the State can be said to provide an effective service for individuals, if it helps exporters to overcome obstacles which exist under Community law or which are lawfully retained by other Member States in the field of health inspection. In this way the value of the product to be exported increases; a very definite advantage accrues, the quantification of which certainly requires a knowledge of market conditions and also of the terms of the Treaty, because the loss of profit which could be said to be the consequence of a failure to undertake the export, depends upon this.

In my view this reasoning is not valid. In the first place it appears doubtful whether the quantification of the alleged benefit, which is not at any given time the same for each exporter, gives rise to difficulties. I call your attention on this point to the findings in Case 24/68 *(Commission of European Communities* v *Italian Republic,* [1969] ECR 193) to the effect that a fee cannot be regarded as payment for specific services provided by the administration if the benefit in question is of a general application and

more importantly is difficult to assess. It has moreover been correctly pointed out that in fact the measures were adopted for the control of epidemics; however this is undertaken in the public interest. On this point reference may be made to the judgment in Case 87/75 which contains this finding. Accordingly the argument that veterinary and public health inspections are services provided for importers was rejected and the Court consequently held that it was proper for the costs thereby incurred to be borne by the general public. Finally the judgment in Case 63/74 may be of interest. It was emphasized in that case that inspections of exports do not represent services provided for the exporter. Since the individual interest of exporters is so difficult to assess it must rather be assumed that such measures for the promotion of exports are adopted in the public interest.

(b) In the view of the Netherlands Government these must then be considered as justification for the charging of the fees the general economic principle that the costs incurred for the benefit of a product must be borne by that product and therefore by the consumer. On this point, that is to say, on the problem of 'social expenditure', 'negative external effects' and 'internalization of external costs' we heard during the oral procedure long and impressive arguments incorporating a series of quotations from writings on economics which were not always easy to understand. Moreover an attempt was made show in what fields this principle is actually applied, for example the recognition, in the field of the protection of the environment, of the principle that the polluter pays — there is even a Council recommendation on this which was issued in 1975 — or when the infrastructure costs in the field of transport are passed on to the users.

In this case it is doubtful whether it is right and proper that the costs of measures for the prevention of rinderpest, which are therefore in the interests of the livestock owner, should be borne by the very trade in which such dangers originate and consequently in the end on the consumer, although he does not benefit directly. Next it is also important to bear in mind — as the Commission has stressed — that, if it is at all possible to talk about a *general* principle of this kind it is at most a politico-economic principle, whereas there is no evidence that it also exists as a legal principle. The examples given by the Netherlands Government, some of which relate to different facts, do not lend themselves to such proof and there are not enough of them. As against this there is evidence to be derived from Community law which militates against the validity of the principle in this field. In this connexion the most relevant judgments are those dealing with the question when fees can be regarded as consideration for individual services. According to them the issue is whether an actual and quantifiable *benefit accrues to the product* and in this connexion measures such as the protection of public health which are adopted in the public interest are excluded. Reference may also be made, as the applicant has done, to the *Marimex* judgment, and it may be inferred from the fact that in this judgment it was held that inspections but not fees for inspections were lawful that the principle mentioned by the Netherlands Government that the product bears the costs of the inspection does not apply in this field. Finally it also seems to me that there is force in the Commission's observation that, even if the said principle is acknowledged to be valid, when the question of assessing the influence it exerts in the field of tension existing between it and the principle of the free movement of goods arises, the answer can scarcely be that the last mentioned principle, the importance of which has been repeatedly emphasized in the case-law of the Court, must give way.

(c) Therefore it only remains to consider what view is to be taken of the

argument that the prohibition on the charging of fees means that the cost of the health inspection on the occasion of exportation must be met out of public funds. This assumption by the State of marketing costs is said to be nothing less than a concealed aid to exports which might lead to distortions of competition and therefore incompatible with Article 92 of the Treaty.

The Commission's objection — which I find convincing — on this point to the effect that the line of reasoning of the Netherlands Government does not meet the requirements of a coherent interpretation of the Treaty. In fact it is impossible to accept that, in the case of the costs of an operation permitted under the Treaty, Article 16, on the one hand, contains a prohibition against charging them to the exporter, whereas Article 92, on the other hand, forbids them to be financed out of public funds. The elimination of a charge which infringes Community law cannot therefore be prohibited under Article 92. Also of interest is the plaintiff's argument that financing these inspections out of public funds does not lead to distortion of competition within the meaning of Article 92, because similar fees are not payable in the purely internal trade of the Member States. Following on from this the court making the reference also considered that it was not proved that the elimination of the charge would be discriminatory, but took the opposite view that levying the charge might lead to discrimination on the market of the importing country. For the rest, so far as this last question is concerned, it must be pointed out, as the Commission has done, that proceedings in which a preliminary ruling is sought are not adapted to such inquiries, that is to say, to findings by the Court that competition has been distorted. If there could in fact be said to be distortion, then, if in an importing country the inspected product bears the costs of such inspection, this could not in any case be challenged on the ground that it is an exception to the prohibition contained in Article 16 but only in the context of the endeavours made to harmonize laws. It is possible that these endeavours might induce the importing countries concerned to finance the inspections out of public funds, but it is also possible to conceive of Community measures of harmonization on the subject of covering the costs.

5. All told therefore one is left with the conclusion that fees for export inspections of the kind applicable to this case are incompatible with Article 16 of the EEC Treaty. The court making the reference must draw its conclusions from this and indeed bear in mind that the elimination of charges which are illegal under Article 16 had to be effected at the end of the first stage of the transitional period at the latest, and that a corresponding directly applicable prohibition entered into force as from 1 January 1962.

6. Consequently I submit that the question referred by the Arrondissementsrechtbank, The Hague, should be answered as follows:

A pecuniary charge imposed unilaterally on goods exported to other Member States on the crossing of the frontier is a charge having an effect equivalent to a customs duty. This also applies if such charges are payable in respect of compulsory veterinary inspections of exports which are compatible with Community law or are prescribed by Community law.