OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 5 JULY 1983 [1]

Mr President,
Members of the Court,

1. This dispute concerns the compatibility with Community law of the Danish internal rules relating to health inspections of groundnut products imported from other Member States. The Court is asked to decide whether such rules, which render the importation of the aforementioned products subject to a systematic health inspection and require the importers to bear the cost of it, are compatible with Articles 9 and 13 of the Treaty which prohibit customs duties and any charge having an equivalent effect.

I will summarize the facts. Order No 7 of the Danish Ministry of the Interior of 7 January 1971 prohibits the sale of groundnuts and groundnut products in Denmark when they contain appreciable quantities of aflatoxin (Article 1), a toxic substance produced by certain fungi in particular conditions of temperature and humidity. To give effect to the prohibition the Danish Order provides that the above-mentioned products, originating from non-member countries or — and this is the relevant point — from other Member States, must be examined in a private laboratory designated by the director of the *Statens Levnedsmiddelinstitut* [State Foodstuffs Institute] (Article 5 (1)). It then requires the importer to pay the laboratory which carries out the analysis and the sampling (Article 5 (3)). The amount of the payment is not fixed by the State but by the laboratory itself and is paid directly to it.

By letter of 28 February 1980, the Commission initiated against the Danish Government the procedure provided for by Article 169 of the EEC Treaty, claiming that the obligation to pay for health inspections of groundnuts and groundnut products imported from other Member States constituted a charge having an effect equivalent to a customs duty and was therefore prohibited by Article 9 *et seq.* It therefore invited the Danish Government to submit its observations relating to that complaint within two months. The Danish Government gave its reply in a letter of 8 July 1980 from its Permanent Representative to the European Communities. The duty to pay for health inspections — it stated — constituted "internal taxation" within the meaning of Article 95, being a charge systematically applied to *all* products falling within the same category. For obvious reasons of climate, it added, groundnuts were not produced in Denmark. That did not alter the issue, however, for in the absence of corresponding national products even a charge imposed only upon imported products must, in the light of the judgments of the Court, be regarded as a non-discriminatory internal tax and, as such, in compliance with the rules of the Treaty.

1 — Translated from the Italian.

Unmoved by those arguments, the Commission issued the requisite reasoned opinion (on 3 September 1981) confirming the views which it had originally expressed. The Danish Representative reiterated his Government's argument in turn (on 8 December 1981); and thereupon the Commission brought an action (on 26 May 1982) for a declaration that by levying a charge for health inspection on the importation from other Member States of groundnuts and groundnut products the Kingdom of Denmark had failed to comply with its obligations under Articles 9 and 13 of the Treaty.

2. The problem before the Court is, in essence, to establish whether an internal rule which makes importers bear the expenses involved in the inspection of goods coming from other Member States is lawful under Community law. I should point out at this juncture that the issue is not the lawfulness of the Danish system of health inspections but, I repeat, solely the lawfulness of the burden placed upon importers.

As I have said, Denmark maintains that, far from constituting a charge having an effect equivalent to a customs duty, the charge represents an internal tax: it is not, therefore, Articles 9 and 13 which are applicable to it but Article 95. It puts forward various arguments in support of that proposition.

First of all, it denies that the obligation to pay the laboratories in which the inspections are carried out constitutes a charge in the true sense: in reality, states the Danish defence, it is merely payment of the costs relating to the inspection procedures. That proposition is utterly groundless. I would point out that according to the judgments of this Court a charge having an effect equivalent to a customs duty, for the purposes of Articles 9 and 13 of the Treaty, means "any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier" (judgment of 25 January 1977 in Case 46/76, *Bauhuis* v *Netherlands* [1977] ECR 5, at paragraph 10 of the decision; see also, *inter alia*, the judgments of 14 December 1962 in Joined Cases 2 and 3/62, *Commission* v *Luxembourg and Belgium* [1962] ECR 425 and 3 February 1981 in Case 90/79 *Commission* v *France* [1981] ECR 283).

If, therefore, the designation and mode of application of the charge are irrelevant, the fact that, as in the present case, the sums paid by the importer are charged by private bodies which do not transfer them to the public administration is also irrelevant. What is relevant, on the other hand, is another factor which the Court has often emphasized: namely the obstructive effect, albeit minimal, which the charge has on intra-Community trade. It cannot seriously be doubted that the payment required of importers for inspection procedures has such an effect. It clearly affects the price of imported goods and therefore its effects on trade patterns are analogous to those of a customs duty.

Similarly, the defendant government describes the payment for laboratory inspection as the consideration for a service. According to the judgments of the Court pecuniary charges of that nature cannot be called charges equivalent to customs duties (see the judgments of 1 July 1969 in Case 24/68

Commission v *Italy* [1969] ECR 193, particularly paragraph 11 of the decision; 11 October 1973 in Case 39/73 *REWE-Zentralfinanz* v *Landwirtschaftskammer Westfalen-Lippe* [1973] ECR 1039, particularly paragraph 4 of the decision; 5 February 1976 in Case 87/75 *Bresciani* v *Amministrazione Italiana delle Finanze* [1976] ECR 129; 25 January 1977 in the *Bauhuis* case, cited above, at paragraphs 7 to 11 of the decision; and 12 July 1977 in Case 89/76 *Commission* v *Netherlands* [1977] ECR 1355). Those judgments, however, may not be relied upon in the present case because the Danish inspection of groundnuts serves a general interest of the State, namely health protection. It is not therefore possible to regard it as a service rendered individually to the trader whose goods undergo the inspection and therefore such as to justify claiming recompense from him.

3. The Danish Government's defence then emphasizes that the internal provisions on health inspection of groundnuts are applicable to imported and national products alike. Since Denmark does not produce groundnuts, the vaunted equality of treatment is in fact of form alone; moreover, it may be observed that the Court has held that it is not essential for a charge having an effect equivalent to a customs duty to be discriminatory for the prohibition in Article 9 to apply. In support of that interpretation (see the judgment of 1 July 1969 in Case 24/68, *Commission* v *Italy*, cited above, in particular at paragraph 9 of the decision, and the judgment of the same date in Joined Cases 2 and 3/69, *Diamantarbeiders* v *Brachfeld and Chougol* [1969] ECR 211, in particular paragraphs 17, 18, 24 and 25 of the decision) the fact that the prohibition in question is applied objectively, that is to say, irrespective of the existence or otherwise of competing products in the importing country, is in fact decisive.

The truth is that in order to avoid that prohibition and to fall within the scope of Article 95, the charge must be part of a "general system of internal dues applied systematically to categories of products in accordance with objective criteria" regardless of the origin of the products (see, *inter alia*, the judgment of 28 January 1981 in Case 32/80 *Officier van Justitie* v *Kortmann* [1981] ECR 251, at paragraph 16 of the decision). That seems to me to be the nub of the dispute. Does the Danish charge form part of a general system of internal dues? Let us first ask ourselves what is meant by that expression.

Many judgments of the Court give useful guidance on that point. I shall refer in the first place to the judgment of 3 February 1981 in Case 90/79, *Commission* v *France*, cited above, upon which the Danish defence relied heavily, maintaining that it could draw serious arguments from it in support of its own proposition. The question was whether a charge on imported products (in that case, reprographic machines) constituted not a charge having an effect equivalent to a customs duty but internal taxation within the meaning of Article 95. The Court investigated the whole body of legislation in France within the framework of which the measures relating to reprographic machines were applied and, in particular, all the internal rules designed to prevent the reprographic process from depriving authors and editors of the benefits guaranteed them by national laws on copyright.

It seems to me obvious, therefore, that when it speaks of a "regime" or "general system", the Court is contemplating a broad spectrum of rules within the context of which the charge is squarely situated. Other judgments give similar guidance. I refer to the judgment of 22 March 1977 in Case 78/76, *Steinike und Weinlig* v *Germany* ([1977] ECR 595). In that case the Court was asked to rule upon the nature of a contribution imposed on a broad category of products, for instance fruit and vegetable products; the Court stated that there may be said to be a "general system" where the internal taxation applies to "whole classes of domestic or foreign products which are all in the same position no matter what their origin" (paragraph 30 of the decision).

Nor does it seem to me possible to rely to the contrary, as the Danish defence does, on the two judgments of 4 April 1968 in Cases 27/67 *Fink-Frucht* v *Hauptzollamt München* ([1968] ECR 223) and 31/67 *Stier* v *Hauptzollamt Hamburg-Ericus* ([1968] ECR 235). In each of those cases the disputed charge was levied as turnover tax, which is by definition a general tax. That seems to me to have been the decisive factor in the circumstances dealt with in those decisions. By contrast the fact that, in the absence of a corresponding national product, the duty concerned in those cases affected only imported products (vegetables or fruit which did not grow in the Federal Republic) is irrelevant to our case.

4. Let us now see whether the pecuniary charge referred to in the Danish provisions fulfils those requirements: that is to say, whether those provisions cover a whole sector of produce, and whether the area of application of the charge is sufficiently wide.

Order No 7 of 7 January 1971, which gave rise to the present dispute, was adopted pursuant to Law No 310 of 6 June 1973 concerning foodstuffs *(inter alia)*. The Order gave local authorities the task of supervising and inspecting those products at various stages of production, distribution and marketing, the relevant costs being discharged by the community by means of local taxes. A different system is provided for, however, for some products. Article 41 provides that "the minister responsible for measures to combat pollution may make rules or adopt provisions on the basis of which certain categories of foodstuffs or of additives may be subject to a special inspection, the relevant costs being borne by the undertaking concerned". The commentary on the Law states that the system was adopted in the expectation that undertakings would transfer those costs to the consumers by including them in the selling price.

Many orders relating to inspections for additives and on certain foodstuffs were issued on the basis of Article 41. But the group relating to foodstuffs consisted of only two measures:

(a) Order No 555 of 29 November 1974, which prohibits the importation of Brazil nuts, and

(b) Order No 7 of 7 January 1971, which imposed a similar prohibition on groundnuts and is the subject-matter of this action.

Both of those prohibitions were justified by the high health risk involved in the presence of aflatoxin in the relevant products and neither of the two is absolute. As we know, the importation of Brazil nuts and of groundnuts is permitted provided that it is authorized by the director of the Statens Levneds-middelinstitut following health inspections the charge for which is borne by the traders.

In my opinion however, a charge such as the one in question has too limited a field of application for it to fall within the concept of "a general system of taxation". The defendant government maintains that there is a system, whose unifying feature is the special degree of risk presented by the products to which the duty applies. I do not agree. The presence of aflatoxin is certainly the fact which explains the identical treatment accorded to groundnuts and Brazil nuts; but it remains the case that such products constitute a group which is too narrow, even if it can be described as a "group" at all, to form a "category" so as to justify an internal system of taxation applicable to it alone. In the present case, therefore, "system" and "category" are entirely inappropriate terms: what we have is simply a pair of special provisions and, as such, they are not covered by Article 95.

5. Finally, and in the alternative, the Danish Government relies upon the argument of good faith. If, it maintains, a Member State imposes a pecuniary charge upon the importers of certain products and does so in good faith, that is without the intention of obstructing Community trade, it is not fair to consider that it is guilty of having infringed Article 9 of the Treaty. In the present case, the defendant government adds, the fact that, in the final analysis, the charge is intended to serve the protection of health demonstrates good faith. It must therefore be assumed that if equivalent national products existed they would be subject to the same charge.

However, that argument is far from being persuasive. As the representative of the Commission has observed, to admit good faith as an exemption would be to introduce a purely subjective criterion. The judgments of the Court tend to the opposite view. The Court has repeatedly stated that the general system of internal taxation, to which the charge imposed upon traders must belong if it is to be considered to be lawful, must be determined by means of objective criteria. In addition, and in my view this point is crucial, the prohibition in Article 9 applies whenever the charge objectively obstructs Community trade. In those circumstances, therefore, to permit the influence of subjective factors would seriously weaken the fundamental principle of the free circulation of goods.

6. For the reasons set out above, I suggest that the Court decide the action brought by the Commission against the Kingdom of Denmark and lodged at the Court Registry on 26 May 1982 as follows:

By retaining the requirement that importers of groundnuts and groundnut products coming from other Member States must pay the costs arising from health inspections to which those products are subject and making authorization to import the aforementioned products subject to those inspections, the Kingdom of Denmark has failed to fulfil its obligations under Articles 9 and 13 of the EEC Treaty.

As for costs, it seems to me fair to divide them between the parties, having regard to the nicety and, at least in some respects, the novelty of the questions dealt with.