OPINION OF ADVOCATE GENERAL MISCHO

delivered on 10 May 2001 [1]

1. Although the pig industry is a jewel in the crown of Danish agriculture, both through the quality of its products and through the share that it has earned in export markets, one aspect of the rules governing that industry has been the subject of criticism by Mr Nygård, a pig producer. Previously he had his own slaughterhouse in Denmark and sent his output there but, beginning in 1993, he boldly shifted his activity to the export of live animals to Germany and the Netherlands, markets on which he now sells around 25 000 pigs a year.

2. Mr Nygård complains that in Denmark his exports are subjected to a levy collected for the benefit of the Svineafgiftsfond (Pig Levy Fund, hereinafter 'the Fund'), a body which is an integral part of the public administration but is managed by Danske Slagterier, an organisation of cooperative slaughterhouses. The origin of the Fund is to be found in the Lov om administration af Det Europæiske Økonomiske Fællesskabs forordninger om markedsordninger for landbrugsvarer (Danish Law on the Administration of European Economic Community Regulations on the Organisation of the Markets in Agricultural and other Products), No 414 of 13 June 1990.

3. Paragraph 6(1) of the Law provides that the Minister for Agriculture may:

'lay down rules relating to the payment of levies on agricultural products produced in Denmark, to the payment of those levies on equivalent agricultural products imported into Denmark and to the extent to which such levies are to be refunded in respect of agricultural products used in the manufacture of industrial products. The levies shall be paid into a fund for each of the sectors within which they are charged'.

Paragraph 6(3) provides that:

'The Minister for Agriculture shall lay down the detailed rules for payment of the public resources specified in subparagraphs 1 and 2'.

1 — Original language: French.

4. Paragraph 7(1) of Law No 414 of 13 June 1990 provides that:

'Fund revenue shall be used to finance measures for sales promotion, research and trials, product development, provision of advice, training, preventive sanitary measures, disease eradication and control, together with all other measures authorised by the Minister for Agriculture. The revenue shall also be applied to cover expenditure for inspecting the use thereof. The resources referred to in Paragraph 6(1) must be allocated to the sectors in which they were levied.'

5. Pursuant to Law No 414 of 13 June 1990, the Minister for Agriculture adopted Decree No 74 of 30 January 1992, under which Mr Nygård's exports were made subject to the levy. That decree provides in particular as follows:

'Paragraph 1

1. A production levy shall be charged for every pig — including sows, boars, store pigs and piglets — bred and slaughtered in Denmark and declared fit for human consumption following inspections carried out by the public authorities. The levy is also payable in respect of pigs slaughtered for private consumption.

2. The amount of the levy shall be DKK 7.00 for each pig having a carcass weight below or equal to 100 kg and DKK 17.50 for each pig having a carcass weight greater than 100 kg.

...

Paragraph 2

1. For pigs slaughtered in abattoirs for export, it is for the abattoir concerned to charge the levy referred to in Paragraph 1 to the supplier and to notify the Svineafgiftsfond each week... of the number of pigs slaughtered and declared fit for consumption, in each of the two weight categories, during the previous week, and to pay to the Fund the levies due in that regard.

2. In the case of pigs slaughtered in private abattoirs, it is for the abattoir concerned to pay the levy referred to in Paragraph 1 to the Svineafgiftsfond... no later than two weeks after slaughter. The payment card is issued by the veterinary inspector, who

must notify the Svineafgiftsfond, immediately after the inspection certificate has been issued, of the number of pigs slaughtered in each weight category.

Paragraph 3

1. For every pig — including sows, boars, store pigs and piglets — bred in Denmark and exported live, the exporter shall pay a levy amounting to DKK 7.00 for each pig having a live weight below or equal to 120 kg and DKK 17.50 for each pig having a live weight greater than 120 kg.

2. The exporter shall, no later than two weeks after exportation, notify the Svineafgiftsfond... of the exports, by stating the number of live pigs in each weight category, and pay to the Svineafgiftsfond the levies due in that regard.'

6. Being a State aid, the whole of this levy scheme to raise funds to improve the products of the Danish pig industry was notified to the Commission under Article 93 of the EC Treaty (now Article 88 EC) and was authorised by the latter.

7. Mr Nygård refused to pay the amount demanded of him for the period from 1 August 1992 to 1 July 1993 under the levy introduced by Paragraph 3(1) of Decree No 74 of 30 January 1992 and proceedings were accordingly brought against him before the Ret i Skjern (District Court, Skjern, Denmark) which rejected his arguments that collection of the levy infringed Community law and ordered him to pay DKK 101 776.37, plus interest.

8. Mr Nygård submitted the same arguments on his appeal to the Vestre Landsret (Western Regional Court) (Denmark). Essentially, he argues in the first instance that the levy demanded from him should be classified as a charge having equivalent effect to a duty on exports, which is prohibited by Article 9 of the EC Treaty (now, after amendment, Article 23 EC) and the subsequent articles, and, in the alternative, that, if it is not a charge having equivalent effect, the levy constitutes discriminatory internal taxation prohibited by Article 95 of the EC Treaty (now, after amendment, Article 90 EC), which, the case-law of the Court has established, applies to imported products as well as to those which are exported. [2]

9. He also takes the view that the fact that the disputed levy is part of a system of aid

2 — Judgments in Case 51/74 *Van der Hulst* [1975] ECR 79, paragraphs 34 and 35, in Case 46/76 *Bauhuis* [1977] ECR 5, paragraph 25, and in Case 142/77 *Larsen and Kjerulff* [1978] ECR 1543, paragraphs 20 to 27.

authorised by the Commission cannot have the effect of rendering its collection lawful.

10. The Vestre Landsret decided to accede to Mr Nygård's request, to which the Fund objected, that reference be made to the Court for a preliminary ruling, not because it entertains doubts as to the classification of this levy under Community law — on the contrary, it takes the view that the case-law of the Court provides all of the criteria necessary to make that classification for itself — but because the Court has not yet had to rule on the question whether a national court may set aside wholly or in part, as being contrary to Community law, a levy that forms part of a system of aid authorised by a decision of the Commission, which the Court alone may hold to be unlawful.

11. The questions which the Vestre Landsret puts are as follows:

'1. Must Article 9 of the EC Treaty (now, after amendment, Article 23 EC), Article 12 of the EC Treaty (now, after amendment, Article 25 EC) and Article 16 of the EC Treaty (repealed by the Treaty of Amsterdam) *or* Article 95 of the EC Treaty (now, after amendment, Article 90 EC) be construed as meaning that those provisions, or that provision, preclude a public body in a Member State from charging a production levy in respect of pigs bred in the Member State in question and exported live to another Member State, in the case where:

— a similar levy is charged for each pig produced in the Member State in question and sold for slaughter on the domestic market;

— the detailed rules for calculating the levy do not give rise to discrimination between the two product groups, since, when the different "weight categories" are being determined for slaughtered and live pigs, it can be assumed that compensation is provided for the average difference between "carcass weight" and "live weight", but

— the levy in respect of pigs sold for slaughter on the domestic market becomes payable when they are delivered for slaughter, whereas the levy in respect of pigs exported live becomes payable at the time of export;

— in the first case, the levy is payable by the producer, whereas in the second case it is payable by the exporter, irrespective of whether he is also the producer, and;

— the levy is not charged in respect of pigs sold live on the domestic market, and;

— part of the revenue generated by the levy is allocated to activities which, in view of their nature and immediate objectives, concern primary production of pigs in the Member State, and thus also benefit exported pigs, whereas another part of the revenue generated by the levy is allocated to activities which, in view of their nature and immediate objectives, concern only slaughtering and further processing in the Member State and the sale on the domestic and export markets of nationally processed derivatives of the primary product, and thus do not benefit exported pigs?

2. If Question 1 is answered in the affirmative: does it make any difference to the answer that the levy scheme was, pursuant to Article 93(3) of the EC Treaty (now Article 88(3) EC), notified to and approved by the EU Commission as being lawful State aid?'

12. These questions in fact show, in the details which they give regarding the levy scheme concerned, that the national court is fully acquainted with the method of analysis used by the Court for identifying the nature of a national charge for the purposes of either Article 9 et seq. or Article 95 of the EC Treaty.

13. In fact, the national court provides a wide range of particulars relating to the scope of the levy, to the manner in which it is calculated and collected, to the use made of it by the recipient body, and to the benefits which individuals paying it may derive from its use, which are in fact those which the case-law of the Court has acknowledged as relevant when classifying a national charge in the light of the prohibitions set out in the Treaty.

14. On these points, the parties to the main proceedings and the Danish Government have thought it useful to provide the Court with a number of explanations, particulars and even corrections, the accuracy of which I have no intention of challenging but which I do not feel should be conclusive in the reasoning of the Court, which must be concerned with principles.

15. Thus, since the national court has taken the trouble to establish carefully the characteristics of the levy regarding which it seeks to determine whether it is permissible

under Community law, the division of powers between this Court and the national courts as laid down in Article 177 of the EC Treaty (now Article 234 EC) requires this Court to draft its response in the light of the matters which the national court considers to have been established. [3]

16. If the parties to the main proceedings are minded to challenge the analysis of the national court, they are indeed free to do so, using the national avenues of appeal open to them, but this Court is not the proper place to pursue such a challenge.

17. That point having been made, I can now move directly to examine the first question, stating first of all that I shall very largely be guided by the Commission's observations, which I consider of great value, since — among the abundance of case-law relating to charges having equivalent effect and to internal taxation — they highlight the judgments given in those cases in which the specific circumstances lend themselves to a comparison with the Danish levy scheme submitted for examination here.

3 — See, in particular, Case 104/77 *Öhlschlager* [1978] ECR 791, paragraph 14, and Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 40.

The first question

18. The Court has consistently held that, for the purpose of applying the Treaty, a tax cannot at the same time fall within the category of charges having equivalent effect and within that of internal taxation. [4]

19. In intra-Community trade, the prohibition on charges having equivalent effect, whether on imports or exports, is absolute in the sense that, where a charge is of this type, its collection is quite simply prohibited, whereas, for internal taxation, the prohibition on collection relates only to that part of the tax which is discriminatory or protective; I shall therefore begin by examining whether the present case involves a charge having equivalent effect upon exports.

20. Firstly, it must be borne in mind that the Court has consistently held that:

'any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of

4 — See, for example, Joined Cases 2/69 and 3/69 *Brachfeld and Chougol* [1969] ECR 211, paragraphs 18 to 20, and Case 94/74 *IGAV* [1975] ECR 699, paragraph 13.

the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product'. [5]

21. Because this definition of a charge having equivalent effect attaches fundamental importance to the fact that it is levied at the time when the goods in question cross a frontier, it requires some clarification, if the time at which it is levied is not to become more important than the event giving rise to the charge, with the result that the scope of Article 95 of the Treaty is dramatically reduced.

22. That is why the judgment in Case 24/68 states:

'it follows from Article 95 et seq. that the concept of a charge having equivalent effect does not include taxation which is imposed in the same way within a State on similar or comparable domestic products, or at least falls, in the absence of such products, within the framework of general internal taxation, or which is intended to compensate for such internal taxation within the limits laid down by the Treaty'. [6]

The judgment in Case 132/78 [7] set out the conditions under which a charge may be subject, not to Article 9 et seq. of the Treaty, but to Article 95 thereof. This judgment states: 'in order to relate to a general system of internal dues, the charge to which an imported product is subject must impose the same duty on national products and identical imported products at the same marketing stage and... the chargeable event giving rise to the duty must also be identical in the case of both products'. [8]

23. If we now examine the disputed levy exclusively in the light of the criteria upheld by those judgments, we have to note that its nature is not immediately evident. Indeed, although it appears that the levy charged at the time of export has its counterpart in that charged on pigs delivered for slaughter on the Danish market, and we might thus consider that there is in Denmark a general system of internal taxes levied on the products of pig rearing, it is not evident that this system applies in identical manner to exported products and to products intended for national consumption or for further processing within Denmark.

5 — Case 24/68 *Commission* v *Italy* [1969] ECR 193, paragraph 9.

6 — See paragraph 11.

7 — Case 132/78 *Denkavit Loire* [1979] ECR 1923.

8 — See paragraph 8.

24. Pigs delivered for slaughter in Denmark are subject to the levy only if, when slaughtered and presented as carcasses, they are passed as fit for human consumption, whereas exported pigs are subject to the levy systematically, whether or not they are for slaughter and, if they are, without regard for the criterion of being declared fit for human consumption.

25. Pig sales between Danish operators are subject to the levy only if the purchaser intends to slaughter the pigs bought, whereas, if a sale takes place at the time of export, the levy is charged regardless of whether the purchaser intends to use the pigs exported for purposes of slaughter, fattening or breeding.

26. Furthermore, in the case of a sale for slaughter in Denmark, the levy is payable by the producer, whereas, for exports, it falls upon the exporter, whether he is also the producer or not.

27. Are these differences that Mr Nygård uses as arguments sufficient for us to be able to form the view that the charges on exported pigs only appear to be part of a general system of internal taxation and that this case therefore involves a charge having equivalent effect?

28. The case-law of the Court gives an unambiguous answer to this difficult question: in its judgment in Joined Cases 36/80 and 71/80, [9] the Court held that a national charge on livestock when delivered for export is not subject to the prohibition of charges having equivalent effect to customs duties on exports if it is applied systematically and in accordance with the same criteria to non-exported products at the time of their delivery for slaughter.

29. To reach this conclusion, the Court took the view that, regardless of appearances (charge levied at the time of slaughter or charge levied at the time of export), the chargeable event for the levy had to be regarded as the same in both cases inasmuch as the charge arose when the animals were withdrawn from the national herd.

30. The same approach — giving preference to the economic facts over appearances when deciding whether a charge is levied at the same marketing stage, first, on products prepared or for consumption in the national territory and, second, on products imported or exported — is found in other judgments of the Court which have

9 — *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 23.

conclusively upheld the approach being advocated here. [10]

31. If the view is taken on this basis that the Danish levy is payable on all pigs at the same marketing stage, the other points made by Mr Nygård do not justify rejecting the classification as internal taxation.

32. The Danish rules do avoid discrimination as regards the amount of the charge, which depends on the weight category into which an animal falls, by means of an offset, for animals exported live, of the inevitable difference between a live animal and a carcass.

33. While Mr Nygård maintains that he none the less suffers discrimination in so far as he exports many animals of low weight which will be fattened after export, whereas, in most cases, animals slaughtered in Denmark come within a much higher weight range, this difference in treatment results from his own economic decisions and not from any deliberately discriminatory structure of the Danish regulations, which cannot, in my view, be required to multiply *ad infinitum* the categories to be distinguished for charging purposes in order to create perfect equality in the burden of the levy regardless of the commercial policies pursued by those paying the levies.

34. Likewise, while it is indeed unfortunate for Mr Nygård that the pigs which he exports are subsequently — when slaughtered in the importing Member State — liable to a charge of the same type, the case-law clearly and very logically precludes any account being taken of such a charge for the purpose of determining the nature of the charge to which he is liable in Denmark. [11]

35. The same economic approach adopted in the case-law leads to the inference that it is in fact always the producer who will bear the weight of the charge since, whichever trader is legally liable, the selling price of an animal withdrawn from the national herd or — to take an expression used by the parties to the main proceedings — removed from primary production will obviously take account of the charges levied when it is so withdrawn.

36. Before classification as a charge having equivalent effect is rejected, however, a final test remains to be applied. The Court

10 — Joined Cases C-149/91 and C-150/91 *Sanders Adour and Guyomarc'h Orthez Nutrition Animale* [1992] ECR I-3899, paragraph 22, and Case C-213/96 *Outokumpu* [1998] ECR I-1777, paragraph 25.

11 — See *Van der Hulst*, paragraphs 34 and 35, *Bauhuis*, paragraph 25, and *Larsen and Kjerulff*, paragraphs 20 to 27, all cited above.

has consistently held that, even if a charge appears to have all the characteristics of internal taxation, it must count as a charge having equivalent effect if the burden which it places on national production is entirely offset but products imported or exported receive no such compensation.

37. According to the judgment in Case C-266/91, [12] the criterion of the offsetting of the burden is to be construed as requiring financial equivalence, to be verified over a reference period, between the total amount of the charge imposed on domestic products and the advantages exclusively benefiting those products.

38. From the particulars supplied by the Vestre Landsret, it appears that the activities of the Fund financed by the disputed levy are of benefit, in part, to primary production, and thus to pigs exported live; there is nothing therefore to prevent conclusive rejection of classification as an export charge having equivalent effect.

39. However, although we must accept that the levy submitted for examination does count as internal taxation, this does not mean that its collection is exempt from criticism in the light of Community law, because Article 95 of the Treaty is concerned with internal taxation in order to prevent it discriminating against products that are imported or, under the Court interpretation which I referred to earlier, exported.

40. Discrimination may arise at a number of levels. It may be obvious, if the rate of charge is higher on imported or exported products than on national products or those intended for the national market, and it may be less obvious if it lies in the offset enjoyed by those paying the charge. But, whatever form it takes, it is prohibited.

41. As regards the Danish levy in respect of which the Vestre Landsret has made its reference, discrimination might be revealed at the level of the offset.

42. From the information provided in the order for reference, the Fund supported by the levy uses 40% of its budget for activities benefiting primary production, that is to say, all pigs produced within Denmark, and 60% of the budget for activities relating to slaughter, to process-

12 — Case C-266/91 *CELBI* [1993] ECR I-4337, paragraph 19.

ing of the carcasses produced by Danish slaughterhouses and to the promotion of sales, on both domestic and export markets, of pig meat and of processed products made from pigs slaughtered in Denmark.

43. If, notwithstanding the statements of the Fund and the Danish Government, this allocation is a true reflection of the facts, it can no longer be gainsaid that exporters of live pigs who are subject to the levy are suffering discrimination.

44. Whereas a pig exported and a pig slaughtered in Denmark attract the same amount of levy, more than half of the product of the levy is allocated to activities which, by definition, can in no way benefit pigs that are exported live.

45. Since Article 95 of the Treaty has direct effect, it lies with the national court to apply it, not to prevent collection of the levy on pigs exported live but to eliminate the discrimination to which they are subject because, as the Court has consistently held — and contrary to what applies to charges having equivalent effect — the discriminatory nature of an internal charge does not have the effect of purely and simply prohibiting its collection.

The second question

46. If we consider the observations submitted by the Fund, the Danish Government and the Commission, the second question raises no real difficulties. I note that they are entirely at one in expressing the view that where a national charge, such as that at issue here, forms part of a system of aid formally authorised by the Commission under Article 93 of the Treaty, that does not preclude the national court from finding that the charge is being collected in breach of Community law and ordering a complete or partial prohibition on collecting it.

47. In its analysis of the judgment in Case 73/79, [13] the Commission notes that it is affirmed there that 'it is clear from the general plan of the Treaty that that procedure [the procedure under Article 93 of the Treaty] must never produce a result which is contrary to the specific provisions

13 — *Commission* v *Italy* [1980] ECR 1533, paragraph 11.

of the Treaty concerning, for example, internal taxation' and concludes that 'an authorisation by the Commission of a system of aids financed by charges cannot "protect" an infringement of Article 95 by those charges'.

48. I can only endorse that conclusion. Since the economic operator derives direct from the Treaty the right not to be subject to a charge having equivalent effect or to discriminatory internal taxation, it is not clear how the Commission can deprive him of that right, on the ground that the charge or taxation is part of a system of aid on which it makes a favourable ruling as a whole. In no way does Article 93 of the Treaty empower the Commission to restrict the effects of Article 9 et seq. or Article 95 of the Treaty.

49. The answer to the national court should therefore be that, since we are concerned with the lawfulness under Community law of a charge having equivalent effect or of discriminatory internal taxation, it is in fact 'immaterial' whether this forms part of a levy scheme notified to and authorised by the Commission pursuant to Article 93 of the Treaty.

50. But does that answer fully resolve the question put to us by the national court? I am not convinced that it does.

51. If authorisation by the Commission is 'immaterial' in regard to the lawfulness of the levy, does it also make no difference as regards the powers of the national court?

52. In other words, does the national court, when faced with a national charge or tax, have authority to halt implementation even if, in so doing, it halts the effects within the national legal system of a Commission decision authorising the system of aid, including the financing thereof by levying that charge? In so doing, will it not necessarily be adopting the same decision as if it were declaring the Commission decision invalid? And does the national court have authority to do so in the light of the principles laid down in *Foto-Frost*? [14]

53. I feel that this question merits consideration. Of course, for the question actually to arise, the Commission decision authorising the national system of aid must relate to financing of the system. But that is indeed the case here, according to the Danish Government, which refers on this point to the letter of 28 October 1991 (SG (91)D/20129) sent to it by the Commission, and the question put by the Vestre Landsret is indeed based on this assumption.

54. This question is truly without precedent for — although there is abundant case-

14 — Case 314/85 [1987] ECR 4199.

law on the relationship between Article 9 et seq. or Article 95 of the Treaty, on the one hand, and Article 92 of the EC Treaty (now, after amendment, Article 87 EC) et seq., on the other, it does not relate to the situation in which collection of the charge or internal taxation has been explicitly authorised, as part of a system of aid, by a Commission decision under Article 93 of the Treaty.

55. The case-law merely affirms that the same charge may fall within the scope of Article 9 et seq. or of Article 95 of the Treaty and at the same time be part of a system of aids as referred to in Article 92 of the Treaty and that it may therefore be examined under both aspects.

56. The national court will of course not itself declare the Commission decision invalid, because it will be annulling an act under national law, or at least halting its effects, either entirely — if this is a charge having equivalent effect — or partially — if it is taxation covered by Article 95 of the Treaty. But, in order to do this, the national court will have to overcome the obstacle of the authorisation given under Article 93 of the Treaty, and that is based on the fact that, from the Commission's viewpoint, there is no incompatibility with the common market. The national court will be negating the effect of the authorisation given by the Commission to the Member State to levy a given charge and use it to finance a specific activity. Intellectually, moreover, given the primacy of Community law which unquestionably attaches to the Commission's decisions, the national court can do that only if it forms the view that, in giving such authorisation, the Commission has exceeded its powers.

57. The *Foto-Frost* judgment is in fact based on, *inter alia*, the presumption of validity attaching to acts of the institutions, reserving to the Court of Justice the power to declare such acts invalid.

58. Is there a difference between a situation where a national court entertains doubts regarding a Commission decision which authorises not only the payment of aid but also the manner in which it is financed and a situation in which the national court is uncertain whether a Commission decision requiring post-clearance recovery is valid? Should the *Foto-Frost* principles expounded in connection with the latter situation not also apply to the former? I feel there is no point objecting that the national court must be able to disregard the Commission's authorisation in circumstances like these, where the economic operator is invoking a Treaty article with direct effect, for we would then also have to accept that, where an individual is challenging a national measure taken in application of a regulation that he claims infringes the general principles of Community law, the national court should be able itself to declare that regulation to be invalid. Unless — and I dare not imagine this — we were to hold that Article 95 of the

Treaty confers rights deserving of greater protection than the general principles of Community law.

59. In fact, two solutions are open to us.

60. Either we hold that strict limits should be imposed on the scope of the *Foto-Frost* principles, so that, in a situation such as that of the present case, where the national court is not required to make its own ruling on the validity of a measure of secondary law, that court is not required to make a reference to the Court of Justice to be able to halt the effects of that measure *de facto*.

61. Alternatively, we may hold that the reasons stated in *Foto-Frost* for denying the national court any jurisdiction to rule that a measure of secondary law is invalid apply also in the present situation, inasmuch as a declaration that the national levy infringes Community law necessarily — if only implicitly — conveys a declaration that the authorisation to charge it, given by the Commission using the procedure in Article 93 of the Treaty, is unlawful.

62. The benefit of the first solution would be that it does not require the national court to refer to the Court of Justice questions to which it sees the answer — as, in this case, it actually is — as being well-nigh obvious.

63. On the other hand, this would have the major drawback of upholding a fiction, because it would involve the pretence that the question facing the national court was entirely unrelated to any question of validity of a Community measure.

64. Personally, therefore, I prefer the second solution; admittedly, it is stringent, but it is consistent with the *Foto-Frost* judgment and the demands which underlie it, and I believe that the national courts would fully understand it, as is shown by the fact that, although the Vestre Landsret had the answer to the first of its questions, it none the less made a reference to the Court of Justice, because it was fully aware of the implications of the second.

65. In all events, this solution has the advantage — which I see as crucial — of avoiding the problems which could not fail to arise sooner or later if the power to consider whether an individual aspect of an authorised system of State aid can be allowed under the rules of the Treaty were exercised by any court other than the court empowered to rule on the validity of the authorisation given by the Commission to the Member State to apply that system.

Conclusion

66. Having completed the examination of the questions put by the Vestre Landsret, I propose that the Court should reply as follows:

(1) Articles 9 and 12 of the EC Treaty (now, after amendment, Articles 23 EC and 25 EC) and Article 16 of the EC Treaty (repealed by the Treaty of Amsterdam) must be construed as meaning that the prohibition of charges having equivalent effect to a customs duty does not apply to a levy charged by a public body in respect of pigs produced in a Member State and sold for slaughter on the national market or for live export to other Member States, provided that the levy is identical and that the revenue generated by the levy is allocated to activities not benefiting exclusively the marketing of pigs for the national market but also benefiting the marketing of pigs exported live to other Member States.

A levy charged on pigs produced in one Member State and sold for slaughter on the national market or for live export to other Member States is covered by the prohibition of discrimination laid down in Article 95 of the EC Treaty (now, after amendment, Article 90 EC), where the allocation of the revenue generated by the levy means that the burden of the levy weighs more heavily on the marketing of pigs exported live to other Member States than on the marketing of pigs sold for slaughter within the Member State concerned.

(2) The fact that a national levy is part of a system of aid authorised by the Commission under the rules on State aid is immaterial in regard to the applicability to that levy of the prohibitions laid down in Article 9 et seq. and Article 95 of the Treaty. However, where a national court takes the view that any of those prohibitions applies to a levy that has been so authorised, it is for that court to make a reference to the Court of Justice using the procedure in Article 177 of the EC Treaty (now Article 234 EC) in order that the latter may determine whether such application is well founded.