ornamental foliage established by Regulation (EEC) No 234/68 of the Council of 27 February 1968 (Official Journal English Special Edition 1968 (I), p. 26) and forbids persons who are not so affiliated to market, resell, import, export and offer for export, such products whatever their quality may be, is incompatible with the said regulation and also with Articles 30 and 34 of the EEC Treaty.

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Bosco Due

Delivered in open court in Luxembourg on 26 February 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 10 JANUARY 1980 [1]

Mr President,
Members of the Court,

I — On 14 April 1978 the Economische Politierichter [Magistrate in Economic Matters] of the Arrondissementsrechtbank [District Court], Alkmaar found a merchant having his place of business in the commune of Andijk guilty of having sold, between May and June 1975, in that commune or at least in the Netherlands, several lots of chrysanthemum cuttings ("stekken") (Chrysanthemum morifolium Ram.) without being affiliated to the body known as the Nederlandse Algemene Keuringsdienst voor Siergewassen [The Netherlands General Inspection Service for Ornamental Plants] (N.A.K.S. in abbreviated form) whose seat is at The Hague and imposed a fine on him, with imprisonment in default of payment.

According to Article 87 of the Zaaizaaden Plantgoedwet [Law on seed for sowing and stock for plant propagation] of 6 October 1966 the sale of cuttings is reserved to members of an inspection body subject to the conditions laid down by a general measure adopted by the public administration (Algemene Maatregel van Bestuur) for the cultivated plant ("gewas") concerned. The setting up of this body was approved on 22 December 1967 by the Minister of Agriculture. It has about 400 members. Five

1 — Translated from the French.

officials of the Algemene Inspectiedienst [General Inspectorate] are responsible for the inspections which are carried out on behalf of the N.A.K.S. There are other similar associations in the Netherlands for vegetables and flowers (Nederlandse Algemene Keuringsdienst voor Groenten en Bloemzaken) and also for nursery shrubs (Nederlandse Algemene Keuringsdienst voor Boomkwekerijgewassen). At the time when the events occurred the Secretary of the N.A.K.S. was also responsible for the secretarial services of the other associations.

On 5 April 1967 a Royal Decree (Aansluitingsbesluit N.A.K.S. [Decree on affiliation to the Netherlands General Inspection Service for Ornamental Plants]), adopted pursuant to Article 87 (1) of the above-mentioned Law, had introduced in respect of *inter alia* chrysanthemums compulsory affiliation to the N.A.K.S. and prohibited (Article 1 (a)) non-members from undertaking by way of trade "the production for purposes other than utilization in their own undertaking, marketing, resale, importation, exportation and offering for export of material for the propagation ("teeltmateriaal") of the plants ("gewassen") listed in the present decree . . .".

According to the findings of the national court the object of this decree is to guarantee that the material sold is of good quality. This guarantee is provided by proof of membership of the body in question: the fact that the material may also satisfy the criteria of quality fixed by the N.A.K.S. is unimportant. Furthermore membership of this trade association is reserved to those who accept that the awards of its Appeals Board (Raad van Beroep) relating to the decisions of one of its organs, with the exception of those decisions concerning the certification of material, are binding on the members to whom they are addressed.

The merchant concerned was fined for non-compliance with this prohibition. Although he bought his cuttings from growers ("telers") who were members of the same organization he resold them to retailers without himself being a member. If he had wished in pursuance of his trade to import chrysanthemum cuttings into the Netherlands he could likewise only have done so if he had himself been a member of the N.A.K.S. Propagation material imported by a member into the Netherlands and intended to take root there ("aan de wortel gebracht worden") must be declared to the N.A.K.S.; this material is inspected during a specified period at the member's premises.

The aim of the system is the strict supervision from the point of view of quality and origin, of material for propagation, parent plants and cuttings taken from these plants ("moederplanten en de daarvan gekweekte stekken") at all stages from the grower ("kweker") to the retailer. Imports and exports are checked by the Plant Health Service (Plantenziektenkundigedienst), whereas the N.A.K.S. is reponsible for checking the material after it has been imported into the Netherlands up to the time when it is sold to the customer.

II — The Gerechtshof, Amsterdam, to which the merchant concerned has appealed, asks the Court in substance whether the Netherlands Law in question is compatible with Articles 30 to 37 of

the EEC Treaty (especially with the provisions relating to the elimination of quantitative restrictions between Member States), with Articles 38 to 47 of that Treaty (on agriculture) and also with Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage. The answer to these questions in Article 177 proceedings cannot of course prejudge the result of any review undertaken by the Commission for the purpose of establishing that the national measures in question are incompatible with the Treaty.

III — Chrysanthemums are within Chapter 6 of the Common Customs Tariff and the organization of the market established by Regulation No 234/68. Article 1 thereof provides that the common organization of the market shall comprise common quality standards and a trading system in the sector concerned.

With a view to improving the quality of the products Article 3 thereof provides for quality standards to be determined. Regulation (EEC) No 315/68 of the Council of 12 March 1968 determined quality standards for flowering bulbs, corms and tubers and Regulation (EEC) No 316/68 of the Council of the same date did the same for fresh cut flowers and fresh ornamental foliage.

Article 2 of the Basic Regulation No 238/68 provided for the adoption of Community measures to encourage action by individual and general trade organizations with a view to promoting better organization of production and Article 12 provided, without laying down a time-limit for this purpose, that the Council should add to the regulation such further provisions as might be required "in the light of experience". Apart from the regulations of the Commission on the minimum export prices of certain flowering bulbs, corms and tubers to non-member countries, no measure had been adopted in this connexion on a Community level at the time when the events with which this case is concerned occurred.

As against that Article 10 not only prohibits, by virtue of a provision which moreover is found in the other common organizations of the market, in the internal trade of the Community the levying of any customs duty or charge having equivalent effect *but any quantitative restriction or measure having equivalent effect.*

Nevertheless according to Article 10 (2) thereof:

" ... the maintenance of quantitative restrictions or measures having equivalent effect ... shall continue to be authorized

— for unrooted cuttings and slips of vines ... vine slips, grafted or rooted ... until the date fixed for the application in all Member States of the provisions to be adopted by the Council on the marketing of materials for the vegetative propagation of the vine;

— for potted plants and sapling fruit trees (Common Customs Tariff Heading No 06.02 C II) until 31 December 1968.

As regards potted plants and sapling fruit trees and bushes (Common Customs Tariff Heading No 06.02 C II) the Council shall adopt such measures as may be required in pursuance of Articles 3, 12 or 18 of this regulation".

As far as concerns the marketing of material for the vegetative propagation of the vine the Council adopted on 9 April 1968 Directive No 68/193/EEC, Article 19 whereof provides that:

"The Member States shall not later than 1 July 1969, bring into force the measures necessary to comply with this directive and shall forthwith inform the Commission thereof".

This time-limit was extended to 1 July 1972 by Article 11 of Council Directive No 71/140/EEC of 22 March 1971 and then to 1 July 1976 by Article 9 of Council Directive No 74/648 of 9 December 1974.

IV — Two conclusions should in my view be drawn from a comparative study of these various provisions.

In the first place a national law of the kind which is at issue in this case contains a quantitative restriction or a measure having equivalent effect.

In the second place such a quantitative restriction or measure having equivalent effect was no longer justified in the relevant field at the time when the events with which this case is concerned occurred.

I refer at this point to the Court's judgment of 30 October 1974 in Case 190/73 *Officier van Justitie* v *J. W. J. van Haaster* [1974] ECR 1123, which was concerned with the compatibility with Article 10 of Regulation No 234/68 of the Netherlands Regulation of 1971 in so far as it restricts the production of hyacinth bulbs, from which it is clear that the power which Member States have to intervene in matters governed by a common organization of the market is limited by the extent to which the exercise thereof is contrary to the objectives of such an organization.

It is noteworthy that Regulation No 234/68 is based on a Community system of quality standards the application of which aims at eliminating products of unsatisfactory quality. It seems to me that any other restriction of production derived from national measures is precluded. If, not later than the end of the transitional period and in the light of experience (Article 12), the Council has not adopted, pursuant to Article 3, standards of quality for the products referred to in Article 1 (that is to say in this case chrysanthemum cuttings), the second paragraph of Article 3 does not apply to them and these products may then be displayed for sale, offered for sale, sold, delivered or otherwise marketed. The possibility of the Commission's having in the near future to propose to the Council an amendment of the standards designed to guarantee the quality of live plants and flowers which are marketed in the Member States cannot be ruled out, but, in the meantime, the Community legislature has clearly come down in favour of a system based on free trade leaving no room for national provisions (cf. judgment of 18 February 1970 in Case 40/69 *Hauptzollamt Hamburg-Oberelbe* v *Firma Paul G. Bollmann* [1970] ECR 69 and judgment of 7 February 1973 in Case 39/72 *Commission of the European Communities* v *Italian Republic* [1973] ECR 101).

The judgment of 23 January 1975 in Case 51/74 *P. J. van der Hulst's Zonen* v *Produktschap voor Siergewassen* [1975] ECR 79, which was concerned with the withdrawal of surplus bulbs, confirms that Regulation No 234/68 is based primarily on a system of quality standards and does not provide for any intervention machinery. The adoption of supplementary measures is expressly reserved to the Council. If the Court held that in the final analysis the Netherlands measures were compatible with Community law the reason may be,

as has been noted, that Community bulb production is concentrated in the Netherlands and that the Netherlands intervention system might, on a *Community* level, encourage marketing of production on a rational basis and stabilize the market. But chrysanthemums which are produced in large quantities in certain other Member States, are a different matter, even if in the Netherlands this production is locally very concentrated.

V — There is another reason which might lead to the view that Community law cannot accommodate itself to such legislation as is described in the questions put by the national court. Membership of the association in question is reserved to persons who accept that the awards of the Appeals Board of the N.A.K.S. (as provided for in Article 26 of its rules and approved by the Minister of Agriculture on 22 December 1969, an Appeals Board moreover the procedural rules whereof were laid down in a "regulation" of the Governing Body approved by the Minister on 12 December 1977) relating to the decisions taken by an organ of this body which have affected them and do not cover the certification of material for propagation are binding on them (Article 90 (1) of the Zaaizaad- en Plantengoedwet [Law on seed for sowing and stock for plant propagation]).

In fact the N.A.K.S. is not covered by the provisions of Council Regulation (EEC) No 1360/78 of 19 June 1978 on producer groups and associations thereof. Such associations have only been authorized in limited sectors, for example, in the case of fruits and vegetables by Council Regulation (EEC) No 1035/72 of 18 May 1972 and by the above-mentioned Regulation No 1360/78 in the case of the products (*inter alia* plants used in perfumery and lavender) and countries or regions listed in that regulation. As far as concerns the chrysanthemum sector no general rule concerning the taking of *Community* measures as provided for in Article 2 of Regulation No 234/68 (measures in respect of the products referred to in Article 1 to improve quality and stimulate demand and also to promote better organization of production and marketing) has been laid down by the Council.

Accordingly, at least in the sectors where an organization of the market has actually been established, the prohibition contained in Article 85 of the Treaty applies automatically to trade and joint trade organizations save as otherwise provided in Article 2 of Regulation No 26 of the Council of 4 April 1962.

VI — Finally, although the means adopted by the trade and guaranteed by the authorities is undoubtedly very effective, it may be asked whether it is not disproportionate to the objective which it is sought to attain. There are no Community provisions applicable to the sector under consideration which authorize inspectors, even if they have taken the appopriate oath to enter private property or stores in order to carry out inspections as there are in Regulation No 17 which relate to competition. In the absence of any express provision justifying such a system the adoption of penal sanctions (a fine or imprisonment) for the implementation of national provisions seems to contravene Community law. Although the powers for the purpose of carrying out inspections have been granted in the context of contractual commitments, on this point as well the question of the compatibility of such commitments with the prohibition in Article 85 of the Treaty arises.

I submit that the Court's answer to the questions asked by the Gerechtshof should be:

The provisions of Regulation (EEC) No 234/68 entail the abolition of a system whereby Member States, directly or through bodies which they have set up or approved, forbid the sale, resale, importation, exportation and offer for export by way of trade of chrysanthemum cuttings, even though this material for propagation satisfies national quality standards.