OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 4 DECEMBER 1974 [1]

Mr President,

Members of the Court,

1. The Court is faced with the task of giving a preliminary ruling on the interpretation of 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. It is the same document on which a preliminary ruling was given in the judgment delivered on 30 October last in *Van Haaster* (Case 190/73). On that occasion the question was whether Article 10 of the Regulation, which prohibits any kind of quantitative restriction or measure having equivalent effect in intra-Community trade in the products covered by the regulation, also prohibited national interventions which, while not directly affecting trade, affect production by imposing a restriction on the quantity of articles produced. In this case we are first asked whether this provision, which forbids the levying of any customs duty or charge having equivalent effect, excludes the application of national charges of the kind described as 'surplus levy' and 'trade levy' which were the subject of three regulations issued in 1971 and 1972 by a Dutch public authority, the Produktschap voor Siergewassen (Ornamental Plant Authority) to which we shall refer from now on as the PVS.

As the College van Beroep voor het Bedrijfsleven, the Dutch court making the reference, observes the machinery of levies and allowances set out under Articles 2 and 3 of the 1972 Regulation of the PVS concerning the *surplus levy* for ornamental plant bulbs has the effect of imposing the levy on all bulb sellers, including exporters on sales to purchasers who do not possess a trade card. A bulb seller must grant traders who possess a trade card a rebate exactly equal to the amount of the surplus levy. This document is, on application from an interested person, issued annually to traders who reside in the Netherlands and have paid an advance on the surplus levy.

Under the provision of Article 5 of the PVS Regulation of 1971, dealing specifically with the surplus levy, the revenue therefrom is transfered to the 'Surplus Bulb Purchase Fund' which uses it for the purchase of bulbs which have not reached on the free market the minimum price laid down by the Fund. If it proves impossible to sell them off on the market without going below this minimum price, the bulbs are converted into animal food or destroyed.

For the *trade levy* the relevant PVS Regulation of 1971 provides similar machinery for collection but with some notable differences: in particular, the levies and allowances are not of the same amount and there are differences in the various categories of those subject to them.

The amount of the levy is fixed as a percentage of the bill. The amount of levy to be paid on sales to purchasers based outside the Netherlands is, apparently, greater than on sales carried out within the Netherlands. This is, first, because the rate levied on exports is higher than the rate fixed for sales to wholesalers and national producers (3·5 % instead of 3 %) and, second, because the rate is calculated on a higher basis of assessment which, in addition to the selling price, takes account of various additional items which do not enter into

1 — Translated from the Italian.

consideration in the calculation of the levy on internal sales.

Under Article 10 of the PVS Regulation on the trade levy for bulbgrowers, the sums received therefrom are, subject to deduction of an amount to cover administrative costs, transferred to the 'PVS General Purposes Fund for Bulbs' in order to finance scientific research, publicity in this sector and other general objectives.

This information seems to indicate that these levies have a special character, operate within the framework of a national market organization, and cannot, therefore, be regarded as forming part of a general system of taxation.

2. In its first question the Dutch court requests the interpretation of the said Article 10 of Regulation No 234/68 and of the corresponding provision of Article 16 of the EEC Treaty of the two types of charges in question; in its second, the court asks whether Article 40 of the Treaty and Article 1 of the Regulation or indeed other provisions or general principles of Community law mean that in the live plants sector, which is the subject of the Regulation concerned, the creation of market organizations like that covered by the PVS regulations on the surplus levy and on the trade levy is no longer permitted except for the purpose of implementing the basic Community Regulation.

This second question is so wide that is subsumes the first, and, moreover, raises a general issue which logically comes first. This is, in fact, the issue not just whether the national measures to which the Dutch court refers are compatible with a particular provision but the more general one whether in principle the existence of a set of Community rules creating a common market organization, such as that established by Regulation No 234/68, precludes the existence of national measures of the kind considered above. It behoves us, therefore, to proceed forthwith to a consideration of the second question, with the reservation, however, that, because of the breadth, bordering on vagueness, of its terms, this cannot entail exhaustive examination of every aspect of the Community rules which might conceivably be of importance in assessing the validity of the national measures with which the Dutch court is concerned. We must confine ourselves to those issues which have been raised, expressly or by implication, by that court.

I have already had occasion to state my inability to accept the radical view that the existence of a common market organization makes it no longer possible for acts of national intervention, their nature, to take place in the sector which it covers. This view was urged before the Court in *Geddo v Ente Nazionale Risi* (Case 2/73, [1973] ECR 870). In that case, the plaintiff in the main action had, in particular, argued that 'the fact that there is a single market means that transfer of the product ... cannot be subject to payment of special pecuniary charges imposed by the Italian State outside Community provisions' even if this took place within the confines of that State. The judgment of the Court rejected this Draconic construction and was based on the principle that, in the light of all the relevant circumstances, a decision must be taken in each case whether the national measures concerned are incompatible with the Community rules operative in the sector. This pragmatic approach was adopted and applied recently in the judgment recorded in *Van Haaster* (Case 190/73).

As I pointed out in the opinion given in *Geddo* (Case 2/73), the creation of a common market organization in respect of given agricultural products does not mean automatic repeal of all previous regulatory mechanisms and systems which have any bearing on products in the sector concerned. I also expressed the view that, in the absence of clear incompatibility between such national measures and the specific terms of the Community organization, this Court

would be greatly limited in the action it could effectively take in terms of a preliminary ruling: the best method of removing conflict in cases of this nature is that available to the Commission under Articles 155 and 169 of the Treaty.

3. In the light of these precedents, we must now consider whether, bearing in mind other general provisions or principles of Community law which must govern application of Regulation No 234/68 and the working of the common market organization, the Regulation is such as to preclude the application, on sales of products covered by the relevant common organization, of internal charges of a fiscal nature and of the type which was the subject of the 1971 and 1972 Regulations of the PVS referred to earlier.

The plaintiff in the main action contends that the mechanism concerned is incompatible with the general rule which can be derived from the precedents established by this Court that a State may not finance interventions which operate mainly or exclusively to the advantage of a sector of the national economy by imposing, in terms of intra-Community trade, the burden of these interventions also on undertakings of other Member States which, do not derive corresponding benefit from the measures concerned (see Judgment in Case 47/69 concerning French aids for textiles, Rec. 1970 p. 249 and the Judgment in *Capolongo-Maya,* Case 77/72 [1973] ECR 613).

Nevertheless, there is an essential difference in relation to the situations on the basis of which the principle was defined: in the present case, the national charge is not levied on foreign products but only on sales of the home product.

It is true that, apart from any formal considerations, the economic burden of the operation ultimately falls on the final consumer, whether he is Dutch or foreign. But so long as foreign purchasers of Dutch bulbs were in this respect treated no differently from Dutch purchasers, it would in principle be acceptable that, even if this were contrary to their immediate interests, foreign consumers should have to share the cost of a national mechanism which keeps the market in order, and helps to maintain selling prices at a minimum guaranteed level.

The question does, however, contain rather complicated economic and social features and it is fairly difficult to give a theoretical answer without first identifying the facts to be taken into account and evaluating them in a way which allows for factors where is an element of discretion. It assumes a certain basic conception of agricultural policy which is certainly outside the competence of the judiciary, and this evaluation cannot therefore be expected from any quarter other than the Commission. This is one of those cases to which I referred in my opinion in *Geddo,* where the meaning of the general rule must be defined in relation to a specific situation and where identification of any incompatibility can only be the result of complicated assessments of the facts and economic effects and, moreover, presupposes a choice of economic policy.

Accordingly, in the context of the present proceedings, we are not in a position to give the national court interpretative guidance enabling it to identify any incompatibility between the overall system and Community law.

National intervention machinery might, however, infringe individual rights, which are directly enforeable by the national courts, if the charge were applied in a manner which is clearly discriminatory, as would be the case if its impact were greater on a foreign trader than on a national of the country concerned. This could occur not only as a direct result of applying different tariffs in the two cases but also indirectly when, for example, domestic traders or certain categories of them were *by law* entitled allowances on purchase of the product concerned which were directly

related to the charge imposed. If, as appears to have been the case at the material time in the main action, traders who used the bulbs for their own purposes were also wholly exempt from the charge, while this privilege was clearly withheld from purchasers in other Member States at the same stage of marketing and use, the infringement would be equally serious unless there were valid grounds, based on objective considerations unconnected with nationality and strictly related to the machinery of the national system of intervention, which made it possible to justify such difference of treatment.

If, to the detriment of purchasers in other Member States, application of a charge gave rise to a difference of treatment whose essential basis was that the sale took place within the State or between it and other States, this would amount to imposition of a charge having equivalent effect to a customs duty, which in the present case, could be exemplified by the charge being necessarily levied on export sales whilst it was reimbursable on internal sales in the form of a compulsory reduction in the sale price.

At this point it is worth recalling the general observation that, in investigating these categories of charge having equivalent effect to those which are prohibited, the lawyer, and above all, therefore, a court must look beyond the guises which the charges assume. It would, for example, be of considerable significance if it were true that, as was urged on behalf of the plaintiff in the main action, these particular levies had been wholly designed to replace, for all intents and purposes, the previous export duties which automatically lapsed as a result of the establishment of the common market.

4. As for the exemption of the Dutch bulbgrower who puts bulbs produced by him to immediate use for the production of flowers on his premises, a situation on which the plaintiff in the main action bases part of his case, this does not appear to contain anything of a manifestly discriminatory character or, from any other point of view, to be incompatible with a Community rule. This exception is the objective outcome of the condition that the charge shall apply only to products put on the market and the exemption may well be justified on practical grounds. But, once again, we are faced with the obvious limitations of the procedure for a preliminary ruling and the need for the Commission to make a preliminary study in depth of all the circumstances.

If, however the national machinery in question has as the plaintiff in the main action has alleged, been contrived with a view to enabling the competent national authority, as it saw fit, to exempt undertakings from payment of charges which under the laws in force would otherwise be due, there would be no need to wait for the Commission to establish the absolute incompatibility of such a system with those requirements of objectivity and of equality of treatment between those subject to Community law which must govern the actions of the national administrative authorities, especially in the case of products which come under a common market organization. As stated in the third, eighth and ninth recitals of the preamble to Regulation No 234/68, a common market organization in addition to meaning 'the removal . . . of all obstacles to the free movement of the goods in question' between Member States, serves the purpose of 'promoting commercial relations on the basis of genuine competition' and lays down that 'the provisions of the Treaty which allow the assessment of aids granted by Member States and the prohibition of those which are incompatible with the Common Market should be made to apply'.

If, even in the limited context of individual trading activities the national administration could as it saw fit exempt undertakings within its jurisdiction from

the charges involved, this would create a situation which could be a source of unacceptable national discrimination, and is already intolerable purely on account of its lack of transparency. This applies particularly in the case of a national enactment which, in view of the special position of a State which is responsible for almost the total output of the products concerned in the Community, may, in the light of the Commission's statements, be regarded as a kind of supplement to the Community rules governing the market organization of the products.

5. As regards, more specifically, *the surplus levy* this, as we have seen, serves to finance machinery used to prevent bulbs being put on the market at a price lower than the minimum price fixed by a national authority. The fact that Regulation No 234/68 provides for minimum prices to be fixed for the products concerned when exported to third countries, without any corresponding provision for sales in the common market, certainly does not allow us, by arguing in reverse, to conclude that a system of minimum prices for sales within the Community should be held to be prohibited, not even if it has been instituted and maintained in operation unilaterally by the national authority. On the contrary, precisely because the common organization has not, as far as the internal market is concerned, provided any intervention machinery on the subject of prices, the validity of an appropriate national system of intervention cannot, in principle, be ruled out.

The State intervention on prices which the surplus levy serves to finance cannot, therefore, be criticized on its own account but solely in so far as, for one of the reasons described above or for those which we shall now consider, it proves to be incompatible with the general principles or the specific rules governing the proper functioning of the common market organization as it has in practice been evolved. In this connexion it is perhaps of special significance that the levy makes it possible to exercise an influence not only on prices but also on the quantities made available for trade within the Community. As supplies of products which do not, on the free market, fetch the minimum price laid down by the surplus fund are withdrawn from the market, can this situation be regarded as constituting a measure equivalent to a quantitative restriction on exports? Dutch producers and traders are not, of course, compelled to sell to the PVS Fund products which they have not been able to dispose of at the minimum fixed price; on a strictly formal view, therefore, it is impossible to refer to an act of administration which directly affects the volume of products which could otherwise be available for intra-Community trade, but it is clear that, in terms of economic reality, and taking into account the Dutch dealers' need to sell above the market price, the effect will necessarily be the same as that of a measure which closed the market to the products concerned.

The judgment in *Van Haaster* laid down that a national measure which has only an indirect or potential effect on the marketable supplies of a product subject to the common market organization set up by the relevant regulation must be regarded as incompatible with the regulation. Nevertheless could the *surplus levy* be justified in the light of the objective pursued by the common organization of the products with which we are concerned?

The second preamble of Regulation No 234/68 refers to the need to 'ensure stable market conditions', and the Dutch regulation does, indeed, help to keep prices stable on the market. However, as Mr Advocate-General Mayras pointed out in Case 190/73, the control established under Regulation No 234/68 over the quality of bulbs is sufficient in itself to produce the effect of stabilizing prices.

Of course, we do not know whether the Community rules governing quality suffice to ensure the requisite degree of

stability. It must be borne in mind, however, that again according to the second recital of the preamble, quoted above, stable market conditions must be ensured through appropriate measures promoting the 'rational marketing' of production; only with very rose-coloured spectacles would it be possible to regard the destruction of bulbs, or their use as animal food as answering to this description!

Furthermore, as was stated in Court on behalf of the PVS the standards of quality to be attained in order to satisfy the national conditions for compulsory purchase of surpluses, are less demanding than those required by the Community conditions; consequently, as the applicant in the main action has pointed out, this machinery could, in fact have the undesirable effect of encouraging the cultivation, in large and highly mechanized undertakings, of products which are easier to produce but are in less demand on the market and below Community standards of quality — all with the specific object of their being immediately handed over to the Surplus Fund at the expense of those who produce bulbs of better quality as well as, of course, the consumer.

From one point of view, therefore, the activities paid for out of the surplus levy of the PVS Fund, are liable to encourage the production of goods which do not meet Community rules on quality; from another, it has the effect of withdrawing from circulation in the Community even those products which do meet them.

The first situation is clearly incompatible with the aims of the common market organization established by Regulation No 234/68; the second situation could infringe the ban on measures of equivalent effect to quantitative restrictions imposed in the sector concerned under Article 10 of the Regulation.

I do not want, of course, to maintain that any kind of State intervention to create stable market conditions for products coming under a common organization must be ruled out. A decision on the question of compatibility will depend both on the comprehensiveness of the relevant Community requirements and on the specific way in which, in the light of such requirements, the national intervention measures are constituted and applied.

In the present proceedings it is perhaps enough to recognize that one is faced with a measure which is clearly capable of affecting the quantities made available to the market and that, accordingly, the machinery financed by the levy is liable to impede trade within the Community: this would be in line with the Court's ruling on the cultivation licence system for hyacinth bulbs which, according to the judgment in Case 190/73, is incompatible with the Community regulations.

6. The position with regard to the *trade levy* is not so clear. This is partly because it is difficult to ascertain the amount involved and the different ways in which the levy is applied to the various categories of product, and partly because the purposes for which the income from the levy is used are less well defined.

On the basis of the information at our disposal, it can meanwhile be stated that there does not, in principle, appear to be any incompatibility between the requirements laid down under Regulation No 234/68 and the imposition of a quasi-fiscal charge to finance activities for the general benefit of a category of products subject to it, such as scientific research and sales promotion.

An exception must, however, be made in the case of a levy designed in such a way as to differentiate between foreign and domestic purchasers by making them pay different amounts. In these circumstances, the basic prohibition, embodied in Article 7 of the EEC Treaty, of national discriminatory measures should, in conformity with firmly established precedents of this

Court (see the Judgment in *Wilhelm/ Bundeskartellamt,* Case 14/68 Rec. 1969 p. 16), be regarded as directly applicable. The discriminatory nature of the levy is not, of course, altered by the fact that on the other hand, foreign operators may be placed at some fiscal advantage compared with their domestic counterparts, particularly in the case of those exporting the finished product into the State concerned. It certainly would not contribute to legal certainty and to the clarity of the Community system if we were to allow that a discriminatory device could be justified on the basis of a claim that it was, in economic terms, offset by indirect advantages: apart from the fact that their actual value overall is rather a matter of chance — one cannot imagine there can be much importation into the Netherlands of flowers produced from Dutch bulbs! — these compensations do not redound to the advantage of those who are the victims of discrimination.

A levy designed on the basis I have suggested is recognizably a charge having equivalent effect to a customs duty on exports, which is expressly prohibited by Article 10 of Regulation No 234/68. This would be true even if the amount of the levy were the same for all those to whom it applied so long as some categories of national operator were exempted, although only indirectly, from the charge as licensed traders, i.e. on the basis of a condition which could not be taken advantage of by undertakings of other countries operating at the same level in terms of marketing the product.

7. Finally, the Dutch court refers a third question whose object is the interpretation of Article 93 (2) of the EEC Treaty in the light of the letter addressed on 9 February 1972 by the Vice-President of the Commission to the Netherlands Minister of Foreign Affairs concerning application of Article 93 to certain aids granted by the State in the sector with which we are concerned. In the light of the close connexion which, in the view of the national court, exists between the question of interpretation of the aforesaid provision of the Treaty and the Commission letter referred to, one could even limit oneself here to observing that the letter expressly refers to the application only of paragraph 1 of Article 93, which refers to the Commission keeping systems of aid existing in Member States under constant review, while paragraph 3 refers to plans to introduce fresh aids or at least to make changes in existing arrangements.

It may, however, seem inadequate to limit our reply to this formal comment, because, while it is true that the Dutch court may have misunderstood the purpose and practical scope of the Commission's letter in its statement of grounds for the decision of reference, the court refers to the introduction of fresh aids or at least to an alteration of existing arrangements for aids which it appears to discern in the PVS regulations referred to concerning the two quasi-fiscal charges examined above. Apart, therefore, from the meaning and scope of the Commission's letter, a question of interpretation has, with a view to reaching a decision in the main action, in effect been referred concerning Article 93 (3) of the EEC Treaty. If the Dutch regulations of 1971 and 1972 concerning the surplus levy and the trade levy had indeed made substantial alterations in the system of aids previously in force, there would have been, under pain of inapplicability, an obligation to give advance notice of them to the Commission in accordance with Article 93 (3). In this connexion, the fact that these aids were under the control of a corporate body working under rules of private law would make no difference whatever, this is because the funds concerned represent the yield from a fiscal or quasi-fiscal levy authorized by the State authorities.

Against this background, and without prejudice to the question of the extent to which those regulations actually

represented a change in the existing system of aid, it is appropriate to bear in mind the previous decisions of this Court in which it was laid down that 'the direct effect of the prohibition on the Member State concerned from putting its proposed measures into effect extends to all aid which is granted without being notified and, in the event of notification, operates during the preliminary period, and up to the final decision where the Commission sets in motion the contentious procedure. As regards the whole of this period it confers rights on the individual which the national courts are bound to safeguard. While the direct effect of [the prohibition] compels national courts to apply this provision without it being possible to object on the grounds of rules of national law whatever they may be, it is for the internal legal system of every Member State to determine the legal procedure leading to this result' (preliminary ruling in *Lorenz*, Case 120/73, Judgment of 11 December 1973 [1973] ECR 1471 at pp. 1484-1485; judgments in the same sense were delivered in Cases 121, 122, 141/73, *Markmann, Nordsee, Lohrey, ibid* pp. 1495, 1511 and 1527).

If, therefore, the national regulations under review constituted new developments in respect of the previous system, justifying the supposition that they were new aids of which, under Article 93 (3) of the Treaty, the Commission must be notified, any failure to notify would render them inapplicable. The reference made by the Commission in its letter of 9 February 1972 to the two types of levy does not indicate whether the Commission had considered the system which is the subject of the regulations with which the Dutch court is called upon to deal or whether on the other hand, the Commission is referring to a previous system which, though bearing the same name, involves substantial differences. The fact that the Commission is examining these aid mechanisms on the basis of Article 93 (1) does not, in any case, indicate any clear decision ruling out the possibility that the Dutch regulations with which we are concerned introduced changes in the system in force and that they are, accordingly, subject to the requirements referred to in Article 93 (3).

It will be for the national courts to ascertain whether the PVS regulations of 1971 and 1972 have changed any of the basic features of the previous system of aids, as would be the case if, for example, there had been changes in the aims pursued, the basis on which the levy was made, the persons and bodies affected or, generally, the source of its finances, or whether, on the other hand, their application was confined merely to introducing adjustments of minor importance, provided for in the basic system. If the first of these possibilities were found to have occurred, it would be necessary to proceed to establish whether the procedure in Article 93 (3) had been followed; from what we have been given to understand, however, from the Commission's observations in the case, it seems that this was not so. If the second alternative is the correct one, the procedure under Article 93 (3) would not apply and the regulations concerned would consequently be subject to the general rules in Article 93 (1) and 93 (2) concerning existing systems of aid.

8. The fact that certain aspects of the national system of intervention to which the Dutch court refers are not wholly transparent has prevented me from speaking with complete assurance on all the points I have been considering. However, in a case involving a preliminary ruling on questions of interpretation, it is primarily the duty of the national court to establish the facts to which Community law must be applied. If the facts fit one or other of the possibilities I have suggested, the national court will draw the necessary conclusions. In particular, it must treat the internal levies as inapplicable insofar as they are capable of giving rise to

differences of treatment between purchasers in the country concerned and in other Member States; or are in breach of the restraints laid down in Article 10 of Regulation No 234/68; or, in any case, are in conflict with the objects and the proper working of the common market organization (due account being taken of what has been explained on the subject of quality standards); or, finally, whether in connexion with such measures there has been a failure to meet the formal requirements of Article 93 (3) of the EEC Treaty.

I therefore propose that the questions of the Dutch court should be answered as follows:

1. Levies imposed in a State on the sale of products subject to Regulation (EEC) No 234/68 with the object of financing, within the framework of a national market organization, interventions on prices or other purposes of general interest to producers constitute a breach of the general principle of non-discrimination and represent measures having equivalent effect to a customs duty on exports, and such measures are prohibited to the extent that the arrangements for which they provide are such as, directly or indirectly, actually or potentially, to impose burdens on purchasers resident in other Member States which are greater than those on purchasers resident in that State and operating at the same level of marketing or consumption.

2. An internal levy imposed on purchasers of a given product and intended to finance compulsory purchase at a guaranteed minimum price, by a public or private body, of a product subject to a common market organization which incorporates quality standards is not compatible with such common organization insofar as it serves, additionally, to finance the purchase of products not meeting the aforesaid common standards.

3. The said levy, by making it possible to withdraw products from the market when the market price falls below the level laid down in advance by a national body, is liable to have a restrictive effect on the movement of the products. Where, therefore, this restrictive effect cannot be justified on the basis of the operational requirements and objectives of the common organization, the national intervention machinery of which the levy is an essential component may be regarded as a measure having equivalent effect to a quantatitive restriction, which, so far as Regulation No 234/68 is concerned, is prohibited under Article 10 thereof.

4. Internal measures which set up new systems of aid or introduce changes in an existing system are, under Article 93 (3) of the EEC Treaty, subject to the obligation to give previous notice to the Commission, otherwise they will be inapplicable.