uncoordinated action is of such a nature as to cause discrimination between producers and consumers and to disturb trade between the Member States.

4. The circumstance that the Community authorities encouraged practices which are not in accord with Community law does not allow the Court to concede that like measures taken by a public institution of a Member State are compatible with Regulation No 123/67.

5. Regulation No 123/67, especially Articles 2 and 13 thereof, must be interpreted as making measures enacted by the national authorities to impose a quota on the slaughtering of poultry incompatible with those provisions.

In Case 111/76

Reference to the Court under Article 177 of the EEC Treaty by the Gerechtshof (Regional Appeal Court) of Amsterdam, Economic Chamber, for a preliminary ruling in the action pending before that court between

OFFICIER VAN JUSTITIE

and

BEERT VAN DEN HAZEL

on the interpretation of Articles 30 to 37 of the EEC Treaty and the provisions of Regulation No 123/67/EEC of the Council of 13 June 1967 (OJ, English Special Edition 1967, p. 63),

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The judgment making the reference and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

The accused in the main action, who runs a slaughter-house for poultry, was charged and found guilty in the court of first instance by the Economische Politierechter (Magistrate in Economic Matters) of the Arrondissements-rechtbank (District Court), Haarlem of infringing Article 2 (1) of the Verordening Produktie Slachtpluimvee-sector 1974 (Regulation concerning the Production of Poultry for Slaughter). In order to counter a fall in the price of poultrymeat resulting from a surplus produced in 1974 this provision prohibits poultry slaughter-houses from slaughtering between 1 July 1974 and 1 January 1975 more fowls than corresponded to the number of kilogrammes live-weight stated in the allocation form issued to them by the Produktschap voor Pluimvee en Eieren ('Production Board for Poultry and Eggs' hereinafter referred to as 'the Produktschap'). Since, after the judgment of the Court of Justice of 30 October 1974 (Case 190/73, *Van Haaster* [1974] ECR 1123), the Openbaar Ministerie (Department of Public Prosecutions *inter alia)* doubted whether this regulation was compatible with the provision of Community law it submitted an appeal against the judgment of the Economische Politierechter. The Community provisions which, it was maintained, had been infringed were Regulation No 123/67/EEC of 13 June 1967 on the common organization of the market in poultrymeat (OJ, English Special Edition 1967, p. 63) and Articles 30 to 37 of the Treaty, on the elimination of quantitative restrictions between Member States. Regulation No 123/67 incorporates a system of levies on imports and refunds on exports but without intervention on the market. Article 2 thereof however empowers the Council to take measures 'in order to encourage action by trade and joint-trade organizations to facilitate the adjustment of supply to market requirements, with the exception of action relating to the withdrawal from the market...'.

The Gerechtshof, Amsterdam, with which an appeal was filed, submitted by a judgment of 28 October 1976 received at the Court Registry on 24 November 1976, a request to the Court of Justice for a ruling on the following question:

'Must the rules contained in the Verordening Produktie Slachtpluim-veesector 1974 of the Produktschap voor Pluimvee en Eieren be regarded as being incompatible with Regulation No 123/67/EEC of the Council of the European Economic Community of 13 June 1967 on the common organization of the market in poultrymeat or with Articles 30 to 37 of the EEC Treaty?'

The Commission and the Netherlands Government submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without any preparatory inquiry.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations of the Commission

As a preliminary to its consideration of the question submitted the Commission surveys the Community provisions in the poultrymeat sector, the market position in 1974 and the relevant Netherlands provisions.

The Community provisions

It is noteworthy that Regulation No 123/67/EEC of the Council of 13 June 1967 on the common organization of the market in poultrymeat contains no measures concerning market intervention. Both the Council itself and the Commission in a communication of 23 January 1967 considered that it was unnecessary to set up intervention machinery properly so-called (a) because this production was not related to use of the soil (b) because the structure and techniques of production and distribution in the relevant sector were developing, in particular through a grouping of undertakings, towards an 'industrialization' and (c) because of the individual nature of the structure of production costs. The variable costs in fact represent between 74 % and 80 % of the total costs so that a reduction in production following a fall in demand automatically involves a fall in the variable costs.

Article 2 (1) of Regulation No 123/67 however empowers the Council to take Community measures in order to encourage 'action by trade and joint-trade organizations to facilitate the adjustment of supply to market requirements, with the exception of action relating to withdrawal from the market ...'. Nevertheless such Community measures have not been adopted.

The market situation in 1974

The fall in prices in 1974 after an increase in production caused losses in the sector producing fowls for consumption.

In order to counter this the Commission in 1974 fixed higher export refunds, at the same time insisting that the trade and joint-trade institutions concerned should also endeavour to attain a better balance on the market. For their part the trade and joint-trade organizations agreed that it was necessary to reduce production by 10 % in 1974 and this was attained by reducing production for the second half of 1974 by 20 %.

Provisions in Netherlands legislation

Whilst in the other Member States concerned the undertakings responsible for all or almost all the production of frozen chickens decided to reduce production voluntarily with or without financial aid from the public authorities, in the Netherlands the public authorities intervened directly in particular by adopting, through the Produktschap, the Verordening Produktie Slachtpluimveesector 1974.

This regulation lays down for each slaughter-house a monthly quota for slaughter for the period from 1 July 1974 to 1 January 1975 corresponding to 80 % of the live-weight of the fowls slaughtered during a reference period. Exceeding the quota constitutes a criminal offence.

The Commission observes that, since in the questions submitted it was intended to obtain a ruling on the incompatibility of a provision of national law with Community law, they are inadmissible in the context of a reference for a preliminary ruling but that in substance they amount to asking whether Regulation No 123/67 or Articles 30 to 37 of the Treaty must be interpreted as prohibiting national provisions

containing quantitative restrictions on the production of poultrymeat.

Regulation No 123/67

The organization of the market established by Regulation No 123/67 not only covers the trade in the products concerned but also contains provisions which affect production and apply to this stage or at any rate enable Community measures to be adopted on production (Article 2). The absence of positive Community intervention measures at the production stage cannot be interpreted as an intention to confer powers in this sphere upon the national authorities and merely reflects the conscious choice of a Community policy based upon the machinery of supply and demand and the action of the undertakings concerned.

The Council's decision not to establish within the framework of Regulation No 123/67 intervention machinery for the poultrymeat sector clearly implies that the Member State may not individually establish national intervention machinery which would distort competition and infringe the prohibition against discrimination laid down in Article 40 (3) of the Treaty.

The Commission considers that this argument also applies, *mutatis mutandis,* to restrictions imposed on production in this sector.

Such direct intervention by the national authorities would be at odds with the intention expressed in Regulation No 123/67 to leave production for the marked to be adapted by the relevant sectors. The reasons why intervention measures by the Community, and consequently by the Member States, were avoided also apply to limitations on production.

The options selected by the Commission and the Council when the organization of the market in this sector was established show that measures to standardize prices are to be left to the forces inherent in the production process itself. This explains why the agreements on voluntary restrictions concluded between producers are less open to criticism than intervention by the authorities because, whilst such agreements are not representative of those forces inherent in the production process, they are at all events derived therefrom.

The fact that measures intended to encourage action by trade and joint-trade organizations to facilitate the adjustment of supply to market requirements (Article 2 of Regulation No 123/67) were not taken does not justify unilateral measures by the Member States to limit production.

At the most the Member States can take measures to encourage action along the lines indicated in the abovementioned Article 2 (1) by granting financial aid on the conditions prescribed in Articles 92 to 94 of the Treaty.

The prohibition on quantitative restrictions (Articles 30 to 37 of the Treaty)

Although the provisions of the Treaty on quantitative restrictions and measures having equivalent effect refer only to measures relating to marketing it must in fact be considered whether they are applicable to restrictions on production. Limitation of production at the stage of slaughter of the fowls might in fact have an incidence not only upon the export of poultrymeat but also on the marketing of chicks and of eggs.

With regard to the incompatibility of limitations on production with the organization of the market in the relevant sector the Commission considers that it is clear from the case-law of the Court that the prohibition on quantitative restrictions or on measures having equivalent effect laid down by the

Treaty no longer constitutes an independent factor in itself once it has been established that a national measure restricting production infringes the provisions relating to the Community organization of the market.

The Court of Justice emphasized that in assessing the compatibility of national provisions with Articles 30 to 34 account must be taken both of the factual and legal background to such provisions.

The Commission refers in particular to the judgment of 30 October 1974 (Case 190/73, *Van Haaster* [1974] ECR 1123). It is clear from this judgment that restrictions on production must be appraised within the framework of the totality of the provisions on the establishment of a common organization of the market rather than within the context of Articles 30 to 34 of the Treaty even if a specific provision of an agricultural regulation renders these articles applicable to the relevant organization of the market. Furthermore, the decisions of the Court on national maximum prices (judgment of the Court of 26 February 1976 in Case 65/75, *Tasca* [1976] ECR 291; judgment of the Court of 26 February 1976 in Joined Cases 88 to 90/75, *Sadam* [1976] ECR 323), in which the Court drew a distinction between compatibility with the organization of the market on the one hand and compatibility with Article 30 on the other, related to a different case, namely that of a maximum price which was not in itself incompatible with the organization of the market. In such a case the Member States could continue to control within the framework of their general economic policy certain aspects of the production and marketing of products.

The Commission concludes that in the relevant sector, poultrymeat, the prohibition on quantitative restrictions and measures having an equivalent effect does not constitute an independent factor with regard to national action to limit production. Such national action is forbidden because it is contrary to the provisions relating to the organization of the market. If the Court were to consider that such national action was not prohibited in terms of the organization of the market but remained within the competence which Community law expressly or by implication has left to the Member States it would be necessary to check whether its restrictive effect on the free movement of goods exceeds the proper scope of such national action. This would be so if that restrictive effect were disproportionate in relation to the aim in view or if that aim could be attained by less restrictive action.

Such a restrictive effect does not obtain unless the measures limiting production are accompanied by measures at the marketing stage, which is not so in the present case.

The Commission suggests that the reply to the national court should be:

'The organization of the market in poultrymeat, especially Regulation No 123/67/EEC rules out national provisions imposing quantitative restrictions on the production of poultrymeat'.

B — Observations of the Netherlands Government

According to the Netherlands Government the present proceedings arise out of the abovementioned judgment of the Court of 30 October 1974 in Case 190/73, *Van Haaster.* This was the judgment in view of which the Openbaar Ministerie intervened against the decision of the court of first instance which found the accused guilty. It is in fact necessary to consider whether the 1974 regulation, adopted prior to the *Van Haaster* judgment, was not also contrary to provisions of the Community market.

The Netherlands Government first went over the difficulties in the sector for the production of fowls for slaughtering in

1974 and explained that in the Netherlands it was usual for an agreement limiting production concluded in the trade concerned to be established in terms of public law. It was in fact the 'Produktschap' ('Production Board') for poultry and eggs which, for the relevant Netherlands sector, cooperated in the international negotiations. The circumstance that, with regard to the implementation of the agreement, the Produktschap exercised its powers as a decision-making body in public law in no way precludes the limitation on slaughtering resulting from action taken by European trade and joint-trade organizations. The Netherlands Government emphasizes the weight given in Regulation No 123/67 of the Council to the need to facilitate the adjustment of supply to market requirements (fourth recital). It is clear from Article 2 (1) of the regulations that arrangements with a view to such adaptation must be left to the relevant trade or joint-trade organizations. Unlike the national system which forms the subject-matter of Case 190/73 *(Van Haaster)* the scheme in question does not contain criteria as to quality to which the Court attached fundamental importance in its appraisal of the restrictive effect of the system under consideration.

The system of production of hyacinths considered in Case 190/73 further differs from the present scheme in that the latter follows from multilateral negotiations conducted at European level by the trade organizations concerned and that it consists of temporary measures.

The Commission of the European Communities, represented by its agent, Mr Bourgeois, submitted its oral observations at the hearing on 30 March 1977.

The Advocate-General delivered his opinion at the hearing on 28 April 1977.

Decision

1 By a judgment of 28 October 1976, which was registered at the Court Registry on 24 November 1976, the Gerechtshof, Amsterdam under Article 177 of the Treaty referred the following question for a preliminary ruling: 'Must the rules contained in the Verordening Produktie Slachtpluimveesector 1974 of the Produktschap voor Pluimvee en Eieren be regarded as being incompatible with Regulation No 123/67/EEC of the Council of the European Economic Community of 13 June 1967 on the common organization of the market in poultrymeat or with Articles 30 to 37 of the EEC Treaty?'

2 The national rules referred to in the question restrict for the second half of 1974 the slaughter of poultry by fixing quotas calculated in terms of a reference period.

3 In connexion with criminal proceedings instituted against the operator of a poultry slaughter-house for having slaughtered more poultry than the quota

permitted him by the Produktschap, the institution governed by public law controlling the organization of the market in this sector, the question arose whether the rules which, it was charged, the accused had infringed were compatible with Regulation No 123/67 of the Council or with Articles 30 to 37 of the Treaty.

4 Whilst the Court cannot, within the framework of Article 177 of the Treaty, give a ruling on the interpretation and validity of provisions of national legislation or regulations it may nevertheless provide the national court with an interpretation on the issues coming within Community law which will enable that court to resolve the legal problem before it.

5 What is really at issue is whether Regulation No 123/67 of the Council and Articles 30 to 37 of the Treaty must be interpreted as prohibiting within the poultrymeat sector measures restricting production or marketing like those implemented through the national provisions referred to.

6 The organization of the market in poultrymeat established by Regulation No 123/67 of the Council prohibits, with regard to the internal market, State aids, any customs duty or charge having equivalent effect and any quantitative restriction or measure having equivalent effect and covers rules for marketing but it does not establish an intervention system in any form whatsoever.

7 Article 2 of the regulation however provides that a certain number of Community measures may be taken by the Council, 'in order to encourage action by trade and joint-trade organizations to facilitate the adjustment of supply to market requirements, with the exception of action relating to withdrawal from the market'.

8 At the time of the dispute, the Council had not and, up to the present time, has not exercised the powers conferred upon it for this purpose.

9 In order to remedy the surplus on the poultrymeat market and the appreciable fall in prices which were recorded in 1974 the Council granted a financial aid for publicity campaigns to promote the consumption of poultrymeat products whilst the Commission encouraged export by

increasing refunds and also suggested that the producers in the various Member States should take action to limit voluntarily the production of poultry for slaughter.

10 According to the statements of the Commission in the course of the oral procedure concerted action amongst undertakings, which in certain cases, moreover, was encouraged by State aids led by methods which varied from one State to another to a fall in production of approximately 10 % in relation to 1973 which, according to the report of the Commission on the agricultural situation for 1974, was in accordance with the aim in view.

11 Since it had apparently not been possible to arrange this voluntary action amongst producers in the Netherlands, the Produktschap, the trade organization in this sector, with the concurrence of the Netherlands Minister of Agriculture, adopted a measure limiting the slaughter of poultry by fixing for the second half of 1974 quotas calculated on the amount of poultry slaughtered during a reference period.

12 The question submitted calls for a decision whether, taking account of the encouragement by the Community authorities to reduce production in order to counter the fall in prices, the national measure in dispute must be considered as incompatible with the provisions of Community law cited by the national court.

13 Once the Community has, pursuant to Article 40 of the Treaty, legislated for the establishment of the common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it.

14 In its communication of 23 January 1967 to the Council (Doc./CEE/SEC (67) 115 final) the Commission justified the absence of all measures of intervention from its proposal for a regulation on the organization of the market in poultrymeat by the consideration that, because of the nature of the production in this sector and of the structure and marketing of such production, together with the large part played by variable elements in the production costs, 'intervention on the market in eggs and poultrymeat is not desirable'.

15 In the same document the Commission also observed that the rapid adaptation of the volume of production to demand which, it maintained, is characteristic of the market in poultrymeat means that 'before the intervention machinery intended to withdraw from the market a certain quantity of goods can bring about positive results, forces pertaining to the production process itself are already in operation to adjust prices to a normal level'.

16 It may be inferred from those considerations that the absence of measures concerning the withdrawal, where necessary, of products from the market does not stem from an omission or from an intention to leave measures of this nature to the appraisal of the Member States but is rather the consequence of a considered choice of economic policy of relying essentially on market forces to attain the desired balance.

17 This conclusion is confirmed not only by Article 13 of the regulation in accordance with which any quantitative restriction or measure having equivalent effect is prohibited in the internal trade of the Community but further by Article 2 of the same regulation whereby measures may be taken in order to encourage action by trade and joint-trade organizations to facilitate the adjustment of supply to market requirements, with 'the exception of action relating to withdrawal from the market'.

18 It thus follows from the general tenor of the regulation that, as regards the internal trade of the Community, the organization of the market in the product in question is based upon freedom of commercial transactions under conditions of genuine competition.

19 Even if the national restrictions on slaughter must be regarded as referring to the production and not to the marketing of the products they are also prohibited by Article 2 of Regulation No 123/67 as amounting to withdrawal of the products from the market and as constituting quantitative restrictions capable of affecting, potentially at any rate, the system of trade as it has been set up by the organization of the market established by Regulation No 123/67.

20 Nevertheless it must be considered whether the circumstance that the Commission suggested to the trade and joint-trade organizations that they should accept a voluntary limitation of production by their members perhaps justifies an interpretation of Article 2 in accordance with which a decision of

a national public authority entrusted with the organization of the trade imposing a common measure on all the undertakings concerned is in accordance with the said Article 2 and consequently permissible.

21 Although Article 2 of Regulation No 123/67 provides, in order to facilitate the adjustment of supply to marketing organizations, that recourse may be had to action by trade and joint-trade organizations, this is subject to the express condition that Community measures are concerned, and such action may not include withdrawal from the market.

22 Whilst the adoption of Community measures does not necessarily imply that the implementing measures should be in all respects identical throughout the Community it nevertheless precludes measures adopted independently by trade and joint-trade organizations each in a specifically national framework, since uncoordinated action is of such a nature as to cause discrimination between producers and consumers and to distort trade between the Member States.

23 Furthermore even if cooperation of this nature between producers or associations of producers could be considered compatible with Regulation No 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition (1959-1962, p. 129), nevertheless such agreements cannot have as their objective the infringement of the express provision in Article 2 of Regulation No 123/67 prohibiting action relating to withdrawal from the market.

24 Serious doubts must accordingly be entertained whether the encouragement and suggestions of the Commission to the trade or joint-trade organizations concerning withdrawal from the market were in accordance with Article 2 of Regulation No 123/67.

25 The circumstance that the Community authorities encouraged practices which are not in accord with Community law does not allow the Court to concede that like measures taken by a public institution of a Member State are compatible with Regulation No 123/67.

26 Furthermore it must be observed that there is in any event a marked difference between measures relating to voluntary reduction and binding measures imposed by an authority governed by public law.

27 The reply to the question submitted must therefore be that Regulation No 123/67, especially Articles 2 and 13 thereof, must be interpreted as making measures enacted by the national authorities to impose a quota on the slaughtering of poultry incompatible with those provisions.

28 The reply which has been given renders superfluous an interpretation of Articles 30 to 37 of the Treaty.

Costs

29 The costs incurred by the Netherlands Government and the Commission of the European Communities which submitted observations to the Court are not recoverable.

30 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the question submitted to it by the Gerechtshof, Amsterdam by judgment of 28 October 1976, hereby rules:

Regulation No 123/67, especially Articles 2 and 13 thereof, must be interpreted as making measures enacted by the national authorities to impose a quota on the slaughtering of poultry incompatible with those provisions.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 18 May 1977.

A. Van Houtte — Registrar

H. Kutscher — President