OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 14 May 1987 *

Mr President,
Members of the Court,

1. I — The Gerechtshof (Regional Court of Appeal), Arnhem (Netherlands), has asked the Court to interpret a number of provisions of Community law, with a view to determining the compatibility therewith of the system for the licensing of rendering plants provided for in the Destructiewet (Netherlands Law on the destruction of animal carcasses and offal) of 21 February 1957, in particular with regard to poultry offal.

2. The question submitted, to which there is a preamble putting it into context, is worded as follows:

'How should the following be interpreted — Article 30, Article 34, Article 36 and Article 37 of the EEC Treaty, singly or in combination, Regulation (EEC) No 827/68 of the Council of 28 June 1968 on the common organization of the market in certain products listed in Annex II to the Treaty and Regulation (EEC) No 2777/75 of the Council of 29 October 1975 on the common organization of the market in poultry-meat, singly or in combination — in view of the fact that the destruction of poultry offal is restricted solely to a few licence-holders?'

3. The question arose in criminal proceedings brought by the Netherlands Public Prosecutor against Nertsvoederfabriek Nederland BV ('Nertsvoederfabriek'), which was accused of having set up and brought into operation or kept in operation between January and October 1984, contrary to Article 5 of the Destructiewet, a plant exclusively or mainly intended to render innocuous unsound material from the animals slaughtered there, in particular by processing it into a product (a brownish powder) suitable for incorporation into animal feedingstuffs. That operation is governed by the Destructiewet, in order to prevent any risk or damage to or impairment of the environment and public health.

4. The Destructiewet applies in particular to poultry offal which is manifestly unfit for human consumption and comes from establishments where poultry is slaughtered by way of trade, with the exception of offal put to any other useful purpose (Article 2 (1) (f)).

5. Article 4 prohibits the disposal of offal otherwise than by processing in a rendering plant and Article 5 (1) prohibits the setting up or keeping in operation, and the extension or alteration, of a rendering plant without a licence.

6. Accordingly, a person owning or in possession of offal is obliged to declare it and to hand it over, free of charge, to the appropriate municipal authority, although in some cases a payment is made (Article 12). The local authority gives the offal to a duly authorized rendering plant, which is

* Translated from the Portuguese.

required, also free of charge, to take delivery of the offal and process it.

7. Any company in possession of offal is thus prevented from disposing of it otherwise than in the prescribed manner, such as by processing it itself, converting it or using it in any other way, or marketing it or, as stated in the question submitted by the national court and acknowledged by the Netherlands Government, by exporting it to other Member States or to non-member countries. By virtue of that provision, not even the rendering plants themselves can sell the offal received on the market in the Netherlands or export it.

8. At the present time there are four rendering plants in the Netherlands, each operating in an area allocated to it in which it enjoys exclusive rights.

9. The economic importance of the system lies in the fact, to which attention is drawn in the order for reference, that the slaughtering of poultry yields offal which represents about 18% of the bird (between 20 and 25% according to the Netherlands Government), of which about one quarter can be usefully employed for another purpose. As a result, Netherlands undertakings which slaughter poultry are prevented from carrying out the potentially profitable processing of the offal which, although unfit for human consumption, has an economic value if it is converted into high-protein animal meal.

10. II — Since the application of Article 169 of the Treaty is not involved in this case, it is inappropriate here to determine whether or not a Member State has failed to comply with the Community rules.

11. A question has been submitted under Article 177 for a preliminary ruling, and it is for the Court to give a decision on the interpretation of Community law, against the background of the matters of fact and law described by the national court, so as to enable the latter to adopt a decision in the main proceedings that is not incompatible with the provisions of Community law which are directly applicable in the internal legal system. [1]

12. The fact that the Commission has instituted proceedings against the Netherlands State under Article 169 for failure to fulfil its obligations cannot change the nature of the present proceedings, which are not intended to serve the same objectives and, consequently, could not be substituted for proceedings under Article 169.

13. It must also be emphasized that the question in these proceedings relates only to poultry offal and not to the offal of animals in general, and my analysis will be restricted accordingly.

14. The question submitted by the national court appears to me to have the following objectives:

On the one hand, to determine whether a system of the type provided for in the Netherlands law, which entails an almost total prohibition of the marketing of the

1 — See, for example, the judgments of 26 January 1977 in Case 49/76 *Gesellschaft für Überseehandel* [1977] ECR 41; of 23 November 1977 in Case 38/77 *Enka* [1977] ECR 2203; of 29 June 1978 in Case 154/77 *Dechmann* [1978] ECR 1573; of 17 December 1981 in Case 272/80 *Biologische Produkten* [1981] ECR 3277 at p. 3290, paragraph 9.

offal in question, is compatible with the prohibition of measures having an effect equivalent to quantitative restrictions on imports and exports laid down in Articles 30 and 34 of the EEC Treaty, and whether that prohibition might possibly be regarded as justified on public health grounds under Article 36;

On the other hand, to determine whether that system is compatible with the rules on the common organization of the market laid down in Regulations Nos. 827/68 and 2777/75, in so far as it eliminates the free market in such products by compelling producers to give the poultry offal to the only authorized purchaser in a given region, with the result that the latter enjoys a monopsony.

15. I would add that the reference by the national court to Article 37 of the EEC Treaty does not appear to require this Court to interpret that provision, in view of the nature of the matters of fact and of law set out in the order for reference. It will in fact suffice to consider the exclusive rights position from the point of view of its effect on the functioning of the common organization of the market or markets.

16. III — Let us therefore analyse the two points into which I have just resolved the question submitted, starting, for logical reasons, with the second, namely determination of the extent to which the two sets of rules on the common organization of the markets referred to by the national court preclude a system of the type set up in the Netherlands.

17. Poultry offal unfit for human consumption is covered, under Tariff heading 05.15, by Regulation (EEC) No 827/68 of the Council of 28 June 1968 on the common organization of the market in certain products listed in Annex II to the Treaty.[2]

18. As regards the other common organization of the market mentioned in the question submitted for a preliminary ruling, which was established by Council Regulation No 2777/75 of 29 October 1975[3] and relates to the poultry-meat sector, it does not cover poultry offal unfit for human consumption but only edible offal.

19. Since the question submitted relates only to the first type of offal, I do not think that it is necessary, for the purpose of giving the national court guidance for a decision in the main proceedings, to interpret the principles underlying Regulation No 2777/75.

20. It is true that the Commission referred, in the observations which it submitted in these proceedings, to Directive 71/118/EEC on health problems affecting trade in fresh poultry-meat,[4] in support of the view that certain poultry offal might, in particular circumstances, be covered by Regulation No 2777/75.

21. However, the Commission made it clear that it had in mind a case where the slaughtered bird was, at the time of the compulsory veterinary inspection, regarded as partially unfit for human consumption as a result of damage suffered, the offal nevertheless remaining fit for human

2 — OJ English Special Edition 1968 (I), p. 209.

3 — OJ 1975, L 282, p. 77.

4 — Council Directive of 15 February 1971, OJ English Special Edition 1971 (I), p. 106.

consumption. But the present case is concerned exclusively with offal which is unfit for human consumption; it is therefore unnecessary here to consider the interpretation of Directive 71/118 or Regulation No 2777/75.

22. Moreover, the fact that, according to the reply given by Nertsvoederfabriek to a question put by the Court, by virtue of consumer habits in the Netherlands certain offal which is regarded as edible 'according to Community law definitions' may be regarded as unfit for consumption does not mean that Regulation No 2777/75 is applicable to the present case. That regulation is designed to protect human consumers and is not relevant with respect to waste materials which are to be destroyed.

23. Let us therefore consider to what extent the Destructiewet is compatible with Regulation No 827/68.

24. In my opinion, that regulation does not preclude Member States from establishing systems for collection and processing which are designed to maintain hygiene and protect human and animal health and to conserve the environment, which might otherwise be exposed to danger. As we have seen, those are the objectives of the system governed by the Destructiewet, in so far as it provides that offal or waste materials which cannot be put to any other useful purpose must be collected and destroyed in such a way that, having regard to their potential harmfulness, they cannot constitute a danger to public health.

25. Regulation No 827/68, which is at times regarded as a 'subsidiary regulation' or one of a residual nature, is intended above all to cover products which, although not covered or not capable of being covered by a common organization of the market, whether existing or to be established, are marketable in one form or another. Thus, that regulation covers, in particular, miscellaneous waste materials of vegetable and animal origin and has been referred to as a 'dustbin' or a 'drawer' for left-overs.

26. It is not therefore surprising that the regulation does not lay down specific machinery for a common organization of the market created by it, by contrast with the procedure followed for the great majority of the other market organizations. In essence, it is a set of commercial rules based simply on the principle of freedom of commercial transactions within the common market, the application of the Common Customs Tariff and the prohibition, in principle, of State subsidies.

27. Consequently, it does not seem to me to be possible to extrapolate for that common organization of the market, as suggested in the observations of the defendant in the main proceedings and the Commission, principles established by the case-law of the Court with respect to other common organizations, such as the 'open market' principle, according to which every producer is to have free access to the market and the functioning thereof is regulated solely by the instruments and machinery provided for by the respective common organizations. [5]

28. However, the question must still be asked whether such a system, based on the existence of a limited number of duly licensed rendering plants each of which has

5 — See, for example, judgments of 18 May 1977 in Case 111/76 *Van den Hazel* [1977] ECR 901; of 29 November 1978 in Case 83/78 *Pigs Marketing Board* [1978] ECR 2347; of 26 February 1980 in Case 94/79 *Vriend* [1980] ECR 327.

exclusive rights in a particular area, is compatible with the principles of freedom of trade embodied in Regulation No 827/68.

29. It is undeniable that a licensing system of that kind does in principle have a restrictive effect on freedom of trade.

30. However, it should be remembered that, as emphasized by the Court in its 1985 judgment on 'waste oils',[6] 'the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired'.

31. There can be no question of excluding protection of the environment and of public health from the general objectives of the European Community.

32. Having regard to those same objectives, Council Directive 75/439 of 16 June 1975[7] established a system similar to that under review here, which, for the disposal of waste oils, allowed Member States the possibility of authorizing only one undertaking to collect and dispose of such products in the area assigned to it.

33. The Court, in its judgment of 7 February 1985 in Case 240/83 *Procureur de la République* v *ABDHU*, took the view that such a system did not infringe any superior rule of Community law.

34. Account should also be taken of the fact that there has been no harmonization or approximation of the laws of the Member States in relation to the matter at issue here and therefore the Member States cannot be denied the right freely to establish the systems for collection and destruction of waste materials which they consider most conducive to the protection of public health and the environment.

35. It is always necessary, however, for restrictions on the principle of freedom of trade to be kept to the minimum required to achieve those objectives, having regard to the principles of proportionality and non-discrimination.[8] In particular, systems of licences and allocation of zones will only be beyond criticism where it cannot be shown that those objectives can be attained by systems which encroach to a lesser extent upon the principle of proportionality.

36. That is particularly true in view of the fact that the Netherlands legislation in question expressly excludes from its provisions offal that can be put 'to another useful purpose', which is allowed to be marketed provided that the precautions laid down in the applicable regulations are observed (for example, storage of the waste materials in closed casks until they are cooked — an operation which can be dispensed with in certain cases). Those operations may involve risks to the environment and to human and animal health which are identical to those arising from waste materials which are to be processed into products that can be used in animal feedingstuffs.

6 — Judgment of 7 February 1985 in Case 240/83 *Procureur de la République* v *ADBHU* [1985] ECR 531 at p. 549, paragraph 12.

7 — OJ 1975, L 194, p. 31.

8 — Case 240/83, *supra*, at p. 549, paragraph 13.

37. The legislature took the view, however, that in one case such risks could be controlled without detriment to normal trade but could not in the other case.

38. IV — *A* — The other aspect of the question submitted is the issue of the extent to which the restrictive effect on intra-Community trade resulting from the system provided for in the Destructiewet is compatible with the prohibitions laid down in Articles 30 and 34 of the Treaty and whether, if that is not the case, those effects may be justified under Article 36.

39. The defendant in the main proceedings and the Commission contend, in their respective observations, that, by prohibiting the disposal of poultry offal otherwise than under the system of processing established by it, the Destructiewet prohibits exports and, indirectly, imports.

40. It is doubtful whether the answer to this part of the question submitted is of any real use to the national court since the main proceedings concern charges against an entrepreneur who installed and brought into operation in his slaughterhouse a unit for the processing of offal for which he did not have proper authorization. The national court — which has the responsibility of disposing of the case before it and has direct knowledge thereof — is in a better position than anyone else to decide as to the relevance of the questions submitted and as to the usefulness of the interpretative criteria which it seeks from the Court of Justice with a view to giving the judgment required of it. [9]

9 — See *Pigs Marketing Board*, *supra*, at p. 2368.

41. *B* — It must, however, be stated that, as regards the interpretation of Article 30 — the principle of which is, moreover, reflected in the second part of Article 4 (1) of Regulation No 827/68 — with a view to providing the national court with guidance enabling it to assess any impact on imports of the system established by the Destructiewet, the information on record in these proceedings is clearly insufficient to allow a categorical and direct answer.

42. But it seems to me that the Netherlands legislation does not directly give rise to any prohibition of imports of the products in question. Apparently, anyone who wishes may import them provided that he brings them within the compulsory system created, within the frontiers of the country, by the Destructiewet, by handing them over to the local authorities for subsequent transfer to the disposal undertakings.

43. However, it is the conditions upon which the products must be handed over — in principle, without any payment being made — which ultimately discourage imports.

44. The Court has taken the view on innumerable occasions [10] that 'Article 30 of the Treaty, in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.

45. The peculiar feature of the present case lies in the fact that the system created by the Netherlands legislation conduces a complete

10 — See, for example, the judgment of 10 July 1984 in Case 72/83 *Campus Oil* [1984] ECR 2727 at p. 2746, paragraph 15.

prohibition of marketing, by preventing the market mechanisms from operating not only in relation to imports but also within the Netherlands.

46. The system created by the Destructiewet is not designed to, nor does it in fact, have a protective effect on any internal production since, as a rule, Netherlands traders are also prevented from making any profit out of the inedible poultry offal in their possession.

47. On the other hand, it should be remembered that in this area there is no harmonization of the national provisions in force, and no details are available of the regulations applicable to such products in the other Member States.

48. This aspect of the issue is, moreover, of secondary importance in the context of the main proceedings and it does not appear from the actual question submitted by the national court, even though it refers at the end to Article 30 of the Treaty, that an answer on this point is required (by contrast with the case of exports).

49. In any event, the observations submitted in these proceedings by the Netherlands Government show that, in certain cases, the licensed rendering plants are themselves obliged to pay for the offal which they receive, in order to avoid competition from other quarters as a result of the possibility of processing the offal with a view to putting it to 'other useful purposes'.

50. This means that the system does not completely eliminate the market, and therefore the situation does not in all cases give rise, as an inevitable consequence, to the discouragement of imports.

51. If, in addition, other restrictions on imports were imposed, which hindered the entry of products legally marketed in other Member States, Article 30 would without doubt come into play. However, in these proceedings there is nothing to indicate that that is the case.

52. Accordingly, it is unnecessary to consider whether the conditions justifying exceptions provided for in Article 36 are fulfilled.

53. I consider, therefore, that any answer to be given on this matter must be limited to the specific points which have been duly clarified, formulating the general principles applicable.

54. *C* — As regards the interpretation of Article 34, it likewise cannot be said that the information given in these proceedings is wholly conclusive.

55. The positions of the various parties involved concerning the restrictive effect on exports attributable to the Destructiewet do not wholly coincide.

56. The national court stated in its judgment submitting the question that 'according to the government concerned the legislation entails a prohibition on the exportation of material for destruction'; similarly, the Commission considers that the Netherlands legislation prohibits exports by anyone whatsoever, in such a manner as to constitute, in its opinion, an outright infringement of Article 34 of the Treaty.

57. For its part, the Netherlands Government concedes that the Destruc-

tiewet, by requiring that offal should be handed over to the local authority, by implication prohibits the removal of the offal from the municipal area. There is accordingly, it explains, a total prohibition on marketing, both internally and in other Member States, and there is thus no specific restriction on exports.

58. Nertsvoederfabriek points out that Article 4 of the Destructiewet entails, by implication, a prohibition of exports but that in practice there has ceased to be a restriction, since a judgment was given on 13 November 1985 by the Raad van State (court of last instance in administrative matters) — or a decision of the President thereof — to the effect that the Destructiewet does not prohibit the exportation of offal and that the competent administrative authorities must take the measures necessary to facilitate exports.

59. Be that as it may, the Court of Justice has already held, first in the *Inter-Huiles*[11] judgment and subsequently in the 1985 judgment on waste oils,[12] that the Community rules prevent any Member State from organizing within its territory a system for the collection and disposal of waste oils which, by virtue of exclusive rights of the kind provided for in the Destructiewet, is liable to prohibit exports to a licensed disposal or recycling undertaking in another Member State.

60. Considerations of protection of public health would not of themselves be such as to justify that prohibition: that objective (like that of protecting the environment) is attained just as certainly where the poultry (like the waste oil — see the *Inter-Huiles* judgment, paragraph 14) is sold to a specialized establishment situated in another Member State as where it is disposed of in the Member State of origin — provided that, during transport and disposal, the necessary precautions are taken to prevent any risks — regardless of the fact that the various national systems are not in any way harmonized.

61. In any event, it is incumbent upon a Member State which seeks to rely upon such considerations to show that there are no less onerous ways of ensuring compliance with the requirements of public health to which Article 36 of the Treaty refers.

62. The Netherlands Government also claims that it is necessary to ensure the profitability of the licensed rendering plants, which are obliged by law to collect free of charge all animal offal, with or without economic value. Although it may not be feasible to require a payment from small producers of such offal (who might then be tempted to avoid surrendering the offal for destruction), the fact remains that there are other ways of paying for fulfilment of the public service obligations imposed on rendering plants, without having recourse to a prohibition of exports (*Inter-Huiles* judgment, paragraph 13).

11 — Judgment of 10 March 1983 in Case 172/82 *Fabricants raffineurs d'huiles de graissage* v *Inter-Huiles* [1983] ECR 555 at p. 566.

12 — [1985] ECR 549 at paragraph 14.

63. V — I therefore propose that the Court should give the following answers to the questions submitted by the Gerechtshof, Arnhem:

(1) Regulation No 827/68 of the Council of 28 June 1968 does not prevent a Member State from adopting a system under which all poultry offal intended for processing, so as to render it harmless by converting it into useful products, must be handed over, in principle free of charge, to a limited number of duly licensed undertakings, provided that the same objectives cannot be attained by a system which is less restrictive of freedom of trade within the Community.

(2) Article 30 of the Treaty prevents the imposition, as part of such a system, of restrictions on the importation of offal lawfully marketed in other Member States, which make it impossible to take advantage of such market conditions as exist, provided that the other marketing requirements applicable to national traders are fulfilled.

(3) The Community rules on free movement of goods and, in particular, Article 34 of the Treaty, prohibit a system of the type provided for by the Destructiewet for the collection and destruction of poultry offal unfit for human consumption to the extent to which it leads to an absolute prohibition of exports of such offal, purportedly justified by the fact that such a system is necessary to ensure the profitability of licensed rendering plants. Any restriction introduced under Article 36 of the Treaty, in particular for the protection of the life and health of humans and animals, must be non-discriminatory and proportionate to the objective pursued.