sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it, having regard not only to the express provisions of the legislation but also to its aims and objects.

4. A national intervention mechanism is incompatible with Regulation No 234/68 on the establishment of a common organization of the market in live plants in so far as products which do not satisfy Community standards laid down under the regulation qualify for the intervention.

5. An internal levy on sales of a product is incompatible with the prohibition of discrimination embodied in the EEC Treaty when it falls more heavily on export sales than on sales on the national market or when the revenue from the levy is designed to place national products at an advantage.

In Case 51/74

Reference to the Court of Justice under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven for a preliminary ruling in the action between

P. J. VAN DER HULST'S ZONEN (Limited Liability Partnership) of Hillegom

and

PRODUKTSCHAP VOOR SIERGEWASSEN (Ornamental Plant Authority) of The Hague

on the interpretation of

1. Article 16 of the EEC Treaty and Article 10 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 (OJ L 55, p. 1)

2. Article 40 of the EEC Treaty and Article 1 of Regulation No 234/68

3. Article 93 (3) of the EEC Treaty

THE COURT

composed of: R. Lecourt, President, Lord Mackenzie Stuart, President of

Chamber, A. M. Donner, R. Monaco, P. Pescatore, H. Kutscher and M. Sørensen (Rapporteur), Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The judgment making the reference and the written observations submitted under Article 20 of the Statute of the Court may be summarized as follows:

I — Facts and procedure

1. P. J. Van der Hulst's Zonen (hereinafter called Van der Hulst), a limited liability partnership, grows and sells flower bulbs. It lodged an appeal before the College van Beroep voor het Bedrijfsleven against a decison of the Produktschap voor Siergewassen (hereinafter: PVS), a trade body coming under public law, which was claiming payment of a series of charges in respect of the 1972 crop on the basis of Dutch regulations as laid down in several regulatory orders of the PVS. Van der Hulst disputes the legality of two kinds of charge: the 'surplusheffing' (surplus levy), imposed under the 'Verordening Surplusheffing' and the 'vakheffing' (trade levy), imposed under the 'Verordening Vakheffing'). [1] The plaintiff contends that these charges are not enforceable because they are incompatible with certain provisions of Community law.

2. Before giving its decision, the College van Beroep stayed proceedings and referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty on the following questions:

(1) Are Article 16 of the Treaty and Article 10 of Regulation (EEC) No 234/68 to be interpreted as meaning that 'charges having equivalent effect' as referred to in those Articles also include levies such as those pursuant to the 'Regulation — Surplus Levy' and the 'Regulation — Trade Levy'?

(2) Does it follow from Article 40 of the Treaty and Article 1 of Regulation (EEC) No 234/68, or from any other provision or general legal principle of Community law that, as regards the sector defined in Article 1 of Regulation (EEC) No 234/68, Dutch bodies having legislative capacity are no longer permitted to make any market-regulatory provisions such as that contained in the 'Regulation — Surplus Levy' and in the 'Regulation — Trade Levy', except for the purpose of carrying the provisions of Regulation (EEC) No 234/68 or any

1 — *Translator's Note:* These are the names given by the College van Beroep to the regulatory decrees issued by the PVS with the consent of the Minister of Agriculture.

other provisions of Community law into effect?

3. (a) Must Article 93 (3) be understood as meaning that the procedure referred to in the second sentence of that paragraph also includes the giving of notice, as defined in Article 93 (2) and to which paragraph (3) refers?

   (b) If this question is to be answered in the affirmative, must Article 93 (3) be interpreted as meaning that such giving of notice on the part of the Commission has as a consequence that the relevant national support measure must not be carried into effect for as long as the procedure previously referred to has not resulted in a final decision?

(a) In the judgment of reference, the College van Beroep gives the following information about the surplus levy.

A seller of bulbs, is, upon the sale thereof, obliged to grant dealers in possession of a trade card a reduction in the sale price charged by him. A trade card is issued by the PVS to dealers registered with them as bulb-dealers and who fulfil the obligation upon them to pay the advance on the surplus levy. Every seller is obliged to pay a levy upon the sale of bulbs to a purchaser not in possession of a trade card. The allowances and levies are of the same amount.

Under the system laid down by the PVS regulations a levy is paid by every seller of bulbs — thus also by an exporter — who sells to a purchaser, Dutch or foreign, who does not hold a trade card.

The revenue from the levy is paid by the PVS to the 'Stichting Bloembollen-surplusfonds' (bulb surplus levy fund) which use sums so collected to finance the purchase of bulbs submitted to it for destruction because on the free market they did not fetch the minimum price fixed by the fund.

As regards the regulations concerning the trade levy, the College van Beroep notes that it also comprises a system of allowances and levies which, however, deviates in several respects from the regulations dealing with the surplus levy. On making a sale to a dealer in possession of a trade card, the bulb seller must grant him a reduction. On making a sale to growers registered with the PVS, to flower growers using the bulbs as basic material in their own nurseries or to dealers not in possession of a trade card, the bulb seller must pay a levy to the PVS. A levy must also be paid by bulb growers and bulb dealers who sell to purchasers other than those abovementioned. The levies to be paid and the reductions to be granted are not of the same amount and there are also differences in the amounts payable by the various parties subject to the levy.

The revenue from the levy is, after deduction of an amount to cover costs of the PVS, paid into a financing fund for general trade purposes in the bulb growing sector, to pay for scientific research, advertising on behalf of the trade as a whole, and other general trade purposes.

(b) On the subject of the questions referred, the College comments that the first question means, amongst other things, that the Dutch bulb grower who uses bulbs he has grown on his own premises as basic material for his flower growing business is obliged neither to grant a recution nor to pay a levy, whereas the flower grower based in any other Member State who buys bulbs in the Netherlands for use as raw material in his business in principle pays a price for them which includes amounts corresponding to the surplus levy and the trade levy.

As regards the third question, the College comments, *inter alia*, that the regulations in question were promulgated in 1971 and that, in view of a document lodged by the applicant, containing part of a letter from the Vice-President of the Commission to the Netherlands Minister for Foreign Affairs

dated 9 February 1972, the conclusion can be drawn that the Commission was informed of the intention to introduce the new, or at least revised, aids provided for under the regulations.

4. The judgment of the College van Beroep dated 16 July 1974 was registered at the Court on 17 July 1974.

Written observations were lodged before the Court on behalf of Van der Hulst by J. van der Plas, of The Hague, by its Secretary, N. Luitse, on behalf of the Produktschap voor Siergewassen; for the Netherlands Government by W. P. L. G. de Boer, acting Secretary-General of the Ministry of Foreign Affairs, and on behalf of the Commission by its Legal Adviser, J. J. J. Bourgeois.

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

II — Written observations submitted to the Court

Van der Hulst first considers the surplus levy and comments *interalia* that a purchaser of bulbs who holds a trade card entitling him to a reduction on sales but who is also a flower grower and uses the bulbs he has bought to produce flowers on his own premises does not have to pay levy on them.

Van der Hulst further states that ultimately, the surplus levy is borne by the final purchaser of the bulbs, and points out that deldealers based abroad are not issued with a trade card.

It states that the Surplus Fund lays down quality standards for the bulbs to be bought in and contends that this practice is incompatible with Regulation (EEC) No 315/68 (OJ L 71 p. 1) concerning the quality of flower bulbs.

As regards the trade levy, Van der Hulst points out that the system employed is very complicated and makes provision for more than twenty categories of levies and reductions. Apart from the unlimited discretion conferred on the President of the PVS to grant exemptions, the provisions of the Regulation contain two examples of discrimination in the difference between the system of taxation applicable within the Netherlands and the system which applies to exports to Member States. In the first place, a selected group, viz. those in possession of a trade card based in the Netherlands, are entitled to reductions; in the second place, the rate applicable in the country is 3 % whereas the rate for exports to EEC countries is 3·5 %.

Van der Hulst raises questions concerning the system of charges on imported bulbs.

It refers to the Commission's letter of 9 February 1972 to the Netherlands Government and points out that the burden of the letter is the abolition or revision before 1 April 1972 of the systems of aid specified and of, *inter alia,* the levy imposed by the PVS in favour of the Fund for financing general purposes in the bulb sector (trade levy) and the levy imposed for the benefit of the Surplus Bulb Fund (surplus levy). Van der Hulst maintains that the two levies lead to a distortion of competition and to discrimination on the ground that they do not have the same impact on growers or dealers based inside and outside the national frontiers of the EEC countries, and that the surplus levy, in particular, is designed to keep prices at an artificial minimum to the detriment of foreign consumers of bulbs and, moreover, with the help of funds which they provide.

Van der Hulst stresses that it would be desirable for the PVS to provide information on points itemized by the plaintiff and, *inter alia,* the exemptions granted to the various groups and individuals.

Van der Hulst then asks to what extent, under Community agricultural regulations, the legislatures of Member States are still free to legislate. In its view,

Member States can enact implementing measures but it cannot be accepted that they may be inconsistent with the pattern of European Regulations or that provisions may be added to the Regulations. The more detailed and comprehensive a set of Community Regulations, the less the legislatures of Member States are free to adopt complementary rules. Member States must confine themselves to adopting regulatory enactments which are absolutely necessary for implementation of Community law.

Van der Hulst devotes attention to Regulation No 234/68 and makes particular reference to Article 2, which authorizes the Community institutions to take a number of measures designed to encourage activity by trade organizations. The powers conferred on the Community are exclusive and withdraw from Member States the freedom to take such measures at national level; it is left entirely to the discretion of the Community institutions to decide on the action to be taken and when to adopt the necessary measures. The regulatory orders of the PVS which are the subject of dispute deal with measures making it possible to encourage more efficient methods of production and marketing and, in connexion with the Surplus Fund, with a measure making it easier to follow price movements on the market. Only Community institutions can take these measures.

For these reasons Van der Hulst concludes that adoption of these regulatory decrees by the PVS infringes Community law because they cover a sphere of activity for which the Community institutions are alone competent.

Finally, Van der Hulst submits the following observations on the questions referred by the College van Beroep.

As regards the first question, the plaintiff emphasizes that it relies on the provisions of Article 10 of Regulation No 234/68 not merely because they prohibit the imposition of any customs duty or charge having equivalent effect but also because they prohibit any quantitative restriction or measure having exquivalent effect. It requests the Court to consider this question of its own motion. It is clear that the levies collected for the benefit of the Surplus Bulb Fund have the same effect on trade developments between Member States as quantitative restrictions. The object of these levies is to withdraw from the market and destroy bulbs which meet the standards of quality laid down by the PVS but which do not fetch the minimum prices fixed on the basis of these standards.

According to Van der Hulst, it is moreover beyond dispute that, in view of their effect on trading, these two levies must be regarded as 'charges having equivalent effect' to customs duties. An important consideration is that the income from the levies is used in the pursuit of objectives from which purchasers based in other Member States derive no direct benefit.

Another consideration is that the trade levies differ in amount according to whether the sale takes place inside the country or abroad. This difference justifies referring to the levy as a monetary charge unilaterally imposed on Member State purchasers because a frontier has been crossed.

Van der Hulst believes that the second question should be answered in the affirmative. It recalls the arguments already developed and adds that it has provided numerous examples to demonstrate that the disputed orders are in breach of the prohibition of any discrimination between producers or consumers within the Community.

As regards the third question, Van der Hulst recalls that the Netherlands Government has been called upon to adjust or remove the aids concerned. Their effect is discriminatory and they distort competition. According to Van der Hulst, that is another ground upon which they cannot be implemented so long as the procedure referred to in

•Article 93 of the EEC Treaty has not produced a final decision.

The observations of the *Produktschap voor Siergewassen* are confined to the first question. In view of the different character of the two levies concerned, it regards it as desirable to supplement the information given about them by the College van Beroep.

As regards the surplus levy, the PVS lays particular emphasis on the fact that only bulbs put on the market are affected by it. The levy cannot be applied also to bulbs used by a flower grower on his own premises because it would be impossible to check whether the bulbs complied with the standards of measurement and quality laid down for re-purchase by the Surplus Fund. Moreover, bulbs used for growing flowers on the premises constitute only a very small proportion of total bulb production in the Netherlands (about 5 %). Again, the surplus tax applies only to bulb producers. There is no payment of the surplus levy on the part of the exporter, the flower grower or national wholesale trade. The involvement of exporters and national wholesalers is confined to recovery of the levy.

The PVS claims that the surplus levy is not incompatible with Article 16 of the Treaty or with Article 10 of Regulation No 234/68.

As regards the trade levy, the PVS emphasizes that it is a levy based on the volume of business and that the costs of financing it are shared between members of the trade.

Producers have to pay the 'producer's contribution' to the trade tax (3 %) of the market value) when they sell their bulbs direct to nurserymen. When producers sell to exporters or national wholesalers, the exporters and wholesalers deduct the 'producer's contribution' from the purchase price on production of the trade card. The levy to be paid by exporters and national wholesalers therefore includes the producer's contribution.

The 'wholesaler's contribution' to the trade levy paid by exporters to the PVS is 3·5 % of the export value, less 3 % of the purchase price. According to the PVS, exports are not subject to the trade levy. Exporters do not bill their foreign clients with the levy and it is not true to say that the trade levy is 'in principle included' by exporters in their export price. The selling price is produced on an entirely free market. The national levies which affect the various suppliers have no bearing on the price. When he sells to a foreign client it is quite impossible for an exporter to work out the precise amount of his own 'wholesaler's contribution'. The amount to be paid would only be known at the end of the marketing year. In the case of sales at a loss the amount of the reduction applied would be higher than the amount of trade tax to be paid. In the opposite case, it is clear that the selling price (produced by the interplay of supply and demand) would not be any lower if the 'wholesaler's contribution' to the trade levy did not have to be paid. The only slight increase would have been in the profit made.

The PVS further points out that, as in the case of the surplus levy, it is not possible to require bulb growers who use their own bulbs in their flower growing business to pay the 'producer's contribution' to the trade levy.

Finally the PVS states that national wholesalers have, since 1965, also been under an obligation to pay it the amount which they deduct from the price owing to bulb producers, from which it follows that a trade levy of 3 % is now applied to all bulb deliveries to nurserymen, in the case of direct delivery by the producer or delivery through national wholesalers. There can be be no doubt about the fact that, by reason of the competition between the wholesalers and the producers who deliver direct to nurserymen and seedsmen situated in the Netherlands, it is impossible to go further and require the national wholesale trade to pay a 'wholesaler's contribution' to the trade levy.

In the light of its observations, the PVS concludes that the trade levy on bulbs cannot be regarded as incompatible with Article 16 of the Treaty or with Article 10 of Regulation No 234/68.

The *Netherlands Government* contends that the disputed levies do not constitute 'charges having equivalent effect' within the meaning of Article 16 of the EEC Treaty. On this point it refers to the Judgment of the Court of 12 July 1973 (*Geddo* [1973] ECR 880) in which the Court ruled that an internal tax which is imposed on national products alone and which is designed to provide funds to aid national production does not constitute a charge having equivalent effect.

The Government states that administrative considerations are responsible for the fact that bulbs cultivated by the nurseryman himself and used for the purposes of his own business are not subject to levy. The consequent disadvantage at which this could place the foreign grower applies equally in the case of the majority of Netherlands nurserymen. The Government emphasizes that the different treatment applied to these different cases arises from the objective fact that the levies are exclusively concerned with marketing.

As regards the second question, the Government first of all maintains that the mechanism of the two levies does not perform the function of a market regulator as such but is concerned exclusively with financing national measures. The Government refers once more to the Judgment of the Court of 12 July 1973 in *Geddo* (Case 2/73). It maintains that the use to which revenue from a levy is put does not appear to be a decisive factor in cases where the levy ought to be regarded either as a charge having equivalent effect, or as a charge regulating the market, in cases where the way in which they are financed does not exercise any influence on the national activities provided for.

The Government maintains that if, in the event, the use to which the revenue from the levies was put were adjudged to be of importance, the measures financed with the help of the two levies are not incompatible with the Treaty or with Regulation No 234/68.

It stresses that the object of the common market organization in the live plant sector was of a provisional and limited character. This is due not so much to the mere fact that there is no Community intervention system but to Article 12 of Regulation No 234/68. This provision, which is not found in other market organizations, explicitly provides for the possibility of adopting additional measures which may prove necessary in the light of experience. It is important that any interpretation of this provision should take account of the fact that the Commission and the Council were, at the time when Regulation No 234/68 was being drafted, familiar with the measures in force in this sector in the Netherlands. In the Government's view, the Council had no intention wholly to substitute forthwith the Community organization for the national market organization in bulbs which was in force in the most important production zone in the Community. This does not mean that any check on a national set of regulations, such as those governing the Surplus Bulb Fund, must be ruled out. A check on these lines would, for example, reveal that the national buying-in prices are one-third or more lower than the minimum Community export prices. On the other hand, to fix a buying-in price at a substantially lower level than that at present applied in the Netherlands would, in practice, endanger the possibility of realizing minimum Community export prices. In fact the, by comparison, unacceptably low level of prices within the Common Market in practice makes it possible only with difficulty to go on making exporters observe the minimum price. The application of the national buying-in system is not, therefore, incompatible with the technique of market control provided for under Regulation No

234/68; it should rather be regarded as a necessary support measure.

With regard to the third question, the Government states that the regulatory orders of the PVS were intended merely to coordinate the methods by which the Netherlands systems were financed and that these orders did not themselves provide for these systems. Consequently, what these systems, regarded as national aid systems within the meaning of Article 92 of the EEC Treaty, consist of cannot be ascertained from these regulatory orders which deal with taxation. Even on the assumption that these two orders were regarded as providing for aids, it could not possibly be said that their adoption in 1971 constituted a plan to alter within the meaning of Article 93 (3); the system of financing by means of quasi-fiscal charges then in operation did not undergo any substantial change.

Furthermore, the Government draws attention to the fact that the heading and contents of the Commission's letter of 9 February indicate that they referred to measures proposed within the meaning of Article 93 (1). It accordingly takes the view that this letter ought not to be regarded as an act which can be the subject of proceedings before the national court.

The Commission first considers the Dutch regulations, among its comments being that, after an amendment applied with effect from 1 July 1973 to the orders, the two levies were not applied to imported bulbs.

The Commission replies to the second question first because the answer given to it can be decisive for the other questions.

In the Commission's view, the Dutch regulations in question are not in themselves incompatible with Regulation No 234/68, and no other provision or general principle of Community law operates automatically to annul them. The Commission bases its view on a number of indications to this effect which it claims to have found in the wording of the Regulation, the system of common market organization in the sector concerned, and in the origins of the Regulation.

The Commission maintains that Regulation No 234/68 contains no express prohibition against keeping in force national systems effecting an intervention on the market or the furtherance of general trade objectives. It points out that the Dutch regulations provide for other measures than those to be found in Regulation No 234/68. That Regulation did not set up any intervention system. Moreover, Article 2 of the Regulation, authorizing the adoption of Community measures which have certain features in common with some of the measures provided for by the 'Verordening Vakheffing' has not been put into effect. The various Dutch regulations have no direct effect on the scope of the provisions of Regulation No 234/68. From this point of view therefore there is a difference between the circumstances of this case and the issue which was the subject of the cases in which the Court gave a ruling on the relationship between national regulations and Common Market organizations.

The Commission also points out that Regulation No 234/68 was conceived as a set of regulations which would need to be supplemented. Above all the absence of an intervention system has been regarded as lacuna which had to be tolerated for the time being on grounds relating to the current policy on the subject. In this connexion the Commission refers to Article 12 of the Regulation. This lacuna could be tolerated precisely because there was an intervention system in the Netherlands which guaranteed a fair return to the producer and which, because of the dominant position occupied by the Netherlands, at the same time set the pattern for the rest of the Community.

The Commission also maintains that the argument that the establishment of a Common Market organization means that all power to issue regulations is

transferred to the Community and that therefore there is none remaining with Member States is not applicable in the present case. It recalls that the Court reached the opposite conclusion only in cases where, in the exercise of its powers, the Community promulgated rules and it was found that national provisions had an impact on the scope of those rules.

In The Commission's view it is not possible to ignore the difference between the existence of a Community power and its exercise. This is abundantly clear from other judgements of the Court, e.g. the Judgment, already mentioned, in *Geddo* (Case 2/73).

The Commission emphasizes that acceptance of the principle of automatic revocation of the powers of national authorities, in a number of cases where provisions have not yet been adopted at Community level, would, in terms of legislation, produce a lack of continuity which it would be difficult to tolerate.

Again with respect to the second question, the Commission submits certain comments on the issue whether there is discrimination between bulb growers who sell their products to third parties and those who use them in their own nurseries. If, in this context, it were possible to plead Article 40 (3) of the Treaty, which in the Commission's view, is not the case, it would still not be possible for private parties to make direct use of this provision in a case like the present one.

With regard to the first question, the Commission states that it has not been able to establish whether in respect of the trade levy, there is in fact a difference between a sale on the internal market and one in other Member States; in its view however, this issue is not the subject of the request for interpretation.

Nor is the main action concerned with the issue which could conceivably arise out of the use to which the levy is put. In the Commission's view this is correct; the issue could in fact arise only if the levy represented the counterpart of advantages or aids received only for products sold on the domestic market and not for those exported.

The question referred really boils down to this: does the fact that a levy, which *prima facie* forms part of a general system of national taxation, is not imposed in certain cases when the product in question is used for domestic processing, mean that the levy must be regarded as a charge having equivalent effect to an export duty? In the Commission's view, when only some sales on the national market are exempt from the domestic levy the levy cannot be regarded as a charge having equivalent effect to an export duty.

Nevertheless, the combination of a domestic levy to which not all are subject and an aid for national production could be described as a charge having equivalent effect to a customs duty on exports if a clear and calculable privilege arising out of the activities financed by the levy on the product put on sale on the domestic market in fact means that output placed on the domestic market is wholly exempt. According to the information available to the Commission, these circumstances do not obtain in the present case. This kind of preference can neither be calculated nor be shown to exist. On this point the Commission refers to the judgment of the Court of 19 June 1973 (Case 77/72, *Capolongo*, [1973] ECR 611).

As regards the third question the Commission points out that the letter of 9 February 1972 to the Netherlands Government sets out the 'appropriate measures' which the Commission was proposing to Member States pursuant to Article 93 (1) of the EEC Treaty. The Commission states that following, first, adoption of the Directives of 17 April 1972 on the subject of agricultural reform and, second, the accession of the new Member States, it had to make adjustments in the measures proposed. To date, all these steps have been taken

and continue to be taken in accordance with Article 93 (1).

If nevertheless the Court regarded the question as relevant, the Commission points out that the proposal of appropriate measures within the meaning of Article 93 (1) cannot be treated as equivalent to notice given within the meaning of Article 93 (2). The 'appropriate measures' represent the outcome of the procedure provided for under Article 93 (1) and are not mandatory; the giving of notice is the first step in the formal procedure under Article 93 (2) which may result in a Decision placing a Member State under a duty to abolish or amend an aid measure.

Even if the proposal of appropriate measures could be regarded as on all fours with the giving of notice under Article 93 (2), which is not the case, it is clear that the procedure described in that Article reaches its conclusion only in a 'final' Decision of the Commission. Unlike the procedure used for new aid measures, that embarked upon by the Commission against existing aid measures pursuant to Article 93 does not have the effect of 'blocking' them.

At the hearing on 13 November 1974 Van der Hulst represented by J. van der Plas, the Produktschap voor Siergewassen, represented by Mr Heidinga, of the Haarlem Bar, the Netherlands Government, represented by M. J. Kuipers, an Administrative Officer of the Ministry of Agriculture, and the Commission, represented by its Legal Adviser J. H. J. Bourgeois, submitted their oral observations and replied to the questions of the Court.

In the course of the hearing fresh considerations were brought to the attention of the Court and they may be summarized as follows:

Replying to questions from the Court concerning the differences between the levies applicable in the case of sale on the domestic market and in the case of an export sale, Van der Hulst drew particular attention to the complexity of the taxation system and the numerous amendments which have supervened in recent years, especially in connexion with the trade levy. It pointed out the manifold opportunities for exemption provided for by the Dutch regulations. Van der Hulst also pointed out that, apart from differences in rates, there was discrimination due to differences in the basis on which the levy was calculated because a levy on sales on the domestic market was calculated on the basis of the production price and the levy on export sales calculated on the basis of export value (less 3 % of the original price). The company finally states that, at least when proceedings were commenced, the purchaser holding a trade card — and only dealers residing in the Netherlands could obtain one — who used the bulbs he had bought for growing flowers on his own premises was exempt from the levies, just like the flower grower/producer.

The Produktschap voor Siergewassen, dealing with the trade levy, states that the regulations provide for a levy of 3·5 % on export sales and on sales to retailers and the general public. Nevertheless, the last two categories of purchaser have been exempted to the extent that they now pay only 3 %. The PVS maintains that, even if there is a difference of a ½ % between the rates of levy in the case of a domestic sale and in the case of a sale to a foreign buyer, the sale on export is not in fact taxed more heavily than a domestic sale. This is explained, firstly, by the fact that exporters get a rebate from the PVS when paying in the surplus levy (⅓ % of the amount paid in) whereas domestic dealers do not receive this rebate and, secondly, by the fact that Dutch bulb growers must pay a duty of 0·7 % on all sales, which does not apply in the case of foreign bulb growers. Thus, so far as the final product, flowers, is concerned the conditions of competition are once more fairly balanced.

The PVS declares that the purchaser in

possession of a trade card who uses the bulbs bought for growing flowers on his own premises is not at present exempt from the levies. The dealer who uses bulbs for raising plants on his own premises did not exist before 1973. When regulations on this point were changed, an administrative lacuna resulted in the levy not being applied to dealers who were also growers. This omission was made good by the PVS.

With regard to the surplus levy the *PVS* and the *Netherlands Government* stressed that the intervention mechanism financed by the levy is an entirely voluntary system and at the same time one which benefits foreign growers as well. Abolition of the system would cause a drop in prices throughout the whole of the Common Market.

The Advocate-General delivered his opinion on 4 December 1974.

Law

1 By judgement of 16 July 1974, registered at the Court on 17 July, the College van Beroep voor het Bedrijfsleven referred three questions under Article 177 of the EEC Treaty concerning the interpretation of certain provisions of Community law in relation to Netherlands regulations introducing certain levies in the bulb trade sector.

2 These questions were put in the course of proceedings in which a company which cultivates and sells flower bulbs objects to payment of certain sums claimed from it as levies chargeable on bulbs of the 1972 season.

3 These levies are a so-called 'surplus' levy and a so-called 'trade' levy in the bulb sector;

4 The effect of the regulations governing the surplus levy is that every purchaser in possession of a trade card issued by the trade organization in the ornamental plants sector benefits from a reduction on the selling price and that every seller is obliged to pay the levy upon the sale of bulbs to a purchaser, including every foreign purchaser, not in possession of the card, the allowance and the levy being of the same amount;

5 The levy is not charged in cases where the bulb producer uses the bulbs for flower growing on his own premises and, for a certain time in 1973, this also applied in the case of a purchaser in possession of a trade card who used the bulbs himself for flower growing.

6 The revenue from the levy is paid into a fund whose main purpose is to finance the purchase of bulbs which are submitted for destruction because they have not fetched on the market the minimum price fixed by the fund.

7 The effect of the regulations governing the trade levy is that it is imposed and collected pursuant to rules which, generally speaking, are similar to the rules governing the surplus levy, though there are differences between them on several points of detail of considerable complexity.

8 It is, *inter alia,* provided that the reduction to be granted by the seller, like the amount of the levy to be paid on sales to Netherlands purchasers, are 5 % lower than the amount of the levy to be paid on sales to a foreign purchaser.

9 The revenue from the levy is paid into a fund for financing trade purposes in the bulb growing sector, for financing scientific research, general trade publicity and other general trade purposes.

First question

10 The first question asks whether Article 16 of the EEC Treaty and Article 10 of Regulation No 234/68 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 are to be interpreted as meaning that levies such as those in dispute constitute charges having equivalent effect to customs duties on export.

11 The parties in the main action appear to be in agreement that the surplus levy has the same impact on internal marketing in the Netherlands and on exportation of the products concerned, but they disagree on the question whether the heavier charge imposed on exports owing to the different rates of the trade levy is offset by other factors which are part and parcel of the overall pattern of the Netherlands regulations on the subject of bulb and flower production.

12 The Court cannot, within the framework of proceedings brought under Article 177 of the Treaty, settle a difference of this kind which, like any other assessment of the facts involved, is within the province of the national court.

13 The prohibition on the levying of charges having equivalent effect to customs duties on export in trade within the Community covers any charge levied at the time of or by reason of export of the product in question which produces the same restrictive effect as a customs duty on the free movement of goods.

14 To the extent that it may be established that application of an internal levy falls more heavily on export sales than on sales within the country concerned the levy has an effect equivalent to a customs duty on export.

15 Moreover, if an internal levy is the same on domestic sales and on exports, it may be necessary to take into account the use to which the revenue from these charges is put.

16 If, in fact, a levy is designated to finance activities which serve to make marketing within the country more profitable than exportation or in any other way to give preferential treatment to the product intended for the internal market, to the detriment of that intended for export, it is liable to impede exports and thus to have an effect equivalent to a customs duty.

17 The answer to this question therefore must be that an internal levy may have an effect equivalent to a customs duty on export when its application falls more heavily on export sales than on sales within the country, or when the levy is intended to fund activities likely to make internal marketing more profitable than exportation or in any way to give preferential treatment to the product intended for marketing within the country, to the detriment of that intended for export.

Second question

18 The second question asks the Court to rule whether Article 40 of the Treaty and Article 1 of Regulation (EEC) No 234/68 or any other provision or

general principle of Community law mean that, as regards the sector defined in Article 1 of Regulation (EEC) No 234/68, Dutch bodies having legislative capacity are no longer permitted to make any market-regulatory provisions such as that contained in the 'Regulation — Surplus Levy' and in the 'Regulation — Trade Levy' except for the purpose of carrying into effect the provisions of Regulation (EEC) No 234/68 or any other provisions of Community law.

19 Article 40 (2) of the Treaty provides that a common organization of agricultural markets shall be established taking the form of common rules on competition, compulsory coordination of the various national market organizations, or a European market organization.

20 Under Article 40 (3) the common organization established in one or other of these forms may include all measures required to attain the objectives of the common agricultural policy, in particular regulation of prices, aids for the production and marketing of the various products, storage and carry-over arrangements, and common machinery for stabilizing imports or exports.

21 Article 1 of Regulation No 234/68 provides that the common organization of the market established thereunder shall comprise common quality standards and a trading system in the sector concerned.

22 Article 12 of the Regulation provides that the Council shall add further provisions to the Regulation as may be required in the light of experience.

23 The second recital of the preamble to Regulation No 234/68 states that the production of live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage is of particular importance to the agricultural economy of certain regions of the Community and declares the need to promote the rational marketing of such production and to ensure stable market conditions.

24 As regards bulbs in particular, it is not disputed that exports from the Netherlands represent more than 90 % of the total exports from Member States.

25 Once the Community has, pursuant to Article 40 of the Treaty, legislated for establishment of a 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.

26 For this reason it is first of all necessary to consider whether a set of regulations such as those under review is compatible with Regulation No 234/68 having regard not only to the express provisions of the legislation but also to its aims and objects.

27 Regulation No 234/68 contains no reference, either in positive or in negative terms, to the compatibility or otherwise of national regulations, present or future, with the common market organization established by its provisions.

28 Consideration must therefore by given to the question whether the existence of a national intervention mechanism, such as that established by the Netherlands regulations, is of such a nature as to undermine the aims and objects of Regulation No 234/68.

29 When the volume of national production is of such magnitude in the Common Market as that of bulb production in the Netherlands, a mechanism of this kind can be of value in promoting the rational marketing of production and ensuring stable market conditions not only in the Member State concerned but also throughout the Community.

30 It is still necessary, however, to study not only the national intervention mechanism as a whole but also its constituent parts, especially the quality standards which must be satisfied by products to qualify for intervention, in their relationship to the quality standards fixed by the Community for the marketing of the products.

31 In this connexion national quality standards which are less demanding than Community standards may tend to encourage the production of unmarketable bulbs.

32 If the extra cost which this imposes on the fund financing the intervention is covered by the levy and thus distributed among the marketed products, including exports, this militates against the aim pursued by the common organization of the market and the regulations are to that extent incompatible with it.

33 The plaintiff in the main action contends that the Netherlands regulations on the surplus levy and the trade levy embody elements of discrimination which are in breach of the principles enshrined in the Treaty.

34 In this context, the prohibitions against discrimination which require to be considered are the outcome, first, of the principle underlying Article 95 of the Treaty concerning internal taxation and, second, of the provision in the second paragraph of Article 40 (3) of the Treaty under which common organizations of the agricultural markets shall exclude any discrimination between producers or consumers within the Community.

35 Regulations such as those under consideration conflict with the prohibitions which are embodied in these provisions, if only by analogy, in circumstances where exported goods are subject to a heavier charge than those placed on the national market, or where the revenue from the charge is intended to place national products at an advantage.

36 The reply to the question referred must therefore be that

(a) a national intervention mechanism is incompatible with Regulation No 234/68 on the establishment of a common organization of the market in live plants insofar as products which do not satisfy Community standards laid down under the Regulation qualify for the intervention;

(b) an internal levy on sales of a product is incompatible with the prohibition of discrimination embodied in the EEC Treaty when it falls more heavily on export sales than on sales on the national market or when the revenue from the levy is designed to place national products at an advantage.

37 This reply, given in proceedings under Article 177 of the Treaty, cannot prejudice the outcome of any investigation by the Commission to establish

whether the national measures in question constitute aids incompatible with Article 92 of the Treaty.

Third question

38 The third question asks the Court to declare whether Article 93 (3) must be understood as meaning that the procedure referred to in the second sentence of that paragraph also includes the giving of notice, as defined in Article 93 (2) and to which paragraph (3) refers; and, if the answer is in the affirmative, whether Article 93 (3) must be interpreted as meaning that such giving of notice on the part of the Commission has as a consequence that the relevant national support measure must not be carried into effect for as long as the procedure previously referred to has not resulted in a final decision.

39 It is clear from the judgment of reference that this question was put as a consequence of a document lodged by the plaintiff in the main action and quoting a letter addressed by the Commission on 9 February 1972 to the Netherlands Minister of Foreign Affairs.

40 It is, however, clear from the heading of the letter that its subject-matter was not the giving of notice within the meaning of paragraph (2) of the Article but that it arose in the course of an investigation of aid systems being undertaken by the Commission pursuant to paragraph (1) of the Article.

41 In fact, the letter contains proposals drawn up not under Article 93 (3) but under the second sentence of paragraph (1), as was confirmed by the Commission in the observations which it submitted before the Court during the present proceedings.

42 In the view of the Court, these circumstances rob the question of any point.

Costs

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

44 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the College van Beroep voor het Bedrijfsleven, the decision on costs is a matter for that Court.

On these grounds,

THE COURT

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven by order of that Court dated 16 July 1974,

hereby rules:

(1) **An internal levy may have equivalent effect to a customs duty on export if it falls more heavily on export sales than on sales inside the country, or where the levy is intended to fund activities tending to make the home market more profitable than exports or in any other way to place the product intended for the home market at an advantage compared with the product intended for export.**

(2) (a) **A national intervention measure is incompatible with Regulation No 234/68 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 in so far as products which do not meet Community quality standards as laid down under the Regulation qualify for the intervention;**

(b) **An internal levy on sales of a product is incompatible with the prohibition of discrimination embodied in the EEC Treaty if it falls more heavily on export sales than on sales on the national market or if the income from the levy is intended to place the national product at an advantage.**

Lecourt Mackenzie Stuart Donner

Monaco Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 23 January 1975.

A. Van Houtte
Registrar

R. Lecourt
President