OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 6 March 1990 *

My Lords,

1. This case concerns the compatibility with Community law of fees charged for phytosanitary inspections of bulbs and plants for export carried out pursuant to an international convention on plant health protection.

2. Under Article 6a of the Netherlands Law on plant diseases of 5 April 1951, payment can be required for analyses or inspections carried out by the Plant Health Authority, a department of the Netherlands Ministry of Agriculture and Fisheries, in accordance with a schedule of charges to be determined by the competent Minister. A decision of 23 June 1967, the Tarief Plantenziektekundige Dienst (Plant Health Authority Tariff), sets out the relevant fees. According to Article 1(1) of that decision, fees in respect of the cost of inspections of batches of bulbs, tubers and rhizomes from ornamental plants presented for export are to be calculated in accordance with the gross weight of the batch; fees in respect of batches of woody or herbaceous plants presented for export are to be calculated in accordance either with the net value appearing on the invoice or with the gross weight of the batch. In practice, where field inspections of growing plants are concerned, only 75% of the costs of the inspections are charged to exporters, in view of the fact that only 75% of production is exported. The remaining 25% of the costs is borne by the State.

3. In the years 1974-77 the Plant Health Authority carried out a number of inspections, including field inspections, of bulbs and plants on the premises of P. Bakker Hillegom BV ('Bakker'), a major exporter of flowering bulbs, and required payment of a total of HFL 317 400 in respect of the cost of the inspections, calculated in accordance with the abovementioned decision. Bakker refused to pay, arguing in particular that the amount charged bore no relation to the actual cost of the inspections. The State, represented by the Ministry of Agriculture, took proceedings for recovery.

4. The lower courts largely upheld the State's action, requiring Bakker to pay some HFL 277 000 in fees. The Hoge Raad (Supreme Court of the Netherlands) was uncertain as to the compatibility with Community law of two aspects of the calculation and charging of the fees: first, the fact that fees were determined by reference to gross weight or to net invoice value; and secondly, the fact that a proportionate amount of the costs of field inspections of plants, which had to be carried out before the destination of the plants was known, was charged in respect of produce presented for export but not in respect of produce sold on the domestic market. It therefore

* Original language: English.

referred the following questions to the Court for a preliminary ruling:

'(1) Under Community law, in particular Articles 12, 16 and 36 of the Treaty establishing the European Economic Community, is it permissible for fees charged for inspections on consignments of plants (or parts thereof) intended for export and calculated in accordance with Article 1(1) of the Tarief Plantenziektekundige Dienst (Plant Health Authority Tariff), that is to say according to the criteria of weight or invoice value, not to be regarded as charges having an effect equivalent to customs duties, where the total revenue from export inspections does not exceed the total amount of all the costs directly and indirectly connected with those inspections,

or may such fees not be regarded as charges having an effect equivalent to customs duties only where the amount of each fee is related to the costs of the actual inspection in respect of which it is charged?

(2) If it is correct that

(a) field inspections are carried out because certain diseases, from which plants intended for export must be certified as being free, can be diagnosed only while the plants are still in the ground, and

(b) when field inspections are carried out the market for which the plants still in the ground are intended has not yet been determined, with the result that field inspections for export purposes are inevitably also carried out on plants intended for the Netherlands market,

does the fact that 75% of the costs of those field inspections are attributed to exports (on the ground that 75% of the bulbs affected by field inspections are exported) and that the remaining 25% of those costs are not charged to traders who sell the bulbs on the Netherlands market constitute a ground for taking the view that the charging of the costs of those field inspections to exporters is incompatible with Community law?'

5. It appears from the case file that, following amendments to the relevant legislation, fees are currently no longer required for the inspection of bulbs and tubers for export, and that the carrying out of field inspections has been entrusted to a private foundation to which all producers are required to pay contributions. The particular system of charging which gave rise to the present proceedings is thus now only of historical significance.

6. As a preliminary issue, it is necessary to determine the legal framework within which the questions have to be answered. The national court refers to three provisions of the EEC Treaty, namely, Articles 12, 16 and 36. In the context of a dispute relating to charges imposed in respect of exports, Articles 12 and 16 are plainly relevant. As regards Article 36, the Court ruled in Case 46/76 *Bauhuis* v *The Netherlands* [1977] ECR 5 that it must be interpreted strictly and could not be understood as authorizing measures of a different nature

from those referred to in Articles 30 to 34, i. e. quantitative restrictions on imports or exports and measures of equivalent effect: Article 36 thus could not be interpreted as permitting the imposition of charges (paragraphs 12 to 14 of the judgment). Article 36 must therefore be left out of account for the purposes of answering the questions.

The first question

7. The first question must be viewed in the light of the Court's existing case-law. It is well established that health inspection charges imposed by a Member State on products imported from or exported to other Member States must in principle be regarded as charges having an effect equivalent to customs duties and are accordingly prohibited as constituting an obstacle to intra-Community trade (see, for example, Case 29/72 *Marimex* v *Amministrazione Finanziaria Italiana* [1972] ECR 1309; Case 39/73 *REWE-Zentralfinanz* v *Direktor der Landwirtschaftskammer Westfalen-Lippe* [1973] ECR 1039).

8. The Court has, however, taken the view that that prohibition loses its purpose where the inspections in question are prescribed by a Community directive designed to facilitate trade between Member States by providing for the carrying out of inspections in the country of origin prior to export to other Member States. In such a case, fees charged for the inspections do not constitute charges having an effect equivalent to customs duties 'provided that they do not exceed the actual cost of the inspection for which they were charged' (Case 46/76 *Bauhuis* v *The Netherlands* [1977] ECR 5, paragraph 31). In Case 89/76 *Commission* v *The Netherlands* [1977] ECR 1355, the Court took the same view of fees imposed in respect of health inspections for plants for export carried out in the framework of an international convention on plant health protection to which all the Member States were parties. The Court ruled that the inspections required by the convention were designed to encourage the free movement of goods, and that in these circumstances fees charged for such inspections could not be regarded as charges having an effect equivalent to customs duties 'provided that their amount does not exceed the actual cost of the operations in respect of which they are charged' (paragraph 16 of the judgment).

9. It is not disputed that the inspections at issue in the present case were carried out in the context of the same international convention as that in *Commission* v *The Netherlands*, namely, the International Plant Protection Convention of 6 December 1951. The fees charged by the Netherlands authorities must therefore in principle be regarded as compatible with the prohibition of charges of equivalent effect, provided that they satisfy the condition laid down in *Bauhuis* and in *Commission* v *The Netherlands* that their amount does not exceed the actual cost of the inspections in respect of which they were charged.

10. The first question in effect asks the Court to decide whether the method of charging fees applied by the Netherlands authorities satisfies that condition. Bakker argues that the amount of the fees must directly reflect the actual cost of the individual inspection, and adds that the calculation of fees by reference to weight or value results in a form of collective financing which penalizes the big, efficient exporter. The Netherlands Government, on

the other hand, argues that it is sufficient for the purpose of meeting the test laid down in the Court's case-law if, in a given time-scale, the global revenue from all affected exporters in respect of inspections of a given category of produce is reasonably proportionate to the global costs of those inspections. It adds that in view of the need to pass on to exporters the indirect as well as the direct costs of the inspections, an individualized system of charging would be impracticable and more costly than the calculation of fees on the basis of weight or value.

11. The Netherlands Government relies in particular on Case 1/83 *IFG* v *Freistaat Bayern* [1984] ECR 349. That case concerned the compatibility with the prohibition of charges of equivalent effect of fees charged by a Member State in respect of inspections of meat imported from a non-member country, where the Community directive concerning the health inspections applicable to imports from non-member countries was not yet wholly in force. In that situation the Court ruled that:

'... a Member State cannot be prevented from passing on to the importer, either at the time at which the import documents are issued or on the occasion of importation itself, not only the costs of specific inspections relating to the goods in question but also the burden of the administrative expenses involved in organizing the health controls.

The only limitation imposed by Community law in that regard is that there must be a sufficiently close connection between the amount of the charge levied and the costs involved in the controls' (paragraphs 17 to 18).

12. The requirement that there should be a 'sufficiently close connection' between the amount of the fees and the cost of the inspections does appear to be a significantly looser test than that laid down in *Bauhuis* and in *Commission* v *The Netherlands*. However, it should be borne in mind that, as the Court confirmed in *IFG*, 'the health inspection of goods imported from non-member countries is carried out in a different factual and legal context from the inspection of goods originating in the Community ...' (paragraph 10). Having regard to that different factual and legal context, I am of the view that it is not open to the Netherlands Government to rely on the *IFG* case in these proceedings, and that the relevant test is that laid down in *Bauhuis* and in *Commission* v *The Netherlands*.

13. It is apparent from the wording used in those judgments — that the amount of the fees must not exceed the actual cost of the inspections — that that test is intended to be restrictive. In any event, since the test governs the scope of an exception to a fundamental Treaty prohibition, it clearly must be narrowly interpreted and applied. It follows that any fees charged must be directly related to the actual costs of the inspections carried out for the benefit of the individual exporter.

14. The requirement of a direct relationship between the fees and the costs means in my view that only the direct costs of an inspection, such as, for example, labour or travel expenses, can be passed on to the exporter, but not indirect costs such as the administrative expenses of organizing the health inspections. By definition, indirect costs cannot be directly related to the inspection in an individual case, and to permit their passing on opens a door to

possible abuse by national authorities of the limited exception permitted by the Court. It is true that in the *IFG* case the Court authorized the passing on of indirect costs to importers: but, as already mentioned, that case was decided in a different factual and legal context. I would add that in my view there can be no objection if, for the sake of administrative convenience, a Member State calculates direct costs on a fixed flat-rate basis, for instance an hourly rate for a laboratory technician's work, provided, of course, that the rate is uniformly applied.

15. It is abundantly clear that a system of charging fees by reference to gross weight or invoice value cannot ensure a direct relationship between the fees charged and the actual costs of the inspections. In its judgment of 11 July 1989 in Case 170/88 *Ford España SA* [1989] ECR 2305, the Court indeed ruled that a charge for the customs clearance of imported goods calculated by reference to the value of the goods could not be said to correspond to the costs incurred by the customs authorities or to the service rendered to the importer.

16. In my opinion, the answer to the first question should therefore be that Articles 12 and 16 of the EEC Treaty prohibit the charging of fees for inspections of consignments of plants (or parts thereof) intended for export to other Member States carried out in the framework of an international convention on plant protection unless the amount of the fees does not exceed the actual cost of the individual inspections in respect of which they are charged.

The second question

17. The second question in effect asks whether, in a situation where field inspections must be carried out before the destination of the plants is determined, and where some 75% of the plants is eventually exported, Articles 12 and 16 of the EEC Treaty permit the attribution to exports only of 75% of the costs of the inspections.

18. It has already been seen in relation to the first question that a system of charging fees for inspections by reference to gross weight or invoice value is incompatible with the prohibition of charges of equivalent effect to customs duties because such a system cannot ensure a direct relationship between the amount of the fees and the costs of the inspections. The arbitrary nature of such a system of charging is in my view accentuated where the system in addition seeks to ensure that a predetermined proportion of total costs is met from the fees.

19. None the less, there remains an issue of substance in the second question put by the national court, which I would formulate as follows: assuming that fees are calculated and charged in such a way as to correspond to the actual costs of the individual inspections, is it compatible with Articles 12 and 16 of the Treaty to pass on those costs, or a proportion of them, to exporters only?

20. The Dutch Government argues that since only exporters require a phytosanitary certificate in order to market their produce, the field inspections are in effect a service to

exporters only: it is therefore appropriate that they alone should bear a proportionate part of the costs. Bakker and the Commission, on the other hand, argue that all producers, whether they export their produce or not, are capable of deriving a benefit from the inspections, which in effect constitute a quality control, and that it is therefore discriminatory to charge fees to exporters only.

21. In my view, it follows from *Commission* v *The Netherlands* (cited above) that the charging of fees to exporters only for inspections carried out in the framework of an international convention can be compatible with Articles 12 and 16 of the Treaty. However, it should be borne in mind that the exclusion of the fundamental prohibition of charges of equivalent effect in that case (and in the earlier *Bauhuis* case) was strictly justified by the Court by reference to the fact that the inspections were designed to facilitate the free movement of goods.

22. It it were established in this case that a producer who sells his produce on the domestic market also derives from the inspections a benefit equivalent to that obtained by exporters, for instance because the inspections obviate the need for further controls, then the exclusion of the prohibition of charges having equivalent effect would no longer be justified, since in such a situation the inspections would no longer purely serve the purpose of facilitating trade. However, if any benefit obtained is purely of a minor, ancillary nature, then in my view the charging of exporters only would still be justified. It is for the national court to determine as a question of fact whether an equivalent benefit does accrue to produce sold on the domestic market.

23. Accordingly, the answer to the second question should be that where field inspections are carried out on plants in the framework of an international convention on plant health protection before it is determined whether the plants are intended for export or for the domestic market, Articles 12 and 16 of the EEC Treaty do not prevent the charging of fees for those inspections in respect of the plants (or parts thereof) presented for export to other Member States but not those intended for the domestic market, unless it is established that producers of plants intended for the domestic market derive from the inspections a benefit equivalent to that obtained by exporters.