2. Orders each party to bear its own costs.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 12 July 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 8 JUNE 1977 [1]

Mr President,
Members of the Court,

The origin of the present application brought by the Commission against the Government of the Netherlands for failure to fulfil obligations under the Treaty is the 'serious doubt' expressed in Netherlands trade circles as to the obligatory nature, within the meaning of Community law, of the fees charged on the phytosanitary inspection of plants and certain plant products, intended in particular for planting or propagation, which have been exported from the Netherlands to other Member States and, in addition, to third countries.

In a large number of cases a claim has been made for repayment of the amounts collected in this way during the last few years; sometimes there have even been refusals to make any further payment.

Having regard to the large sums involved and in order to bring to an end the present legal uncertainty, the Netherlands Government requested the Commission, as a matter of urgency, to press on without delay with a procedure which it initiated on 15 February 1971 against that government under Article 169. If it was to turn out that charging these fees is in fact incompatible with Articles 12 and 16 of the Treaty then they have been wrongly paid from 1 January 1962 or, at the latest, from the entry into force of the regulations on the common organization of the markets in such of those products as are covered by these regulations.

The fees at issue are levied on the occasion of inspections carried out pursuant to the International Plant Protection Convention concluded in Rome under the aegis of the United Nations on 6 December 1951.

The preamble to this Convention refers to 'the usefulness of international cooperation in controlling pests and

1 — Translated from the French.

diseases of plants and plant products and in preventing their introduction and spread across national boundaries'.

Pursuant to Article I (2) thereof 'Each contracting government shall assume responsibility for the fulfilment within its territories of all requirements under this Convention'.

Article IV provides that each contracting government shall make provision for an official plant protection organization with the following main functions:
(1) the inspection of growing plants;
(2) the inspection of consignments of plants and plant products moving in international traffic.

For this purpose each contracting government (Article V) shall make arrangements for the issue of *certificates* as to the phytosanitary condition and origin of consignments of plants and plant products, to accord with the plant protection regulations of *other* contracting governments. 'Inspection shall be carried out and certificates issued only by or under the authority of technically qualified and duly authorized officers and in such circumstances and with such knowledge and information available to those officers that the authorities of importing countries may accept such certificates with confidence as *dependable documents*'.

The certificates relating to the plants intended for planting or propagation as well as the other plants and plant products shall be as worded in the annex to this convention. The certificates state *inter alia* that 'the consignment is believed to conform with the current phytosanitary regulations of the importing country both as stated in the additional declaration hereon and otherwise'. These certificates accompany the consignments imported into the territory of each contracting government.

Article VI provides that 'With the aim of preventing the introduction of diseases and pests of plants into their territories, contracting governments shall have full authority to regulate the entry of plants and plant products ...'

The Netherlands have fulfilled their undertakings by issuing a decree of 24 September 1951 laying down regulations for the phytosanitary service.

Article 3 of this decree provides that the services to be provided by this department shall be:
'...
(b) to inspect, on application or officially, soil, plants ... with reference to the presence of harmful organisms and to issue certificates to the effect that these inspections have not disclosed any such harmful organisms;
(c) to inspect, on application or officially, consignments of plants for export with reference to the presence of harmful organisms and, after such inspection, to issue certificates certifying that, within the knowledge of the officer responsible for carrying out the inspection, the consignment in question satisfies the requirements prescribed by the country of destination'.

Under Article 7 the inspections referred to in Article 3 (b) and (c) *in so far as they take place on application by the persons or undertakings concerned* give rise to the levying of a fee in accordance with a tariff fixed by the Minister for Agriculture.

The model phytosanitary certificate in use in the Netherlands is based substantially on the model certificate annexed to the convention.

In application of Article 7 referred to above the tariff for the phytosanitary service was fixed by a Ministerial Decree of 23 June 1967 as last amended on 27 June 1975. The preamble to this decree also refers to Article 9 of the Decree of 1947 on the inspection of exports of arboricultural products (nurseries), to

Article 7 of the 1951 Decree on the inspection of exports of flowering bulbs and corms and to Article 7 of the Decree of 1974 on the inspection of exports of potatoes. These decrees *prohibit* the export of the products at issue in this case which, according to the results of the inspection carried out by the phytopathological service, do not comply with the *requisite standards.*

With the advantage of the large number of cases in this field which is has had to decide the Court has had occasion to develop and clarify the principles which govern, in the light of the Treaty and Community regulations, veterinary, public health and phytosanitary fees on both imports and exports whether they come from or are intended for Member States or third countries.

More importantly it has had occasion to modify this case-law in its preliminary ruling in the Bauhuis case of 25 January 1977 which was given at a time when the present case was already pending and the rejoinder of the Netherlands Government had not yet been lodged.

The latter had, moreover, already shown that it was interested in this question by submitting observations in connexion with the application for a preliminary ruling in the Cadsky case in which judgment was given on 26 February 1975 ([1975] ECR 281), and it repeats and amplifies them in this case.

I — Up till now the Court has always held that a fee of the kind at issue in this case cannot be regarded as a charge having an effect equivalent to a customs duty, unless it is *obligatory.*

Now the Netherlands Government maintains that the fee in question is only payable for an inspection which is *'voluntary'*, and which is not connected in law with the crossing of the Netherlands frontier.

But, as this government acknowledges, if the exporter wishes to have a reasonable opportunity of seeing his consignment arrive at its destination he has in practice to apply for and procure the issue of a national phytosanitary certificate, since the product consigned will be able to cross the frontiers of the importing State only if this particular condition is fulfilled.

Although it is true that the inspection is only carried out at the request of the exporter and that the fee is payable even for a consignment inspected on application but which was not exported as a result of unforeseen circumstances, and, finally, that there is no specific provision — as there was in the *Cadsky* case — that the goods must, on leaving the exporting State, be accompanied by a certificate of inspection, the prohibition on importation which is bound to be an obstacle to the introduction of the goods into the State of destination means that in practice it is absolutely necessary to ensure that the consignment is accompanied by such a certificate. In practice the imports will be refused if they are not accompanied by a certificate stating that the products in question have been 'found *substantially* free from injurious diseases and pests'.

The Netherlands Government itself acknowledges this fact by implication in its letter of 28 June 1976 in which it says as follows: 'moreover, it is a matter of small importance in this connexion whether under domestic law a phytosanitary inspection of exports must be carried out or whether this inspection only takes place on application by the exporter'. 'It is in practice very much more important to give the guarantees *required* by the State of destination' (paragraph 10 of the defence). The importing State is only prepared to discontinue the inspection of imports and to 'impede international trade as little as possible' if this inspection takes place in the State where the imports originate. In this roundabout way inspection is made obligatory *in fact* if not in law. The Netherlands Government

admits this when it adds: 'it can nevertheless be admitted that there would be scarcely any point in exporting in this way'. 'The fact that the inspection system *is absolutely necessary* in many cases is first and foremost a truth of which those who have the greatest interest in it, namely exporters, are fully aware'.

On the other hand the fee charged for phytosanitary inspections has not been introduced pursuant to a *Community* measure and this inspection is not carried out in a *uniform* manner, since it is effected each time in accordance with the particular requirements of the importing State. It does not satisfy the two conditions laid down *inter alia* in the judgment of the *Bauhuis* case which have to be fulfilled if a charge is to be exempted from the prohibition contained in Articles 12 and 16 of the Treaty. Even if the inspection has been arranged in the Netherlands in order to enable that State to fulfil obligations which it had entered into on a higher international level, the commitments undertaken at this level are not treated as being equivalent to Community obligations, at all events not in the mutual relations existing between the Netherlands and the other Member States.

It is not certain either whether systematic inspections of imports, which it was the aim of the Convention to bring to an end, have disappeared in the other Member States, even if the continuance of such inspection can be challenged under Community law.

The provisions which the Community had adopted in the field of phytosanitary protection when the Commission commenced proceedings before the Court (three Council Directives of 8 December 1969 on control of Potato Wart Disease, Potato Cyst Eelworm and of San José Scale, OJ English Special Edition 1969 (II), pp. 561, 563 and 565) make it obligatory on Member States to take certain minimal measures in order to fight against and prevent the propagation of these harmful organisms in their territory but do not include any provisions providing for the charging of any fee.

The Council directive of 21 December 1976 (OJ L 26 of 31. 1. 1977, p. 20) on protective measures against the introduction into the Member States of harmful organisms of plants or plant products, which was adopted during the proceedings, provides (Article 7 (2)) that 'Member States shall lay down that the plants, plant products and other objects listed in Annex V *may not be introduced* into another Member State unless they are *accompanied* by a phytosanitary certificate issued in accordance with paragraph (1) ...'.

This directive, which therefore makes phytosanitary inspection in the exporting State *obligatory,* in so far as the products concerned are intended to be sold in other Member States, *neither provides for nor authorizes the levying of charges* for such inspection.

The Commission, moreover, mentioned in its submissions in the *Bauhuis* case that, when the Council considered its proposal for a directive, some of the Member States endeavoured to have a provision inserted in the suggested text allowing Member States or imposing on them the obligation to levy dues on inspections of exports in relation to intra-Community trade, but the Commission objected to these amendments and that perhaps explains why its proposal was held up for so long.

Similarly, in the case of intra-Community trade in fresh poultrymeat, Council Directive 71/118/EEC of 15 February 1971 (OJ 8 March 1971, English Special Edition 1971, (I), p. 106) does not provide for any financial liability on traders for the public health inspections which it makes obligatory.

a specific service actually rendered may form the consideration for a possible proportional payment for the service in question, this may only apply in specific cases which cannot lead to the circumvention of the provisions of Articles 9 and 16 of the Treaty'.

It is worth noting in the first place that the fee could only be regarded as not being caught by the prohibition of Articles 12 and 16 if it was shown that, in every case, the exporter could be certain of being able to pass on the amount of the fee to the foreign *consignee.* Now this is by no means the situation.

Even if it is assumed that the fee is the consideration for an official service which would enable the exporter to 'save time and money', it is also charged in the general interest of the Netherlands which has not entered into the commitment provided for by the Convention only because the plant products exported from the other Member States undergo a phytosanitary inspection before they are exported.

In these circumstances the evaluation in figures of the benefit alleged to have been conferred on the exporter varies according to each export and for each product; it presupposes a knowledge of the market situation and of the terms of the contract. As Mr Advocate General Reischl correctly points out in his opinion in the *Bauhuis* case in connexion with animals it may be asked whether it is right and proper that the cost of measures for the prevention of diseases, which are therefore *also in the interests of the producers,* should be borne by the trade and consequently in the end by the consumer.

In fact the fee is the *fixed* consideration for the inspection which the other Member States carry out on products exported from those States to the Netherlands.

It is not therefore a *specific* benefit to the exporter which can be computed with certainty and does not exceed the actual cost of the inspection on the occasion of which the fee is paid.

Even if the inspection is a service actually provided for the exporter it is impossible to ascertain whether the amount of the fee represents the exact value of the said service and, more importantly, whether the value of the benefit is not less than the amount of the fee collected.

Moreover the obligation to carry out phytosanitary supervision would have to be imposed and applied in the same way in all the Member States and the inspection procedure would have to be uniform. As it happens this was not what the Convention provided, since the inspections were initially carried out in accordance with the importing countries' own phytosanitary regulations.

Even if all the Member States comply with the provisions of the Directive of 21 December 1976, and this might take two to four years, these inspections will not in any case be the same as those carried out on the occasion of the marketing and carriage of the same products in the territory of the Member State of origin, and such inspections do not exist, or at least not to the same extent, in the Netherlands.

It would also be necessary to replace the inspections previously carried out by the importing State by inspections by the exporting State (paragraph 46 of the *Bauhuis* judgment); however in this connexion it is only possible to be 'reasonably' certain.

As far as concerns the argument of the Government of the Netherlands that the system in question contributes to the freeing of intra-Community trade I will merely reply that this trade would be made even freer if there were no financial charges.

Even if the affixing of a national export stamp — assuming that this was lawful in the absence of any Community rules governing the quality of products — is likely to further the export of domestic products, this benefit was not held in the *Cadsky* judgment to be a service provided for the exporter.

Finally, the Netherlands Government states that the abolition of the payment of contributions by traders and financing by means of State resources would amount in fact to a disguised aid. The possibility cannot be ruled out that the fact that the costs incurred in inspecting exports are directly covered by public funds rather than with the help of the receipts of parafiscal taxes may cause distortion of competition. However, to some extent, the 'aids' thus granted by Member States cancel each other out if each Member State undertakes the financing of similar inspections.

If distortions of competition nevertheless remain, they cannot be eliminated by means of a derogation from the prohibition of Articles 12 and 16 but only by harmonization of the law. As the Commission has said 'there is a considerable task for the Community legislator to undertake in this field'.

In short according to the nature of the provisions by virtue of which the fee is charged two different sets of circumstances must be distinguished:

— Either the inspection is *imposed unilaterally by a Member State* under Article 36, which in my view is what has happened in this case: on this assumption Article 36 does not justify the charging on goods liable to be inspected in this way of fees which are designed to cover the costs of inspection: this charge is not intrinsically necessary for the exercise of the power laid down in Article 36 (paragraphs 13 and 14 of the *Bauhuis* judgment);

— or it is *imposed by a Community provision* and is *uniform* and this objective will be attained when Member States have complied with the Directive of 21 December 1976: in such a case the fees charged on the occasion of such an inspection are not charges having an effect equivalent to customs duties on export, *provided that* their amount does not exceed the actual cost of the inspection on the occasion of which they are charged.

However, the Court has to deal with the first of these hypothetical situations: since it is uncertain whether the benefit provided in this way exists and can be quantified and since inspections have not been standardized, the principle of the free movement of goods, the importance of which the Court has always stressed, should prevail.

I therefore have to conclude that, whatever they may amount to, the pecuniary charges which arise in the Netherlands, in accordance with the provisions of Article 1 of the Decree of the Minister for Agriculture and Fisheries of 23 June, on the occasion of the phytosanitary inspection of consignments of plants and plant products only for other Member States are to be regarded as charges having an effect equivalent to customs duties.

I submit, further, that the costs be borne by the Kingdom of the Netherlands.