20 (2) of Regulation No 805/68 derogates from the prohibition on the imposition of health inspection charges to the extent necessary to ensure non-discriminatory treatment, on the one hand, of traders who put fresh meat on the market in intra-Community trade and thereby become liable to pay health inspection charges in the exporting Member State and, on the other hand, of those who import from third countries, provided that those charges do not exceed the actual cost of the inspections.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 28 June 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 21 FEBRUARY 1978

My Lords,

In this case the Court is once again confronted with questions as to the lawfulness of charges imposed in Italy for the veterinary inspection of imported meat. The case comes before the Court by way of a reference for a preliminary ruling by the Pretore of Alessandria.

On 29 November 1971 and on 11 January 1973, Simmenthal S.p.A., the Plaintiff in the proceedings before the Pretore, imported consignments of Uruguyan frozen beef into Italy. It cleared them through customs at Alessandria. Pursuant to Article 32 of the Italian Statute of 27 July 1934 consolidating Italian public health legislation (the "testo unico delle leggi sanitarie", G.U. No 186 of 9 August 1934, the beef was subjected, on its arrival in Italy, to veterinary inspection. For such inspections charges were prescribed by Statute No 1239 of 30 December 1970 (G.U. No 26 of 1 February 1971). They amounted to Lit 128 370 for the first consignment and to Lit 186 775 for the second. Those sums were paid by the Plaintiff to the Amministrazione delle Finanze dello Stato, which is the Defendant in the proceedings before the Pretore. In those proceedings the Plaintiff seeks

restitution of those sums, on the ground that the levying of them was incompatible with Community law.

The relevant Italian legislation has been considered in a number of cases that have been before this Court. It was, in particular, as Your Lordships will remember, expounded in detail by the Commission in Case 35/76, the first *Simmenthal* case [1976] ECR 1871, where its history was traced back to 1888. For the purposes of the present case, the point that needs in my view to be emphasized is that under Statute No 1239 of 30 December 1970, the charges for veterinary inspections were set at a flat rate per unit of weight of the goods inspected, in the case of meat of the kind here in question at, so we have been told on behalf of the Plaintiff, Lit 1 000 per 100 kgs.

After the hearing of this case in this Court, two events of some importance occured in Italy. The first was the publication of Statute No 889 of 14 November 1977 which abolished prospectively (so I understand) the charges imposed by Statute No 1239 of 30 December 1970 as respects goods imported from or exported to other Member States of the EEC or its Associated States, and enacted consequential provisions, particularly as regards the Italian Budget. The second event was the Judgment of the Constitutional Court of Italy of 2 December 1977 (Sentenza n. 163 of 1977) in *UNIL-IT and ARIETE* v *Amministrazione delle Finanze dello Stato*, which declared Statute No 1239 to be, in so far as it related to such goods, incompatible with Community law and consequently with Article 11 of the Italian Constitution. This had the effect (so I understand) of invalidating that Statute, as respects such goods, for the past. In that Judgment the Italian Constitutional Court reviewed, *inter alia*, the decisions of this Court in Case 29/72 the second *Marimex* case [1972] ECR 1309, in Case 87/75 the *Bresciani* case [1976] ECR 129, in the first *Simmenthal* case (already cited), in Case 21/75 *Schroeder* v *Stadt Köln* [1975] ECR 905, in Case 46/76 *Bauhuis* v *Netherlands* [1977] ECR 5 and in Case 89/76 *Commission* v *Netherlands* [1977] ECR 1355.

The relevant Community legislation is also familiar to Your Lordships. Article 12 (2) of Council Regulation No 14/64/EEC, on the gradual establishment of a common organization of the market in beef and veal, forbade the levying by Member States of any customs duty or of any charge having an equivalent effect on imports from third countries, other than as provided for by that Regulation itself. That prohibition was repeated in Article 20 (2) of Council Regulation (EEC) No 805/68 of 27 June 1968 (Official Journal L 148 of 28 June 1968) "on the common organization of the market in beef and veal", which superseded Regulation No 14/64/EEC and was in force at the time of both the importations in question in this case. The prohibition in Article 20 (2) was qualified by the words "Save as otherwise provided in this Regulation or where derogation therefrom is decided by the Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission".

In the *Schroeder* case (already cited), this Court held, following earlier authority, that there was nothing to warrant a different interpretation of the expression "charge having equivalent effect" in Article 20 (2) of Regulation No 805/68 and in the provisions of Community law relating to trade within the Community. The Court accordingly held that "pecuniary charges of whatever amount levied for public and veterinary health inspection of products imported from third countries which are determined according to their own particular criteria and which are not comparable to those used to fix any

pecuniary charges which might be levied" — I would interject, validly levied — "on similar Community products must be considered as charges having an effect equivalent to customs duties".

For that purpose it does not matter, in the case of charges imposed unilaterally by a Member State for a compulsory inspection, whether or not they are proportionate to the cost of the inspection, for an inspection imposed in the public interest cannot be regarded as a service rendered to the importer such as to justify his subjection to a pecuniary charge. Indeed, a charge for a compulsory inspection of imported goods can only escape classification as a charge having equivalent effect to a customs duty if it can be regarded as falling within a general system of taxation applying systematically and in the same way to domestic and to imported products (see, for example, the *Bresciani* case, already cited, at pp. 138-139).

That, in my view, is all the law that is in point so far as regards the first importation here in question.

The Commission however based an argument on Article 9 of Council Directive 64/433/EEC of 26 June 1964 (Official Journal 2012 of 29 July 1964) "on health problems affecting intra-Community trade in fresh meat". (In this context "fresh meat" is deemed to include frozen meat: see Article 1 (3) of the Directive). The purpose of that Directive was to make a start in the elimination of differences between the health requirements of Member States concerning meat, which differences hindered trade between them. It was parallel to Council Directive No 64/432/EEC of the same date "on animal health problems affecting intra-Community trade in bovine animals and swine", with which the Court was concerned in *Bauhuis* v *Netherlands* (already cited). Article 9 of Directive No 64/433 was in the following terms:

"If the Community provisions relating to importation of fresh meat from third countries do not apply at the time when this Directive enters into force, or pending their becoming applicable, national provisions relating to imports from those countries shall not be more favourable than those governing intra-Community trade."

The Commission's argument was, in a nutshell, that the decisions of the Court in *Bauhuis* v *Netherlands* and in *Commission* v *Netherlands* (already cited) had shown that charges made by a Member State for a health inspection carried out, not as an unilateral requirement of that Member State, but pursuant to an obligation imposed by Community legislation or by a Convention binding all the Member States, are not to be regarded as having an effect equivalent to a customs duty if their amount does not exceed the actual cost of the inspection. By a parity of reasoning, the Commission submitted, charges made for inspections carried out by a Member State in compliance with Article 9 of Directive No 64/433 should not be considered as equivalent to a customs duty if not exceeding the cost of that inspection.

As to that, a point that was touched upon both by the Plaintiff and by the Commission in their respective Observations seems to me pertinent. It is that, although the concept of a charge having equivalent effect to a customs duty is essentially the same in the context of intra-Community trade and in the context of trade with third countries, the Community interest served by the prohibition of such charges in the former case is different from that which it serves in the latter, although both are manifestations of the concept of a single market. As I ventured to point out in my Opinion in the *Schroeder* case (at p.

916), in the case of trade between Member States the purpose of the prohibition is to secure the free movement of goods between Member States, whereas in the case of trade with third countries the purpose is to ensure uniformity in the stance of the Member States towards third countries. Indeed it was because of the importance attached to preventing Member States breaching the uniformity of protection provided at the external frontiers of the Community by the Common Customs Tariff that the Court held in Cases 37 & 38/73 *Diamantarbeiders* v *Indiamex* [1973] ECR 1609 that even in the absence of an express prohibition in the Treaty, Member States were precluded from introducing, unilaterally, any new charges on imports from third countries or from raising the level of those already in force, and pointed out that charges already in existence could be forbidden by *inter alia*, legislation adopted by the Council in the context of the common agricultural policy (see pp. 1623-1624).

In my opinion the argument put forward by the Commission misses the point that what underlay the decisions of the Court in *Bauhuis* v *Netherlands* and *Commission* v *Netherlands* was that, in the first case, the system of inspections set up by Directive No 64/432 and, in the second case, the system set up by the International Plant Protection Convention, each had as its object and effect to facilitate trade between the States to which it applied. That being so, it would have been almost perverse to hold that charges imposed to meet the cost of inspections made under that system had an effect equivalent to customs duties.

That reasoning is by its very nature incapable of being transplanted into the field of trade with third countries, where the dominant purpose is not the elimination of barriers to imports or exports but the elimination of differences in the treatment of imports and exports by Member States.

I think it fair to say also that the Commission's argument, even if sound in theory, could hardly be relevant in the present case, where we have it on the authority of the Constitutional Court of Italy itself, in the Judgment to which I referred earlier, that the charges imposed by Statute No 1239 of 30 December 1970 bear no relation to the costs of the inspections for which they are imposed. Moreover, we have it on the authority of the same Judgment, that such charges were not, at the time here material, validly imposed in respect of imports into Italy from other Member States. It cannot therefore have been necessary to impose them on imports from third countries in order to comply with the requirement of Article 9 of Directive No 64/433 that such imports should not be more favourably treated than imports from Member States.

On 12 December 1972, i.e. before the date of the second importation here in question, the Council adopted Directive No 72/462/EEC (Official Journal L 302 of 31 December 1972) "on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat from third countries". (In that Directive too "fresh meat" is deemed to include frozen meat: see Article 2 (o)). The majority of the questions referred to the Court by the Pretore of Alessandria relate to that Directive. The greater part of the argument before us related to it also.

The Directive contains three provisions about costs occasioned by inspections.

The first of them is paragraph 8 of Article 12. That Article provides for health inspections of live animals (cattle and swine) on their arrival in Community territory. The English text of that paragraph is as follows:

"The exporter, importer or their representative shall be liable for any expenditure incurred pursuant to this Article, including the slaughter or destruction of animals, without compensation from the State."

The second provision is paragraph 4 of Article 23, which requires Member States to subject fresh meat, immediately upon arrival in Community territory, to an animal health inspection "whatever the customs procedure under which it was declared". The Commission explained to us that Article 23 was mainly concerned with goods in transit: its object, obviously, like that of Article 12, is to prevent the spread of animal diseases in the Community. The English text of paragraph 4 is as follows:

"All expenditure incurred pursuant to this Article shall be chargeable to the consignor, the consignee or their agents, without repayment by the State."

The third provision is Article 26, which relates to costs occasioned by the application of Articles 24 and 25. Article 24 requires Member States to ensure that fresh meat is, on importation, subjected to a public health inspection and to an animal health inspection. Article 25 requires a batch of meat that has been passed for movement in the Community to be accompanied by a certificate in a prescribed form. The English text of Article 26 is as follows:

"All the expenditure incurred by the application of Articles 24 and 25, and in particular the cost of inspecting the fresh meat, storage costs and possibly the cost of destroying the meat shall be chargeable to the consignor, the consignee or their agent, without repayment by the State."

Your Lordships thus see that the English text of each of those provisions uses somewhat different phraseology. That however is peculiar to the English text. The texts in the other official languages have the same phraseology in each provision. For example the French texts of them are as follows:

Article 12 (8)

"Tous les frais occasionnés par l'application du présent article, y compris l'abattage et la destruction des animaux, sont à charge de l'expéditeur, du destinataire ou de leur mandataire sans indemnisation de l'État."

Article 23 (4)

"Tous les frais occasionnés par l'application du présent article sont à charge de l'expéditeur, du destinataire ou de leur mandataire sans indemnisation de l'État."

Article 26

"Tous les frais occasionnés par l'application des articles 24 et 25, notamment les frais de contrôle des viandes fraîches, les frais de stockage ainsi que d'éventuels frais de destruction de ces viandes, sont à la charge de l'expéditeur, du destinataire ou de leur mandataire sans indemnisation de l'État."

Those provisions must therefore be interpreted in the same sense.

The contention that was pressed upon us, particularly on behalf of the Italian Government, was that those provisions, and in particular the last two relating to fresh meat, must be held to have authorized Italy to maintain in force the charges imposed by Statute No 1239 of 30 December 1970. That seems to me an impossible interpretation. Whatever those provisions may mean, they cannot be interpreted as authorizing a Member State to maintain in force a system of charges unrelated to expenditure incurred. I observe that the Constitutional Court of Italy which, in the Judgment to which I have already twice referred, considered those very

provisions, stated that Italy, like other Member States, would certainly have to enact measures to give effect to them.

That is really enough to dispose of the contention.

But there is another reason why it must in my opinion be rejected. It is quite clear that those provisions apply only in relation to costs incurred in connexion with inspections carried out pursuant to the Directive. There was much argument before us as to the interpretation of Article 32 (1) of the Directive, prescribing the dates by which Member States were to have brought into force the laws, regulations and administrative provisions necessary to comply with different parts of the Directive. But, as the Plaintiff and the Commission both pointed out, the Directive also requires for its implementation, save in minor and irrelevant respects relating to goods in transit from one third country to another through the Community, a number of measures to be taken at Community level, and those measures have not been taken to this day. It follows that no Member State is yet in a position to apply the Directive in any manner here relevant, and so cannot charge for doing so.

So I turn to the Pretore's questions. But I must, I think, preface my consideration of them with this observation. The Order for Reference in this case was made in ex parte proceedings under Article 633 *et seq.* of the Italian Code of Civil Procedure. As so often before in such cases, the propriety of such a proceeding has been questioned by the Italian Government, on whose behalf it was pointed out that it results in the questions to be referred to this Court being formulated without the defendant having been heard. This Court has held many times that that does not, of itself, entitle the Court to decline jurisdiction under Article 177 of the Treaty (see e.g. Case 162/73 *Birra Dreher* v *Amministrazione delle Finanze dello Stato* [1974] ECR 201 and the earlier authorities referred to by Mr Advocate General Mayras in that case, at pp. 220-221). But, in Case 52/76 *Benedetti* v *Mura* [1977] ECR 163, the Court intimated that a procedure that involved a reference being made under Article 177 before all interested parties had been heard, whilst valid, was not necessarily desirable. In my opinion, national Courts ought to heed that intimation, though of course it is for them to judge in each case whether the procedure is nonetheless appropriate.

The Pretore's first question is in these terms:

"Are Article 12 of Regulation No 14/64/EEC and Article 20 (2) of Regulation (EEC) No 805/68 to be interpreted as meaning that any pecuniary charge whatever imposed in a Member State at the time of a veterinary and public health inspection and levied at the frontier on bovine animals and meat imported from third countries constitutes a charge having an effect equivalent to a customs duty?"

In my opinion Your Lordships should, in answer to that question, rule that a pecuniary charge of whatever amount imposed by a Member State unilaterally for a compulsory veterinary or public health inspection of products imported from third countries determined according to criteria that are not comparable to any used to fix charges validly levied on similar Community products constitutes a charge having an effect equivalent to a customs duty.

The Pretore's second question is:

"If the first question is answered in the affirmative, *with effect from what date* did the prohibition against the levying of the said pecuniary charges come into force?"

In Case 84/71 the first *Marimex* case [1972] ECR 89, the Court examined the somewhat complex legislation on that matter and concluded that the prohibition had come into force on 1 November 1964 and that it had continued in force ever since.

In my opinion, the same answer should be given here.

The Pretore's third question is a lengthy one about the interpretation of Directive No 72/462 and in particular of Articles 23 (4) and 26 thereof, and about the date of their entry into force.

In my opinion the answer to be given to that question is that, so far as regards importations into the Community, neither Article 23 (4) nor Article 26 is yet applicable.

On that footing, none of the other questions referred to the Court by the Pretore calls for an answer.