JUDGMENT OF THE COURT (Third Chamber)

28 October 2004 *

In Case C-124/03,

REFERENCE for a preliminary ruling under Article 234 EC

from the College van Beroep voor het bedrijfsleven (Netherlands), made by decision of 11 March 2003, received at the Court on 20 March 2003, in the proceedings

Artrada (Freezone) NV

Videmecum BV

Jac. Meisner Internationaal Expeditiebedrijf BV

v

Rijksdienst voor de keuring van Vee en Vlees,

* Language of the case: Dutch.

THE COURT (Third Chamber),

composed of: A. Rosas, President of the Chamber (Rapporteur), R. Schintgen and N. Colneric, Judges,

Advocate General: M. Poiares Maduro,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 June 2004,

after considering the observations submitted on behalf of:

— Artrada (Freezone) NV, Videmecum BV and Jac. Meisner Internationaal Expeditiebedrijf BV, by A. Van Lent, N. Helder and M. Slotboom, advocaten,

— the Rijksdienst voor de keuring van Vee en Vlees, by J. Hoffmans, acting as Agent, and by B.J. Drijber, advocaat,

— the Hellenic Republic, by V. Kontolaimos and I. Chalkias, acting as Agents,

— the Commission of the European Communities, by T. van Rijn, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2004,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Council Directive 92/46/EEC of 16 June 1992 laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products (OJ 1992 L 268, p. 1).

2 That request was made in the course of proceedings between, on the one hand, Artrada (Freezone NV), a company incorporated under Aruban law, (hereinafter 'Artrada'), Videmecum BV, a limited liability company, (hereinafter 'Videmecum') and Jac. Meisner Internationaal Expeditiebedrijf, a limited liability company (hereinafter 'Jac Meisner') and, on the other hand, the Rijkdienst voor de keuring van Vee en Vlees (Netherlands Livestock and Meat Inspectorate, hereinafter 'the Inspectorate'), regarding the latter's refusal to authorise the import into the Netherlands of a product consisting of a mixture of 75.75% sugar, 15.15% skimmed-milk powder and 9.1% cocoa.

Applicable legislation

Community legislation

3 Article 1(1) of Directive 92/46 provides:

'This Directive lays down health rules for the production and placing on the market of raw milk, heat-treated drinking milk, milk for the manufacture of milk-based products and milk-based products intended for human consumption.'

4 Article 2 provides:

'For the purposes of this Directive the following definitions shall apply:

1. ...

2. "milk for the manufacture of milk-based products": either raw milk for processing or liquid or frozen milk obtained from raw milk, whether or not it has undergone an authorised physical treatment, such as heat treatment or thermisation, or is modified in its composition, provided that these modifications are restricted to the addition and/or removal of natural milk constituents;

3. ...

4. "milk-based products": milk products, namely products exclusively derived from milk, it being accepted that substances necessary for their manufacture may be added, provided that these substances are not used to replace in part or in whole any milk constituent, and composite milk products, namely products of which no part replaces or is intended to replace any milk constituent and of which

milk or a milk product is an essential part either in terms of quantity or for characterisation of the product;

...'.

5 Article 22 of Directive 92/46, which forms part of Chapter III thereof relating to imports from third countries, provides:

'The conditions applicable to imports from third countries of raw milk, heat-treated milk and milk-based products covered by this Directive must be at least equivalent to those laid down in Chapter II for Community production.'

6 Article 23(1) and (2) of Directive 92/46 provide:

'1. For the purposes of uniform application of Article 22, the provisions of the following paragraphs shall apply.

2. In order to be imported into the Community, milk or milk-based products must:

(a) come from a third country on the list to be drawn up in accordance with paragraph 3(a);

(b) be accompanied by a health certificate corresponding to a specimen to be drawn up in accordance with the procedure laid down in Article 31, signed by the competent authority of the exporting country and certifying that the milk or milk-based products meet the requirements of Chapter II or any additional conditions or offer the equivalent guarantees referred to in paragraph 3 and come from establishments offering the guarantees provided for in Annex B.'

7 Commission Decision 95/340/EC of 27 July 1995 drawing up a provisional list of third countries from which Member States authorise imports of milk and milk-based products and revoking Decision 94/70/EC (OJ 1995 L 200, p. 38) contains the list of third countries mentioned in Article 23(2)(a) of Directive 92/46. Aruba is not on that list.

8 Council Directive 97/78/EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries (OJ 1998 L 24, p. 9) describes those checks.

National legislation

9 The referring court states that, in order to comply with its obligations under Directive 92/46, the Kingdom of the Netherlands adopted, among others, the Warenwetbesluit Zuivel (Order on milk products, adopted under the Law on Foodstuffs, Stbl. 1994, p. 813, subsequently amended).

10 Article 23 of Directive 92/46 was implemented by Article 16 of the Warenwetregeling Zuivelbereiding (Regulation concerning the manufacture of milk products, adopted under the Law on Foodstuffs, Stcrt. 1994, p. 243, subsequently amended). That provision refers to the list of third countries annexed to Decision 95/340.

11 At the date of the decision challenged in the main proceedings, 23 February 2001, Article 4 of the Warenwetregeling Veterinaire controles (derde landen) (Regulation on veterinary checks (third countries)), adopted under the Law on Foodstuffs, Stcrt. 2000, p. 207) designated, among other things, the Inspectorate as the competent authority to carry out the checks mentioned in Directive 97/78.

12 Finally, the Warenwetbesluit Invoer levensmiddelen uit derde landen (Order on food imports from third countries, adopted under the Law on Foodstuffs, Stbl. 1993, p. 698), can be applied to foods and drinks from third countries not covered by Community regulations.

Facts, main proceedings and questions referred for a preliminary ruling

13 The order for reference shows that Artrada, a company established in Aruba, produced a mixture of 75.75% sugar, 15.15% skimmed-milk powder and 9.1% cocoa. The product, whose constituents cannot be separated, was to be used as a raw material for the production of chocolate milk in factories in Germany and Belgium. Jac. Meisner, a customs agent, was instructed by Videmecum, a subsidiary of Artrada, to make the import declarations for the product.

14 Two import declarations for imports from Aruba for the placing of containers into free circulation were lodged on 26 January 2001. A border crossing certificate, submitted on 22 February 2001 at the request of the competent authorities, states the nature of the goods as 'bakeryprod. (semi-finished)'.

15 Following a veterinary check, the importation of the consignment into the European Union was, by decision of 23 February 2001, refused on the ground that the import of milk products from Aruba was not authorised, that the product did not originate from a recognised undertaking and that it was not accompanied by a veterinary certificate. A complaint was brought against that decision but the Inspectorate confirmed the import refusal.

16 An action was brought before the Rechtbank te Rotterdam (District Court, Rotterdam) (Netherlands). By judgment of 4 March 2002, that court upheld the action on the ground that the contested decision had not been signed by the person authorised to do so. As Netherlands law authorises it to do, the Rechtbank however upheld the legal effects of the quashed decision.

17 Basing itself on a working document of the Commission, the Rechtbank decided that the product in question was not a 'milk-based product' within the meaning of Article 2(4) of Directive 92/46, because that category covered only finished products, whereas the product in question was a semi-finished product. Taking into consideration the Directive's aim of public health protection, the Rechtbank decided that a constituent of a product should be susceptible to a check and that, therefore, the milk powder contained in the product should be described as 'milk for the manufacture of milk-based products' within the meaning of Article 2(2) of Directive 92/46. Since that semi-finished product — and therefore the milk powder — came from a third country which was not on the list of third countries in Decision 95/340, it was correct that the product could not be imported.

18 The appellants in the main proceedings appealed to the College van Beroep voor het bedrijfsleven, (Administrative Court for Trade and Industry), arguing that the milk powder contained in a compound product, came within the Directive's scope only if it formed an essential part of the product. Since that was not so in this case, the only matter to be considered was whether it had satisfied the provisions of Article 3 of the Warenwetbesluit Invoer levensmiddelen uit derde landen. The appellants in the main proceedings stated at the hearing before the College that the milk powder used in the preparation of the product had been manufactured in an approved undertaking in Poland, which is recognised under Directive 92/46 as a country exporting milk products. They suggested to the Inspectorate that samples be taken of all the consignments of the product in question whose importation was envisaged in order to check whether the requirements of the Netherlands law were satisfied, but the Inspectorate rejected that suggestion because it considered that the product in question came within the scope of Directive 92/46.

19 The referring court found that the working document emanating from the Commission's services on which the Rechtbank had based its decision was not binding and did not necessarily reflect the Commission's view. It held that, viewed in isolation, the wording of Article 2(4) of Directive 92/46/EEC afforded no support for an interpretation whereby 'milk-based products' covered only products which undergo no further processing. It observed, in addition, that the high level of public health protection sought does not mean that Directive 92/46 must be applied to the milk contained in semi-finished products. In fact, other provisions could be applicable. The appellants in the main proceedings referred in that regard to Directive 97/78 and to the Warenwetbesluit Invoer levensmiddelen uit derde landen.

20 In the referring court's view, it is not logical to require, in Article 2(4) of Directive 92/46, that, for the directive to apply, the milk or milk product be an essential constituent of the product, and then to deem the directive applicable none the less to the constituent not regarded as essential. Directive 92/46 would then always be applicable when milk is contained in a product irrespective of whether it is, or is not, an essential constituent. Had that been the aim, the Community legislature could

have merely required that the milk or milk product form part of the constituents without classifying them as essential.

21 If Directive 92/46 and, in particular, Article 2(2) thereof is applicable to the milk powder contained in a mixture of which it is not the essential part, it falls to be determined whether it is that milk powder which must originate from a country on the list of third countries under Article 23 of the Directive and be accompanied by a health certificate or the compound product.

22 If the milk powder is not covered by Article 2(2) of Directive 92/46, it must be asked whether the mixture can be regarded as a 'milk-based product' and, therefore, whether the milk powder is, in itself, an essential part of the product or whether it merely characterises the product as referred to in Article 2(4) of the Directive. The referring court observes in that regard that, in the import declaration, the mixture is classified under tariff heading 1806 2095, that is to say that it is regarded as an 'other food preparation containing cocoa in liquid, paste or powder form'. The product is made in accordance with the specifications of the customer who further processes it into chocolate milk.

23 Finding that a doubt subsisted as to the interpretation of Directive 92/46, the College van Beroep voor het bedrijfsleven considered itself bound to refer the following questions to the Court of Justice for a preliminary ruling:

'1 (a) Must the term "milk for the manufacture of milk-based products" in Article 2(2) of Directive 92/46/EEC be interpreted as meaning that it (also) includes milk constituents of a product which also contains other non-milk constituents and where the milk constituent cannot be separated from the non-milk constituents?

(b) If the answer to Question 1(a) is affirmative: must Article 22 of Directive 92/46/EEC be interpreted as meaning that in the case of imports from non-Member States, that Directive is applicable only to the milk constituent of a product and thus not to the product of which it is a constituent?

2 (a) Does the concept of "milk-based products" in Article 2(4) of Directive 92/46/EEC concern only finished products or also semi-finished products which must undergo further processing before they can be offered for sale to the consumer?

(b) In the event that Article 2(4) of Directive 92/46/EEC also covers semi-finished products, according to which criteria must it be determined whether milk or a milk product forms an essential part of a product, either in terms of quantity or for characterisation of those products, as referred to in Article 2(4) of Directive 92/46/EEC?'

The questions referred for a preliminary ruling

The first question

24 The first part of the first question concerns the interpretation of Article 2(2) of Directive 92/46. The referring court seeks to ascertain whether the expression 'milk for the manufacture of milk-based products' includes milk constituents of a product which also contains other non-milk constituents and where the milk constituent cannot be separated. The second part of the question, referred on the hypothesis of

an affirmative response to the first part, concerns the interpretation of Article 22 of Directive 92/46. The national court seeks to establish whether, in the case of imports from non-Member States, that Directive is applicable to the milk constituent of a mixture or to the mixture itself.

25 As stated in the first recital in its preamble, Directive 92/46 distinguishes between raw milk, heat-treated drinking milk, milk for the manufacture of milk-based products, and milk-based products. Those four expressions are defined in Article 2(1) to (4) of the directive.

26 It is clear from the terms of Article 2(2) of the directive that the expression 'milk for the manufacture of milk-based products' does not cover a product consisting of a mixture of inseparable ingredients, one of whose constituents is milk powder. Article 2(2) covers only milk regarded as a single product, whose composition could be modified only by the addition and/or removal of natural milk constituents.

27 Interpreting Article 2(2) of Directive 92/46 as meaning that it covers the milk constituents of a mixture would, in addition, run counter to the scheme and coherence of that Directive, since it would deprive Article 2(4), relating to 'milk-based products', of its substance.

28 The answer to the first part of the question must therefore be that Article 2(2) of Directive 92/46 is to be interpreted as meaning that the expression 'milk for the manufacture of milk-based products' does not include milk constituents of a product which also contains other non-milk constituents if the milk constituent cannot be separated from the non-milk constituents.

29 In view of the answer to the first part of the question, the second part does not arise.

The second question

30 The first part of the second question concerns the interpretation of Article 2(4) of Directive 92/46. The referring court seeks to establish whether the term 'milk-based products' covers only finished products or also semi-finished products which must undergo further processing before they can be offered for sale to the consumer. In the second part of the question, referred on the hypothesis that Article 2(4) of Directive 92/46 also covers semi-finished products, the referring court wishes to identify the criteria for determining whether milk or a milk product constitutes an essential part of a product, either in terms of quantity or for characterisation of those products as referred to in Article 2(4) of Directive 92/46.

Observations submitted to the Court

31 All the parties which have submitted observations take the view that the word 'products' in Article 2(4) of Directive 92/46 covers both finished and semi-finished products. The Inspectorate and the Commission point out that such an interpretation complies with the objective of public health protection and with the desire to check milk at the earliest possible stage of its production or use. The Commission observes, in addition, that the working document emanating from its services, cited by the national court, cannot be interpreted as meaning that the provision covers only finished products. Artrada, which takes that position only in the alternative, observes that a national law applies to the semi-finished product and that the finished product must, in any event, satisfy Community legislation.

32 Those parties accept that it is the quantity of milk in a product which enables it to be determined whether that milk is an essential part. That would certainly be so if the percentage of the milk in the product exceeded 50%. The Commission explains that the protection of public health justifies the checking of any milk content in a product, but that checks on products containing only small quantities of milk create problems in trade with non-Member States. Artrada maintains that, in the main proceedings, milk powder making up 15.15% of the total weight of the product is not sufficient to characterise that milk powder as an essential part.

33 All the parties who have submitted observations argue that the 'characterisation' of milk in a product can be determined by the taste of the product, its presentation, its use or even the statement used in importing the product. They point out the particular difficulty arising from the fact that the main proceedings concern a semi-finished product which, according to the importers, is for use in the production of a chocolate drink by the addition of milk but which could also well be used as 'Hagelslag' (chocolate granules). In that context, the parties to the main proceedings question the relevance of the product's final use as declared or the taste of the finished product declared. Artrada maintains that, in the main proceedings, the milk powder has been added to cocoa and sugar for reasons of consistency of the mixture, but that it is not indispensable to the product. It observes that the milk in the finished product will essentially be the milk added to the mixture to make the drink and that, in any event, the finished product will taste more of cocoa than of milk.

The Court's reply

34 Article 2(4) of Directive 92/46 must be interpreted as meaning that the term 'milk-based products' covers both finished products and semi-finished products which must undergo further processing before they can be offered for sale to the consumer.

35 It is clear from the text of that provision that it makes no distinction between finished and semi-finished products. Such a distinction would, in any event, run counter to the aim of public health protection of Directive 92/46, which envisages checks on milk from the time of its production to that of its being placed on the market.

36 If the product in question containing a milk constituent is a semi-finished product, Article 2(4) of Directive 92/46 is to be interpreted as meaning that a semi-finished product is a 'milk-based product' where no part replaces or is intended to replace any milk constituent and of which milk or a milk product is an essential part either in terms of quantity or for characterisation of that semi-finished product.

37 It is therefore with regard to the semi-finished product that it must be ascertained whether the milk therein is an essential part, either in terms of quantity or for characterisation. To do that, account must be taken of the characteristics and objective properties of the semi-finished product when it is imported.

38 In order to determine whether the milk or milk product in a semi-finished milk-based product is an essential part in terms of quantity, the proportion of milk or milk product in that product must be examined. If that proportion is not dominant or sufficiently important in the semi-finished milk-based product, the milk or milk product cannot be regarded as an essential part of the product by its quantity alone.

39 In order to determine whether the milk or milk product in a semi-finished milk-based product is an essential part of it by its characterisation of that product, account must be taken of all the objective features present when that product is imported, particularly the use which can be made of the semi-finished product and its taste.

40 In the main proceedings, it is for the competent national court to determine, bearing in mind the aim of public health protection of Directive 92/46 and taking account of all the objective features present at the time of import, whether the skimmed-milk powder in the mixture imported by the appellants in the main proceedings was an essential part of it, particularly for its characterisation of that mixture.

41 It follows from all those factors that the answer to the second question is that:

Article 2(4) of Directive 92/46 is to be interpreted as meaning that the term 'milk-based products' covers both finished products and semi-finished products which must undergo further processing before they can be offered for sale to the consumer. In such a case, it is with regard to the semi-finished product that it must be ascertained whether its milk content is an essential part, in terms of quantity or for its characterisation. To do that, account must be taken of the characteristics and objective properties of the semi-finished product when it is imported, particularly the proportion of milk or milk product in the semi-finished product, the use which can be made of the semi-finished product and its taste.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) rules as follows:

1. **Article 2(2) of Council Directive 92/46/EEC of 16 June 1992 laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products is to be interpreted as meaning that the expression 'milk for the manufacture of milk-based products' does not include milk constituents of a product which also contains other non-milk constituents if the milk constituent cannot be separated from the non-milk constituents.**

2. **Article 2(4) of Directive 92/46 is to be interpreted as meaning that the term 'milk-based products' covers both finished products and semi-finished products which must undergo further processing before they can be offered for sale to the consumer. In such a case, it is with regard to the semi-finished product that it must be ascertained whether its milk content is an essential part, in terms of quantity or for its characterisation. To do that, account must be taken of the characteristics and objective properties of the semi-finished product when it is imported, particularly the proportion of milk or milk product in the semi-finished product, the use which can be made of the semi-finished product and its taste.**

Signatures.