JUDGMENT OF THE COURT
OF 5 JULY 1978 [1]

City of Frankfurt-am-Main v Firma Max Neumann (preliminary ruling requested by the Bundesverwaltungsgericht

Case 137/77

Common agricultural policy — Approximation of legislation on public health and veterinary inspections — Imports from third countries — Health inspections — Charges — Directive No 72/462 — Application by analogy — Not permissible
(Council Directive No 72/462/EEC, Arts. 12, 23, 24 and 26)

Council Directive No 72/462/EEC, which places a duty on Member States to carry out health inspections upon the importation of bovine animals and swine and fresh meat from third countries and provides that the resulting expenses must be paid by the trades concerned, cannot be applied by analogy to the importation of other products (in this case, game).

In Case 137/77

Reference to the Court under Article 177 of the EEC Treaty by the Bundesverwaltungsgericht for a preliminary ruling in the action pending before that court between:

CITY OF FRANKFURT-AM-MAIN

and

FIRMA MAX NEUMANN

Intervener:

FEDERAL REPUBLIC OF GERMANY

on the interpretation of certain provisions of Council Directive No 72/462/EEC of 12 December 1972 (Official Journal, English Special Edition 1972 (31 December); Journal Officiel L 302, p. 28) on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat from third countries and on the interpretation of the

1 — Language of the Case: German.

provisions of the EEC Treaty and of Regulation No 950/68 of the Council establishing the Common Customs Tariff as from 1 July 1968 with regard to the application by the Member States after that date of charges having an effect equivalent to customs duties on imports from third countries,

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The decision making the reference and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

At the beginning of 1975 Firma Max Neumann, the plaintiff in the main action and the respondent (hereinafter referred to as "the plaintiff in the main action") imported red deer, roe deer and wild boar from third countries into the Federal Republic of Germany. The city authority for Frankfurt-am-Main, the defendant in the main action and the appellant, (hereinafter referred to as "the defendant in the main action") claimed from that undertaking the payment of charges (Gebühren für Einfuhruntersuchungen) for the health inspections carried out on that game which the plaintiff in the main action denies that it must pay because it considers them as charges having an effect equivalent to customs duties on imports which were introduced after the entry into force on 1 July 1968 of the Common Customs Tariff (Regulation No 950/68 of the Council of 28 June 1968, Official Journal, English Special Edition 1968 (I), p. 275) and which are therefore incompatible with Community law.

On the other hand, the defendant in the main action maintains that the levying of the charges in question is in accordance with Community law because Council Directive No 72/462/EEC of 12 December 1972 on

health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat of the following species: bovine animals, swine, sheep and goats and solipeds (Official Journal, English Special Edition 1972 (31 December); Journal Officiel L 302, p. 28) and in particular Article 12 (1), (7), (8), and Articles 23, 24 and 26 of that directive authorized the Member States to levy charges for the health inspections carried out upon the importation of the animals and meat referred to by the directive and that it is necessary to extend by analogy that authorization to the charges relating to health inspections carried out upon the importation of other meat.

When the Verwaltungsgericht Frankfurt had quashed the notices of assessment in question by judgment of 30 October 1975 and ordered the defendant in the main action to repay DM 1 141.95, the dispute was brought before the Bundesverwaltungsgericht by an accelerated appeal (Sprungrevision) which, because it took the view that the dispute raised problems of interpretation of Community law, requested the Court of Justice by order of 26 August 1977 issued on 16 September 1977 to give a preliminary ruling on the following questions:

1. Are Article 12 (1), (7) and (8) and Articles 23, 24 and 26 of Council Directive No 72/462/EEC of 12 December 1972 (Official Journal, English Special Edition 1972 (31 December); Journal Officiel L 302, p. 28) applicable by analogy to the importation of game, with the result that the Member States are entitled or obliged to carry out health inspections and may impose charges for such inspections?
2. After the introduction of the Common Customs Tariff by Regulation (EEC) No 950/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1968 (I), p. 275) may national charges still be increased to the extent of the general rise in costs?

The examination of the questions referred to the Court and of the grounds for the decision making the reference suggests that the Bundesverwaltungsgericht assumed that game did not come within the list of agricultural products set out in Annex II to the Treaty and that it could not therefore come within an organization of the market, with the result that the problem of the compatibility of the levying of charges for health inspections on imports from third countries had to be examined in the light of the principles governing the effects on that levying of the introduction of the Common Customs Tariff, as interpreted by the Court of Justice in its judgment of 13 December 1973 (Joined Cases 37 and 38/73, *Sociaal Fonds voor de Diamantarbeiders* v *NV Indiamex and Association de fait De Belder* [1973] ECR 1609). In these circumstances it appears appropriate to analyse briefly the state of the Community legislation in this connexion.

Game in general comes within tariff heading 02.04: "Other meat and edible meat offals, fresh, chilled or frozen: A. ... B. *Of game*", except for wild boar which, in pursuance of an explanatory note come within subheading 02.01 A III (b): "Meat ... of the animals falling within heading No 01.01, 01.02,. 01.03 or 01.04 ... III. Of swine: [(a) Of domestic swine] .... (b) *Other*".

In both cases, therefore, they are agricultural products within the meaning of Annex II to the Treaty, which covers under the heading "Chapter 2 Meat and edible meat offals" all the headings coming within Chapter 2. Moreover, they are products covered by Regulation No 827/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1968 (I), p. 209) on the common organization of the market in certain products listed in Annex II to

the Treaty, and in particular, as appears from the annex to the regulation, meat coming under tariff subheading 02.01 A III (b) (wild boar) and tariff heading 02.04 B (red deer or roe deer). However summary the common organization established by Regulation No 827/68, Article 4 of that regulation nevertheless contains a prohibition on the levying of charges having equivalent effect in the internal trade of the Community and Article 2 (2) contains a prohibition on the levying of any charge having equivalent effect in trade with third countries which is worded as follows: "Save as otherwise provided in this regulation, and save derogations decided on 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, and subject to the obligations arising from international agreements relating to the products listed in the annex, the following shall be prohibited in trade with third countries:

— the levying of any charge having effect equivalent to a customs duty, and

— the application of any quantitative restriction or measure having equivalent effect, subject to the provisions of the Protocol on the Grand Duchy of Luxembourg".

The fact that the products in question are covered by the express prohibition laid down in Article 2 (2) quoted above in no way however makes them irrelevant to the questions submitted by the national court. The problem of the effect of Directive No 72/462 or of its application by analogy to the prohibition on levying charges having equivalent effect in the form of charges for health inspections upon the importation of products from third countries arises in fact in exactly the same terms whether the specific prohibition resulting from an express provision laid down in a regulation on the organization of an agricultural market is involved or the more general prohibition, more restricted however in its effects, which results from the establishment of the Common Customs Tariff.

The order for reference was entered in the Court Register on 16 November 1977. The plaintiff in the main action, the defendant in the main action and the Commission submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

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

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

Observations of the plaintiff in the main action

With regard to the *first question*, the plaintiff in the main action observes that the field of application of Directive No 72/462 has been clearly laid down in Article 1 thereof. As far as fresh meat is concerned, the directive covers only meat of domestic animals of the following species: bovine animals, swine, sheep and goats and solipeds. The methods of control and inspection are likewise specifically laid down with regard to these species of animals. The application by analogy of the directive to game would be contrary to the terms and express meaning of the directive. Moreover, to extend the application of the directive to game would amount to replacing the contents of a Community provision by a different provision. This would be to exceed the bounds of authority and to adopt a legislative measure which the Council alone is empowered to take in this case.

Directives must be transferred to the national law. With this in mind, Article 32 of Directive No 72/462 requires the Member States to bring into force the laws, regulations and administrative provisions necessary to comply with that directive and its annexes not later than 1 January 1976. In view of that provision, the field of application of a directive must be clearly determined since if this were not so the Member States would implement the directive differently and in an unharmonized manner. If the argument put forward by the defendant in the main action was correct all the Member States would probably have been in breach of the duty laid down in Article 32 of the directive because they have not adopted provisions relating to game on the basis of that directive.

The prohibition on levying charges having an effect equivalent to customs duties is a basic principle of the customs union and therefore provisions derogating from that principle must be strictly interpreted. Even if Article 26 of Directive No 72/462 were regarded as an authorization to levy national charges that could only be within the framework laid down by the field of application of the directive itself. In the absence of such a limitation the Member States might well apply the existing authorization to levy charges on the basis of the Community rules so widely that they could more or less maintain all charges having an effect equivalent to customs duties. The plaintiff in the main action therefore rejects any possibility of applying Articles 12, 23, 24 and 26 of Directive No 72/462 by analogy.

According to the plaintiff in the main action the first question involves the problem whether Article 26 of the directive, interpreted as extending by analogy to products other than those listed by the directive, would still be compatible with certain superior rules of Community law.

Referring to the judgment of the Court of 13 December 1973 (Joined Cases 37 and 38/73, *Sociaal Fonds voor de Diamantarbeiders* v *NV Indiamex and Association de fait De Belder* [1973] ECR 1609), the plaintiff in the main action considers that the basic provisions laid down in Articles 3 (b) and 110 *et seq.* of the EEC Treaty and those laid down in the Common Customs Tariff would be infringed if Article 26 of Directive No 72/462 gave the Member States the power to levy at will charges on imports of fresh meat and to fix the amount thereof. Varying use of that power and the application of varying rates of charge would necessarily lead to fresh distortions of competition. For that reason, it is possible to create an exception to the prohibition on charges having an effect equivalent to customs duties within the context of the organizations of the market only if that exception defines uniformly within the Community the events which give rise to the levying of a charge and fixes the amount of the charges authorized.

The plaintiff in the main action observes moreover that under certain national provisions the importation of game may only be carried out in the Federal Republic of Germany by undertakings which are also expressly authorized to export the same product. These firms are inspected and importers pay considerable fees in the form of charges for the sending and subsistence of veterinarians in the third country in question. The levying of other charges on the importation of game would lead to doubling the financial burden and therefore to discrimination *vis-à-vis* other importers in the Community.

With regard to the *second question*, the plaintiff in the main action, having observed that the charges payable on 1 July 1968 had been considerably increased, claims that it follows from the judgments of the Court of 13 December 1973 (Joined Cases 37

and 38/73, *Sociaal Fonds voor de Diamantarbeiders* v *NV Indiamex and Association de fait De Belder* [1973] ECR 1623) and of 5 February 1963 (Case 26/62, *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 3 that the effect of the introduction of the Common Customs Tariff is to prohibit all the Member States from increasing unilaterally the level of the charges already in force. Taking into account the rise in inspection costs constitutes an infringement of that prohibition.

Although the court making the reference has not raised any questions in this respect, the plaintiff in the main action takes the view that the fixing of new amounts for old charges converts the latter into fresh charges which are incompatible with the Common Customs Tariff and it requests the Court to give a ruling to that effect.

Observations of the defendant in the main action

The defendant in the main action, having emphasized the importance of health inspections for game, considers that in the absence of harmonized rules on game there is no doubt that the Member States are authorized to carry out health inspections on imports of game from third countries.

Broaching next the problem of charges, it observes that for the purpose of answering the question whether the system of charges laid down in Directive No 72/462 is applicable by analogy to imports of game, it is unimportant whether the prohibition of principle on levying charges on imported game follows from the Common Customs Tariff or from Article 2 (2) of Regulation No 827/68. The determining factor is whether, by the provisions on costs contained in Directive No 72/462, the Community legislature has adopted an essential decision of principle which is applicable to the treatment under tax law of imports of meat from third countries which must be applied by analogy to other imports of meat which have not yet been harmonized. In this connexion it is necessary to attach fundamental importance to certain statements made by the Commission in Case 21/75 *(Firma I. Schroeder KG* v *Oberstadtdirektor der Stadt Köln).* It stated that "to attain the objective laid down in the common organization of the market a uniform treatment of the question of charges relating to the importation of goods from third countries is required" ([1975] ECR 912) and therefore declared that "with regard to the imposition of charges relating to inspections of meat preparations carried out as public health measures, a system will be introduced identical to that which already exists in the case of cattle and fresh meat". These statements, made with regard to meat preparations, also apply to the inspection of game which is likewise not yet harmonized. According to the defendant in the main action it results necessarily from these statements that Directive No 72/462 is lawful and must be applied by analogy and that the arguments put forward against such applications must be rejected. Examining these arguments, the defendant in the main action replies first to two preliminary objections put forward by the plaintiff in the main action.

The statement that Articles 12 (8), 23 (4) and 26 of Directive No 72/462 do not contain any authorization for the Member States to levy charges is incorrect. The clear wording of those provisions shows that the costs of all the measures of inspection are chargeable to the importer.

The statement that if it were necessary to consider those provisions, in particular Article 26, as empowering the Member States to levy charges they would infringe a superior rule of Community law is also incorrect. The plaintiff in the main action invokes in

this connexion the judgment of the Court of Justice of 13 December 1973 (Joined Cases 37 and 38/73, cited above) and the provisions of the Treaty relating to the common commercial policy but its arguments are not well founded. In fact even if Article 100 *et seq.* of the Treaty on commercial policy could prohibit independent measures being adopted by the Member States they would not nevertheless restrict the freedom of the Community itself in the choice of measures of commercial policy. Article 26 of Directive No 72/462 forms part of the sphere of the common commercial policy and naturally the same applies to the extent to which the rules on costs contained in Directive No 72/462 were applied by analogy to similar products. Concluding its preliminary remarks, the defendant in the main action observes that it is impossible not to take into account the fact that within the context of Directive No 72/462, the Community legislature has not harmonized the charges themselves. It is clear that because of different cost structures national charges cannot be identical. Although it is possible within the context of the harmonized inspections on imports which are subject to Directive No 72/462 to waive harmonization of the charges neither the interests of the Community nor the principles of the common commercial policy require that import charges should be made absolutely uniform. On the contrary, in the case of imports of meat from third countries, the Community legislature gives priority to complete and precise implementation of the inspections and that implementation depends in fact largely on the raising of the corresponding funds by means of the charges. Consequently, likewise outside the scope of the rules laid down by Directive No 72/462, the permissibility of national charges for inspections on imports of meat from third countries cannot depend upon the prior harmonization of the system of charges at the Community level. The defendant in the main action states that in this sector the national charges relating to the inspection of imports do not appreciably affect the functioning of the common commercial policy nor the application of the Common Customs Tariff and concludes that the question whether Articles 12, 23 and 26 of Directive No 72/462 may be applied by analogy cannot be answered in the negative on the ground that it is necessary for Community law to lay down the details of the charges themselves.

With regard to the *first question* the defendant in the main action considers that in issuing Directive No 72/462 the Council adopted a basic decision of principle which was applicable to the system of imports of meat from third countries. It is therefore necessary to reply to the first question in the affirmative in the case of imports of meat of roe deer or red deer because it is necessary to carry out essentially the same inspections as in the case of domestic animals.

The argument that Articles 12, 23 and 26 of Directive No 72/462 are provisions laying down exceptions from the prohibition on the levying of charges having an effect equivalent to customs duties and that provisions laying down exceptions must be interpreted strictly does not result in the rejection of the application by analogy of those provisions. The rule that exceptions must be interpreted strictly does not apply when they are exceptions which clearly embody a narrower systematic principle. In the present case there is little doubt that the rules adopted in Directive No 72/462 which are applicable to imports of meat from third countries are based on the principle that all charges relating to the inspection of imports may lawfully be levied on those imports by the Member States. In so far as the field of application is clear it is unnecessary to

interpret them restrictively. The defendant in the main action adds that the case-law of the Court of Justice, which states that it is necessary to interpret exceptions strictly (see Case 29/72, *S.p.A. Marimex* v *Italian Finance Administration* [1972] ECR 1309 and Joined Cases 90 and 91/63, *Commission of the EEC* v *Grand Duchy of Luxembourg and Kingdom of Belgium* [1964] ECR 625), always refers to the basic principle of freedom of movement within the Community, in other words to a case which is fundamentally different from that which is in question in the present dispute.

The defendant in the main action concludes that neither the basic principles of the Common Market nor the powers of the Community institutions nor any overriding interest of the Community would be affected if by means of the application by analogy resulting from Community law itself the system of charges laid down in Directive No 72/462 were extended to areas in which there is no doubt that the Community legislature would have laid down provisions to the same effect if it had already adopted rules.

Since a reply to the first question in the affirmative makes the second question purposeless, the defendant in the main action replies to the *second question* only subsidiarily. After describing the German system of health inspection and payment of charges which was already in existence when the Common Customs Tariff came into force, the defendant in the main action concludes from this that according to the case-law of the Court of Justice it was possible for the Federal Republic of Germany to continue to levy those charges. Since the charges were increased during the period from 1968 to 1975, the question arises whether that increase is permissible within the meaning of the judgment of 13 December 1973 (Joined Cases 37 and 38/73, quoted above). According to the defendant in the main action the Court of Justice considered this question in relation to the Common Customs Tariff and ruled to the effect that it is prohibited for the Member States to amend "the level of protection as defined by the Common Customs Tariff" ([1973] ECR 1623). This interpretation does not necessarily exclude each nominal increase in the charges which occurs solely within the context of the general increases in costs. In the case of *ad valorem* customs duties, this adjustment results automatically from the increase in the price of the goods imported. It follows that charges, expressed in absolute figures, may be adjusted in order to remain in the same relationship to the Common Customs Tariff since the Court of Justice clearly intended to recognize as the "level" the relationship existing in 1968 between the Common Customs Tariff and the "existing" charges having an effect equivalent to customs duties. Such an adjustment in no way amends the previous level of protection, so that there would only be an increase in the charges having an effect equivalent to customs duties within the meaning of the judgment of the Court of Justice of 13 December (Joined Cases 37 and 38/73) if the increase in the charges exceeded the ascertainable increase in general costs and in particular the increase in the costs of the administration, which does not apply in this case.

Observations of the Commission

The Commission gives a summary of the provisions of national law and Community law applicable and then observes that German public health and veterinary law comes within the concurrent legislative power of the Federation and the Länder. It observes, first, that there is no provision for a public health inspection in the case of red deer and roe deer slaughtered on the national territory. Only wild boar are subject to inspection and solely for

the purpose of detecting trichinosis, the inspection charge in this case being fixed by the law of the Land. On the other hand, imported game is subject to a public health inspection on importation which was introduced by the Law of 4 July 1973 (part of which came into force on 1 January 1975) amending the Law of 29 October 1940 on the inspection of meat. In the case of wild boar this inspection also includes a test for the detection of trichinosis. A charge is levied for the import inspection under the Regulation of 20 January 1975 on the costs of the inspection of meat entering the customs territory, which came into force on 24 January 1975, given that a special charge is fixed for the inspection for the detection of trichinosis.

The Commission points out, secondly, from the point of view of Community law, that meat of red deer and roe deer (tariff subheading 02.04 B) and meat of wild boar (tariff subheading 02.01 A III (b)) are included in the list of agricultural products in Annex II to the Treaty and are covered by Regulation No 827/68 on the common organization of the market in certain products listed in Annex II to the Treaty, Article 2 (2) of which prohibits, in respect of the products referred to and save as otherwise provided in the regulation and save derogations decided on by the Council, the levying of any charge having effect equivalent to a customs duty on imports from third countries.

The Commission then emphasizes that while the various common organizations of the market cover all kinds of meat, fresh or prepared, the harmonization of the health inspections on animals and meat coming within those organizations has only been partially attained. In particular, so far as products imported from third countries are concerned, only Directive No 72/462 has been issued and it relates only to domestic bovine animals and swine and fresh meat of domestic animals of the following species: bovine animals, swine, sheep and goats and solipeds (Article 1 (1)) but not *inter alia* to preserved meat and game. Although the inspections provided for in Articles 12, 23 and 26 of that directive are not yet wholly applicable since various implementing measures which should have been adopted at the Community level have not yet been taken, the Commission is of the opinion that to the extent to which it is necessary to consider the charges levied for the inspections as charges having an effect equivalent to customs duties, Article 12 (8), 23 (4) and 26 of Directive No 72/462 in any case constitute a derogation within the meaning of Article 2 (2) of Regulation No 827/68 from the prohibition on levying charges having equivalent effect laid down by that same provision. Although that derogation is contained in a directive the Commission takes the view that it fulfils the conditions of the procedure laid down in Article 43 (2) of the EEC Treaty.

It thus becomes inappropriate to examine whether it is necessary to extend to inspections in trade with third countries the decision of the Court in its judgment of 25 January 1977 (Case 46/76, *W. J. G. Bauhuis* v *The Netherlands State* [1977] ECR 5), which leads to the conclusion that under certain conditions those charges may no longer be classified as charges having equivalent effect. The Commission deduces from this that if the goods in question were covered by Directive No 72/462, there would be no doubt as to the legality of the levying of the charges.

Continuing next to the examination of the *first question*, the Commission wonders whether it is permissible to extend by analogy to meat other than that covered by the directive the application of the authorization to levy charges for health inspections on imports from third countries.

Such an application by analogy should not be rejected on the whole ground that the arrangements for defraying the costs were not yet applicable at the date of the importation in question (the beginning of 1975) and that even at present they still cannot be applied in their entirety. In fact, regardless of that problem, those provisions render specific a guiding legislative concept of the Community legislature which aims to make the costs of the public health measures applied uniformly on the basis of Community law payable by the traders concerned. Moreover, the scope of such rules with regard to economic policy, and more particularly competition policy, is incontestable. It is in fact probable that future rules will contain a solution to the problem of costs which is in accordance with the present approach. Although purely economic considerations tell in favour of the application by analogy of the abovementioned provisions of Directive No 72/462, the Commission however takes the view that considerations relating to the effects of the application by analogy must lead to the rejection of that solution from both a legal point of view and from that of the upholding of fundamental rights.

It claims, first, that since the provisions in question come within tax law their content must be subject to strict requirements for the protection of the legitimate expectation of interested parties and that therefore the application by analogy is prohibited for that very reason. Legal certainty would be jeopardized if the substantive field of application of a tax law, having once been laid down in detail, were to be given a wide interpretation. However, in the present case the category of goods to which Directive No 72/462 applies and the authorization to levy charges relating thereto are clearly delimited. The Commission then draws attention to the close relationship established by the directive between the inspections and the responsibility for the costs involved therein. To apply the provisions on costs by analogy would amount to applying the inspections by analogy. Such an application of the inspections is prohibited in substance. On the other hand nothing in the system applied until now by Community law in the field of preventive public health measures enables the conclusion to be drawn that national inspections carried out on goods from third countries without authorization from Community law must be subject to a charge levied on the importer.

The interdependence between the inspections and the responsibility for the costs shows that the function of case-law cannot be to encroach upon the task entrusted to the Community legislature with regard to harmonization by filling the lacunae therein by judicial process. In its case-law, the Court of Justice has always emphasized most strongly the importance of fundamental rights in the Community. According to the Commission, the fact that Community law must uphold these rights prohibits the extension in this case of the application of the compulsory levying of charges for public health inspections carried out on imports from third countries to goods other than those listed in the directive.

The Commission concludes from the foregoing that it is necessary to reply in the negative to the first question referred to the Court.

With regard to the *second question* the Commission considers that since it has been established that imports of game fall within the express prohibition contained in Article 2 (2) of Regulation No 827/68, a reply to that question has become purposeless.

III — Oral procedure

At the hearing on 18 April 1978 oral argument was presented by the plaintiff

in the main action, represented by Mr Feldmann of the Cologne Bar, and the Commission of the European Communities, represented by its Agent, Mr Beschel.

The Commission of the European Communities answered certain questions concerning the application of Directive No 72/462.

The Advocate General delivered his opinion at the hearing on 2 May 1978.

Decision

1 By an order of 16 September 1977, which was received at the Court on 16 November 1977, the Bundesverwaltungsgericht requested the Court of Justice to give a preliminary ruling under Article 177 of the Treaty on the following questions:

"1. Are Article 12 (1), (7) and (8) and Articles 23, 24 and 26 of Council Directive No 72/462/EEC of 12 December 1972 (Official Journal, English Special Edition 1972 (31 December); Journal Officiel L 302, p. 28) applicable by analogy to the importation of game, with the result that the Member States are entitled or obliged to carry out health inspections and may impose charges for such inspections?

2. After the introduction of the Common Customs Tariff by Regulation (EEC) No 950/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1968 (I), p. 275) may national charges still be increased to the extent of the general rise in costs?"

2 Those questions are referred in the context of a dispute between the administrative authorities of the City of Frankfurt-am-Main and an undertaking importing game (red deer, roe deer and wild boar) from third countries which calls in question the compatibility with Community law of charges imposed by those administrative authorities in respect of a health inspection carried out on that meat in January 1975.

General considerations

3 It appears from the statement of grounds of the order making the reference that the question asked relate to imports of meat on the assumption that the meat does not come within a common organization of the agricultural markets.

However, it must be pointed out that game is referred to in Regulation No 827/68 of the Council (Official Journal, English Special Edition 1968 (I), p. 209) on the common organization of the market in certain products listed in Annex II to the Treaty.

That organization of the market governs the products listed in the annex to the said regulation, which include all the varieties of meat coming within tariff heading 02.04, "Other meat and edible meat offals, fresh, chilled or frozen", subheading 02.04 B of which covers game except wild boar meat, which by virtue of an explanatory note to the Common Customs Tariff comes under tariff subheading 02.01 A III (b), "Meat and edible offals of the animals falling within headings Nos. 01.01 to 01.04, fresh, chilled or frozen ... III ... (b) other", which products are however also governed by the market organization introduced by Regulation No 827/68.

According to Article 2 (2) of Regulation No 827/68: "Save as otherwise provided in this regulation, and save derogations decided on 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, ... the following shall be prohibited ...:

— the levying of any charge having effect equivalent to a customs duty, and

— the application of any quantitative restriction or measure having equivalent effect, subject to the provisions of the Protocol on the Grand Duchy of Luxembourg".

Therefore game comes under that prohibition and not merely under the more limited prohibition, which was imposed on Member States as a result of the introduction of the Common Customs Tariff, from unilaterally introducing new charges having equivalent effect or from raising the level of those in force prior to 1 July 1968, the date on which the Common Customs Tariff entered into force.

4 These points are to be taken into account in answering the questions asked.

The first question

5 Council Directive No 72/462 of 12 December 1972 (Official Journal, English Special Edition 1972 (31 December); Journal Officiel L 302, p. 28) on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat from third countries provides for the

organization of a uniform health inspection, the detailed rules for which are to be established by the Council, the Commission or the Member States, as the case may be.

Article 12 (1) and (7) and Articles 23, 24 and 25 of the directive place a duty on Member States to carry out a health inspection upon importation of animals (Article 12) and fresh meat (Articles 23, 24 and 25), and Articles 12 (8), 23 (4) and 26 provide that the expenditure incurred pursuant to the articles in question "shall be chargeable to the consignor, the consignee or their agents, without repayment by the State".

As the Court found in its judgment of 28 June 1978 in Case 70/77 *Simmenthal*, in providing that the expenses of the veterinary and public health inspections at issue must be charged to the traders specified, those provisions do not prohibit the attribution of those expenses from being effected by means of the imposition of charges, provided that the latter do not exceed the actual cost of the inspections.

Thus they constitute a derogation, within the meaning of Article 2 (2) of Regulation No 827/68, from the prohibition placed by that provision on the levying of charges having equivalent effect.

6 In view of the fact that Directive No 72/462 concerns only health inspections upon importation of bovine animals and swine and fresh meat of certain domestic animals, but does not mention game, the national court has raised the question whether that derogation is applicable by analogy.

7 Before deciding the question whether those provisions are applicable by analogy, it must be considered whether they were already applicable at the time of the importation at issue and could be relied upon by the administrative authorities of the Member States in order to justify the imposition of charges.

8 In order to enable those derogations to take effect, the inspections of which they are designed to cover the costs must have been organized in accordance with the directive and applied by the Member States concerned.

In fact, each of the provisions referred to clearly states that the expenditure which is to be recovered is that incurred pursuant to Articles 12, 23, 24 and 25 of the directive.

9 A large number of the provisions of the directive cannot be applied until the necessary measures have been taken by the Community authorities, particularly in the context of the procedure for obtaining the opinion of the Standing Veterinary Committee which is referred to in Articles 29 and 30 of the directive.

In particular, the implementation of the inspections provided for in Articles 12, 23, 24 and 25 of the directive requires — at all events in so far as it concerns trade and transport other than transit through the Community from one third country to another third country — various implementing measures to be adopted by the competent Community authorities.

As the Court found in its aforementioned judgment of 28 June 1978, *Simmenthal*, most of those measures have not yet been adopted, so that application of Articles 12, 23, 24 and 25 of the directive is not possible.

Thus, since the conditions laid down by Directive No 72/462 itself as the basis for the imposition of health inspection charges by way of derogation from the prohibition on the levying of charges having equivalent effect have not been fulfilled, at the present stage of its implementation that directive cannot justify the imposition of the said charges.

Moreover, it is not possible to accept the argument that, by applying the national animal health legislation in force at the time when the directive was adopted, the Member States were in some sense applying the directive in anticipation, in that, for the purposes of public health, the inspections which they apply pursuant to that legislation in fact offer guarantees similar to those which the directive is intended to achieve.

In fact, the purpose of the directive is not to reinforce the arrangements for the protection of public health in the Member States, but to ensure the uniformity of the inspection systems with a view to preventing distortions of competition and deflections of trade within the Common Market.

However, it should be pointed out, in so far as it is relevant, that, as the Court found in its aforementioned judgment of 28 June 1978, *Simmenthal*, as regards imports of fresh meat from third countries, an exception is made to the prohibition on the imposition of health inspection charges to the extent provided for in Article 9 of Directive No 64/433 of 26 June 1964 (Official Journal, English Special Edition 1963-1964, p. 185) concerning intra-Community trade in fresh meat, according to which: "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".

10 Since at the date of this judgment Article 12 (1), (7) and (8) and Articles 23, 24 and 26 of Council Directive No 72/462 have not yet taken effect in the areas to which they expressly refer, there can be no question of applying those provisions by analogy.

11 Moreover, even if Articles 12 (8), 23 (4) and 26 of Directive No 72/462 were to be regarded as being applicable at the beginning of 1975, the date of the importation at issue, application of those provisions by analogy should be rejected.

The imposition of charges in the cases referred to in the directive is directly linked to the introduction of a uniform Community system of inspection answering the demands of the introduction of a Common Customs Tariff.

On the other hand, charges unilaterally determined by Member States run counter to that need, and therefore the provisions which allow them to be imposed cannot be extended beyond their own field of application.

12 Therefore Directive No 72/462 is not a particular application of a general principle of Community law to the effect that any inspection at the external frontiers of the Community may give rise to the imposition of charges fixed by Member States, but merely an application of the derogation made possible by Article 2 (2) of Regulation No 827/68 from the prohibition laid down in that article on the levying of charges having an effect equivalent to customs duties in trade in the products concerned.

The second question

13 It follows from the general considerations above that the second question has become purposeless.

Costs

14 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Bundesverwaltungsgericht by an order of 16 September 1977, hereby rules:

Article 12 (1), (7) and (8) and Articles 23, 24 and 26 of Council Directive No 72/462 of 12 December 1972 are not applicable by analogy.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 5 July 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 2 MAY 1978

My Lords,

These two cases, which come to the Court by way of references for preliminary rulings by the Bundesverwaltungsgericht, belong to the same area of Community law as Case 70/77 *Simmenthal S.p.A.* v *Amministrazione delle Finanze dello Stato,* in which I delivered an Opinion on 21 February 1978 but in which Your Lordships have deferred delivering Judgment, in order, so I understand, to be able to consider the three cases together. The area in question is that concerning the lawfulness of charges imposed by Member States for veterinary and public health inspections of meat imported from third countries and, more particularly, the impact, in that respect, of Council Directive No 72/462/EEC of 12 December 1972 (Official Journal L 302 of 31 December 1972). The precise questions raised by these cases are however different from those raised in Case 70/77.