JUDGMENT OF THE COURT
22 OCTOBER 1970[1]

Paul Craeynest and Another v Belgian State (Reference for a preliminary ruling by the Belgian Cour de Cassation)

Case 12/70

Summary

Agriculture — Common agricultural policy — Common organization of the market — Milk and milk products — Importation from a Member State — Benefit under the Community scheme — Certificate DD4 required

(Regulation No 13/64/EEC of the Council of 5 February 1964 on the progressive establishment of a common organization of the market in milk and milk products (OJ No 34 of 27.2.1964, p. 549); decision of the Commission of 17 July 1962 setting up special methods of administrative co-operation for applying the intra-Community levies set up under the common agricultural policy (OJ No 76 of 24.8,1962, p. 2140))

Subject to the exceptions provided for therein, Regulation No 13/64/EEC and the Commission's decision of 17 July 1962 must be 'interpreted to mean that importers of goods from another Member State may only benefit from the intra-Community scheme in respect of goods covered by certificate DD4. This interpretation must also be applied where it is necessary to establish the amount of levies evaded as a result of fraudulent importation, even though the Community origin of the product in question could be established by means other than the said certificate.

In Case 12-70

Reference to the Court under Article 177 of the EEC Treaty by the Belgian Cour de Cassation (Second Chamber) for a preliminary ruling in the cation pending before that court between

(1) PAUL CRAEYNEST,

(2) MICHEL VANDEWALLE

and

(1) BELGIAN STATE, Minister for Finance, Customs and Excise,

1 — Language of the Case: Dutch.

(2) BELGIAN STATE, represented by the Minister for Economic Affairs

on the interpretation of Articles 1 to 12 of Regulation No 13/64 EEC of the Council of 5 February 1964 on the progressive establishment of a common organization of the market in milk and milk products (OJ No 34 of 27. 2. 1964, p. 549), Articles 1 and 2 of the Commission's decision of 5 December 1960 relating to methods of administrative co-operation for the purpose of applying Article 9 (2) of the EEC Treaty (OJ No 4 of 20. 1. 1961, p. 29) and Articles 1 and 2 of the Commission's decision of 17 July 1962 setting up special methods of administrative cooperation for applying the intra-Community levies set up under the common agricultural policy (OJ No 76 of 24. 8. 1962, p. 2140).

THE COURT

composed of R. Lecourt, President, A. M. Donner and A. Trabucchi, presidents of Chambers, W. Strauß (Rapporteur), R. Monaco, J. Mertens de Wilmars and P. Pescatore, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:

1. On 5 December 1960, the Commission adopted a decision based upon the first subparagraph of Article 10 (2) of the EEC Treaty which provided in particular that goods fulfilling the conditions required for the application of the provisions of the Treaty relating to the progressive elimination, between the Member States, of customs duties, quantitative restrictions and all measures having equivalent effect, should benefit from these provisions in the importing Member State upon presentation of a document in proof issued by the customs authorities of the exporting Member State at the request of the exporter.
The decision of 5 December 1960 then fixed the respective conditions for the use of movement certificates DD1 and DD3 (OJ No 4 of 20. 1. 1961, p. 29).
On 17 July 1962 the Commission adopted a

further decision (OJ No 76 of 24. 8.1962, p. 2140) based on the first subparagraph of Article 10 (2) and on Article 38 (2) of the Treaty, referring to the abovementioned decision of 5 December 1960. This new decision drew up conditions for the use of certificate DD4, as regards goods which were subject to agricultural leveis and were transported directly from the exporting Member State to the importing Member State.

On 28 February 1964 Regulation No 13/64/EEC of the Council (OJ No 34 of 27. 2.1964, p. 549) on the progressive establishment of a common organization of the market in milk and milk products entered into force.

2. At the instance of the representative of the public interest and of the Belgian State, represented by the Minister for Finance, Customs and Excise, the court of Courtrai in a judgment of 21 October 1968 found Mr Craeynest and Mr Vandewalle guilty of complicity in the fraudulent importation from the Netherlands into Belgium of 12 000 kilogrammes of butter and imposed on them sentences of imprisonment, fines and forfeiture. Moreover, at the request of the Belgian State as party claiming damages, represented by the Minister of Economic Affairs, the court ordered those concerned to pay jointly the sum of BF 973 560, representing the amount of the levies, payable under the EEC Regulations, which had been evaded. The judgment pointed out in particular in this connexion that, as the product in question had not been imported in conjunction with a certificate DD4, the amount which should have been applied was that laid down for imports from *third* countries.

As, by decision of 6 February 1969, the Cour d'Appel, Ghent, upheld this judgment, Mr Craeynest and Mr Vandewalle lodged a further appeal before the Cour de Cassation. They invoke the infringement of, *inter alia*, Articles 4, 145 and 155 of the EEC Treaty and of Articles 1 to 4 and 7 to 8 of Regulation No 13/64/EEC. They consider that Community rules do not enable Member States to decide that in cases such as the present products imported from another Member State shall be sbuject to the levy applicable to imports from third countries.

II — Terms of the judgment making the reference

In a judgment of 9 March 1970 the Belgian Cour de Cassation decided to refer to the Court the question:

> 'Whether Articles 1 to 12 of Regulation No 13/64/EEC ..., in conjunction with Articles 1 and 2 of the Commission's decision of 5 December 1960 and Articles 1 and 2 of the Commission's decision 'of 17 July 1962 must be interpreted to mean that, in the absence of certificate DD4, an importer may in no case benefit from the application of the scheme for intra-Community agricultural levies nor, therefore, from the reduced rate provided for intra-Community trade, with the particular consequence that in the case of a fraudulent import transaction, even if the goods are imported from a country of the Community, the amount of the levies evaded is calculated on the basis of the rates applying to imports of butter from third countries, as fixed for the period in question in the scales drawn up by the competent authorities in this respect'.

The judgment states in particular that:

— although, under the terms of Article 8 of Regulation No 13/64/EEC, the amount of the levies shall be fixed by each Member State, it must be fixed in accordance with the rules laid down in that regulation;

— for the period in dispute the amount of the 'third country' levies was considerably higher than the amount of the levies applying to imports from the Netherlands;

— the contested decision of the Cour d'Appel, Ghent, accepted that the butter in question originated in the Netherlands;

— the question whether, in cases such as the present, 'the calculation of the levies evaded must be made on the basis of the rates fixed for imports from third

countries or on the basis of rates fixed for imports from the countries of the EEC raises a question of interpretation of Community law'.

III — Procedure

The judgment making the reference was received at the Court Registry on 27 March 1970.

Under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, Mr Craeynest and Mr Vandewalle, the Government of the Kingdom of Belgium and the Commission of the European Communities submitted written observations.

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

Mr Craeynest, Mr Vandewalle and the Commission of the European Communities submitted oral observations at the hearing on 15 September 1970.

Mr Craeynest and Mr Vandewalle were represented and assisted by Arnould Bayart, Advocate, of the Cour de Cassation.

The Belgian Government, as party claiming damages, was represented by the Minister for Economic Affairs, assisted by Mr Houtekier, Advocate, of the Cour de Cassation.

The Commission was represented by its Legal Adviser, J. H. J. Bourgeois.

The Advocate-General delivered his opinion on 17 September 1970.

IV — Observations submitted under Article 20 of the Protocol on the Statute of the Court

These observations may be summarized as follows:

1. *Mr Craeynest and Mr Vandewalle* consider that, in cases such as the present, the levies must be calculated on the basis of the amounts applicable to intra-Community imports.

The question referred is in fact in two parts:

— Does the importer benefit from the reduced Community tariff in the absence of certificate DD4?

— If not, does it follow that in the case of fraudulent importation of butter coming from a country of the Community, the levies must be calculated according to the tariffs applying to imports from third countries?

The parties concerned state that they leave the first question to the wisdom of the Court.

As regards the second question they consider that even supposing that the reduced tariff is only applicable on presentation of certificate DD4, the intra-Community tariff is none the less applicable in the case of fraudulent importation. It is no doubt the result of the combined provisions of Article 11 of Regulation No 13/64/EEC and of Article 1 of the decision of 17 July 1962 that imports from another country of the Community are only authorized on presentation of certificate DD4, which is required for the application of the intra-Community tariff. It is nowhere stated, however, that an importation of goods from a Community country which takes place without certificate DD4 shall be subject to the tariff laid down for third countries. Such importations are simply prohibited. There is thus no reason for Community regulations to determine the tariff which the national authorities must apply in such a case, as the parties concerned succeed in avoiding their intervention.

In the case of clandestine importation the State concerned is only entitled to require payment of an amount equal to the levy which would have been imposed in the case of an importation in due form.

The preamble to Regulation No 13/64/EEC shows that the purpose of intra-Community levies is not to encourage the unification of the Common Market; rather, they constitute measures which are tolerated on a temporary basis in order to avoid disturbance in the economy of each Member State. Therefore, an importer who avoids such levies acts in a way which is contrary, not to the objectives of the Common Market, but solely to the interests of the State in which

importation is effected. Consequently, it is not for the Community but only for the Member States to take the measures necessary to prevent such action. Such prevention might consist, *inter alia*, in punishing the offender by ordering him to pay the tariff laid down for imports from third countries.

2. The *Belgian Government* states that it is acting in its capacity as representative of a Member State and puts forward the following principal considerations:
The problem submitted to the Court lies principally in the interpretation to be given, first, to the principle that the Community shall be based upon a customs union (Article 9 of the Treaty) and, secondly, to the general rules concerning the Common Market and in particular to those which deal with the common agricultural policy, the arrangements therefor contained in the Treaty and the corresponding implementing provisions.

A — The Belgian Government maintains that, like every customs union, that established by the Treaty is characterized by the presence of two factors: within the union, the creation of an area in which free movement of goods is guaranteed between the States taking part therein; outside the union, the adoption of a common customs tariff applying to goods coming from third countries.
Goods which are not considered to be in free circulation in the Member States (cf. Articles 9 (2) and 10 (1) of the Treaty) are not covered by the internal element of the customs union but by its external element. The Commission's decision on 5 December 1960, which is still in force, was intended to determine which goods could benefit from the progressive liberalization of intra-Community trade. To this end it introduced compulsory certificates (DD1 or DD3). Goods not accompanied by such certificates could not benefit from the intra-Community scheme. It is therefore reasonable to apply to them the rules concerning the movement of goods coming from third countries. The contrary argument is incompatible with the system of Article 10 (2) and would lead to unequal treatment of traders within the Common Market.

B — As regards in particular the agricultural products for which the common organizations of the market were established, reference must be made to the Commission's decision of 17 July 1962. It is clear from that decision that in the absence of certificate DD4, it is not the intra-Community system which applies but rather that provided for in relation to trade with third countries. In fact, the absence of this certificate leads to the assumption that the conditions for its acquisition have not been fulfilled and that as a result the goods in question are not in free circulation. Moreover, if the 'third country' levies could not be imposed in the case of fraudulent importation, such imports would be exempt from any levy.
Thus, the Courtrai court and the Cour d'Appel, Ghent, have given judgment in accordance with the relevant Community provisions as well as with the general principles of Belgian law according to which imports effected without a licence are subject to the highest duty.

3. The *Commission of the European Communities* puts forward the following principal considerations:

A — It refers first to the essential elements of what it terms the 'preferential Community scheme'. After alluding to Title I of Part two of the Treaty, and in particular to Article 9 (2), it goes on to deal with the provisions concerning the agricultural sector which derogate or enable derogations jo be made from the rules concerning the establishment of the Common Market (Article 38 (2), Articles 39 to 46). Under these provisions regulations concerning the progressive establishment of market organizations have introduced intra-Community levies in relation to a certain number of products during a transitional period. The Commission explains in detail the objective and method of calculation of these levies in so far as they concern milk and dairy products (Regulation No 13/64/EEC). It also sets out the differences established by this regulation between the factors in the calculation rela-

ting, first, to intra-Community levies, and, secondly, to levies imposed on imports coming from third countries. 'Where dairy products imported into a Member State satisfy the conditions laid down for admission to the intra-Community levy scheme and, in praticular, where they satisfy one of the alternative conditions contained in Article 9 (2) of the Treaty the application of which has not been set aside by Regulation No 13/64, admission to this scheme is an individual right which the Member States must respect and endeavour to apply'.

B — In a second chapter headed 'Implementation of the preferential Community scheme' the Commission emphasizes that the authors of the Treaty left the application of this system to the Member States instead of giving the Community responsibility for drawing up its own customs legislation. 'The provisions of national rules therefore apply not only in the field of criminal law but also where it is necessary to lay down the various detailed rules of the practical application of the preferential Community scheme and, in particular, administrative and customs procedures'. It was only after the period in which the events forming the subject-matter of the main action took place that the Council, acting under Article 235, substituted the Community for the Member States in the area in question (Regulation No 524/69/EEC of the Council of 18 March 1969, OJ L 77, p. 1).

As regards agricultural products in particular, Articles 39 to 43 enable the Community to substitute its legislation to a large extent for that of the Member States. However, as long as the Community has not made use of these powers, the matters in question continue to fall within the competence of the States, although they do not escape from the provisions of the Treaty, including Article 38 (2), according to which, 'Save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the Common Market shall apply to agricultural products'.

The Community has not so far formulated its own legislation regarding customs procedures for applying the rules specifically governing trade in agricultural products covered by common organizations of the markets. In this sector, therefore, trade is carried on according to procedures employed for non-agricultural goods.

Among the detailed rules for the application of the intra-Community trade scheme which are still governed by the internal rules of each Member State are those governing evidence of the fact that products for which the right to the preferential Community scheme is claimed satisfy the conditions necessary to benefit therefrom. Notwithstanding the difficulties involved in the production of such evidence, the Community, in implementation of Article 10 (2) of the Treaty, created a form of evidence which is valid throughout the Community, that is, certificates DD1 and DD3 (decision of 5 December 1960) and certificate DD4 (decision of 17 July 1962 which is alone relevant in this instance).

C — (a) The Commission then considers the conclusion which, in its opinion, must be drawn from these preliminary observations in order to resolve the problem raised by the Belgian Cour de Cassation; it maintains that this problem is whether the decision of 17 July 1962 obliges the Member States to refuse to allow the intra-Community levy scheme to be applied where no certificate DD4 exists to establish that the products in question satisfy the conditions required for benefit therefrom.

After stating that the abovementioned decision does not relate to the substance of the right to the preferential Community scheme, but only to the detailed rules for its application, the Commission proposes that a negative reply should be given to the questions set out in the foregoing paragraph. In fact, no provision in that decision expressly obliges Member States to adopt certificate DD4 as the only means of proof (contrary to the practice introduced subsequently by the above-mentioned Regulation No 542/69), or leads to the decision's being interpreted in that way:

— the sole purpose of documentary evidence is normally to facilitate the establishment of proof;

— certificate DD4 was not introduced as a means of absolute proof; on the con-

trary, it is clear from the very wording of the decision that the relevant departments of the importing Member States may require any further documentary evidence to be submitted if they consider it necessary;

— no argument may be drawn from the fact that the decision provides for cases in which the Community levy scheme applies without certificate DD4 having to be produced. The decision only intended to exclude certain imports for which this formality was not justified.

(b) However, the decision of 17 July 1962 does not prohibit Member States from regarding certificate DD4 as the only evidence of the applicability of the 'Community rules'. In fact, the promotion of trade between Member States depends on the widest possible use of documentary evidence which is the same in every Member State. Moreover, respect on the part of traders for the formalities in question depends to a great extent on the consequences resulting from the absence of such evidence.

However, in order that certificate DD4 may be validly employed as the sole means of proof the trader must be in a position to acquire such a certificate. In this context, and in particular as regards the case of fraudulent importation the question may arise whether the decision of 17 July 1962 must not be interpreted as obliging Member States to allow the importer to show by other means that the products in question satisfy the requirements for the intra-Community levy scheme. However, the reply to this question would be in the negative as such an interpretation would place a swindler, who voluntarily creates the circumstances preventing him from obtaining the certificate, in a more advantageous position than other traders. Moreover, States which, by giving certificate DD4 the character of an exclusive means of proof, prevent a swindler from establishing by other means that the imported goods are Community products, are not depriving that party of his rights. On the contrary, it is the swindler himself who deliberately gives up the means available to exercise those rights.

Grounds of judgment

1 By a judgment of 9 March 1970, received at the Court Registry on 27 March 1970, the Belgian Cour de Cassation has requested the Court under Article 177 of the Treaty establishing the EEC to give a preliminary ruling on the interpretation of Regulation No 13/64/EEC of the Council of 5 February 1964 (OJ No 34 of 27. 2. 1964, p. 549), and of the Commission's decision of 5 December 1960 (OJ No 4 of 20. 1. 1961, p. 29) and 17 July 1962 (OJ No 76 of 24. 8. 1962, p. 2140).

2 In that judgment the Court is requested to state whether Articles 1 to 12 of Regulations No 13/64/EEC, in conjunction with Articles 1 and 2 of the said two decisions, 'must be interpreted to mean that, in the absence of certificate DD4, an importer may in no case benefit from the application of the scheme for intra-Community agricultural levies nor, therefore, from the reduced rate provided for intra-Community trade, with the particular consequence that in the case of a fraudulent import transaction, even if the goods are imported from a country of the Com-

munity, the amount of the levies evaded is calculated on the basis of the rates applying to imports of butter from third countries, as fixed for the period in question in the scales drawn up by the competent authorities in this respect'.

3 Regulation No 13/64/EEC provides, as regards imports of milk and milk products into a Member State, for the imposition of levies whose amount varies according to whether such imports constitute intra-Community trade or rather trade between a Member State and a third country.

4 As this Regulation did not specify the documents by which Community origin was to be established it is necessary to refer to the Commission's decision of 17 July 1962, 'setting up special methods of administrative cooperation for applying the intra-Community levies set up under the common agricultural policy', which replaces to this extent the Commission's decision of 5 December 1960 which is henceforward inapplicable to products which are subject to those levies.

5 Like the earlier measures adopted by the Commission under Article 10 (2) of the Treaty, the purpose of the decision of 17 July 1962 instituting the movement certificate DD4 was to contribute to the elimination of all barriers to trade between between Member States by harmonizing the formalities to which trade within the Community is subject.

6 The adoption of this certificate arose out of methods of administrative cooperation which were already in force whose purpose, according to the third paragraph of the preamble to the decision of 17 July 1962, was to ensure that goods originating in the Member States should benefit from measures liberalizing intra-Community trade 'under exactly the same terms'.

7 It is therefore necessary for the use of certificate DD4 as a standard means of proof to be absolutely identical in all the Member States.

8 This requirement would be invalidated if national administrations were able to employ other means of proof, apart from the proof of origin which is established in the form of the said certificate.

9 According to its preamble the purpose of the decision of 17 July 1962 is to 'exclude goods subject to the agricultural levies from the scope of the Commission's decision of 5 December 1960'—which had created the movement cetrificates DD1 and DD3 —'and to establish for them a special form ... for the purpose of proving that they fulfil the conditions governing their admission to the system of intra-Community levies'.

10 Consequently, in Article 1 the decision prescribes 'for the purpose of applying the system of intra-Community agricultural levies in the importing Member State, a movement certificate form DD4', which, under Article 4 of the same decision 'must be produced ... at the customs office of the importing Member State where the goods are presented', within a period fixed by the said Article 4.

11 By specifically defining those imports—of a non-commercial nature—which, as an exception, do not require certificate DD4, Article 7 of the decisions confirms the mandatory nature of the certificate.

12 It appears therefore that importers of goods from another Member State may only benefit from the intra-Community scheme in respect of goods covered by this certificate.

13 In the absence of provisions to the contrary these considerations remain valid where it is necessary to establish the amount of levies evaded as a result of fraudulent importation, even though the Community origin of the product could be established by means other than the said certificate.

14 The costs incurred by the Government of the Kingdom of Belgium and the Commission of the European Communities, which have submitted observations to the
15 Court, are not recoverable and 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 Belgian Cour de Cassation the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Commission of the European Communities and of Mr Craeynest and Mr Vandewalle;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the EEC, especially Articles 10 (2) and 177;
Having regard to Regulation No 13/64/EEC of the Council of 5 February 1964;
Having regard to the decision of the Commission of 17 July 1962, especially Articles 1, 4 and 7;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Belgian Cour de Cassation by judgment of that court dated 9 March 1970, hereby rules:

1. **Subject to the exceptions provided for therein, Regulation No 13/64/EEC and the Commission's decision of 17 July 1962 must be interpreted to mean that importers of goods from another Member State may only benefit from the intra-Community scheme in respect of goods covered by certificate DD4;**

2. **This interpretation must also be applied where it is necessary to establish the amount of levies evaded as a result of fraudulent importation, even though the Community origin of the product in question could be established by means other than the said certificate.**

Lecourt Donner Trabucchi

Strauß Monaco Martens de Wilmars Pescatore

Delivered in open court in Luxembourg on 22 October 1970.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 17 SEPTEMBER 1970[1]

Mr President,
Members of the Court,

The request for a preliminary ruling with which we have to deal today was submitted by the Belgian Cour de Cassation. Mr Craeynest and Mr Vandewalle, found guilty of complicity in the fraudulent importation from The Netherlands of 12 000 kilogrammes of butter, were sentenced by the Belgian criminal courts to pay the State, which was claiming damages in the action, the sum of 973,560 Bfrs by way of the amount of the levies evaded. This figure corresponded to the rate laid down for imports coming from third countries.

Although the trial judge accepted the fact that the butter came from the Netherlands, he emphasized that the import transaction had not been carried out under cover of a certificate DD4, a goods movement certificate adopted in the Commission's decision of 17 July 1962 for entitlement to benefit from the intra-Community levy scheme which is, as we know, more favourable. Before the Cour de Cassation Mr Craeynest and Mr Vandewalle maintained that once it was found that the product came

1 — Translated from the French.